August 27, 2008

Susan M. Halliday
Kristen L. Zarenko
Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Participant Fee Disclosure Project
Room N-5655
U. S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

RE: Proposed Regulations on Fiduciary Requirement for Disclosure in Participant-Directed Individual Account Plans

Dear Ms. Halliday and Ms. Zarenko:

The American Institute of Certified Public Accountants (AICPA) has prepared the attached comments on Prop. Reg. section 2550.404a-5, which addresses fiduciary requirements for disclosure in participant-directed individual account plans. These comments were prepared by the Employee Benefits Taxation Technical Resource Panel (EBTRP) with input from the Personal Financial Planning Executive Committee (PFP EC). They were approved by our Tax Executive Committee (TEC) and PFP EC.

The AICPA is the national professional association of CPAs with more than 350,000 members, including CPAs in business and industry, public practice, government, and education; student affiliates; and international associates. Our members provide audit, tax, retirement consulting, plan administration, and financial planning services. It is from this diverse perspective that we offer our comments.

We commend the Department of Labor for developing a program to require the disclosure of certain plan and investment-related information, including fee and expense information, to participants in participant-directed individual account plans. It is critical to ensure that all participants in such account plans have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings.

In general, the regulations provide sufficient guidance for plan sponsors and third party administrators to disclose the required information in participant-directed accounts. However, there are areas within these regulations that we feel require further clarification.

These include:

1. Coordinating efforts with the IRS to issue a sample disclosure notice document with standard paragraphs that can be customized to a particular plan.
2. Extending the effective date until at least January 1, 2010.
3. Extending the deadline for providing disclosures to 30 days after a participant becomes eligible for the plan, or coordinating the timing with the timeframe for furnishing summary plan descriptions (90 days after becoming eligible).
4. Clarifying whether the proposal applies to IRAs that provide for employer contributions— that is, "Simplified Employee Pension Retirement Account" (SEP) and "Savings Incentive Match Plan for Employees" (SIMPLE) plans.
5. Excluding smaller plans from gathering information on investment options.
6. Clarifying the terms "participant" and "beneficiary".

* * * * *

We appreciate the opportunity to comment and urge you to clarify these issues. If we can be of further assistance please contact me at (212) 773-2858 or Jeffrey.hoops@ey.com; Dick Fohn at (360) 676-1920 or Dick.Fohn@mossadams.com; Eddie Adkins, Chair of the Employee Benefit TRP, at (202) 521-1565, or eddie.adkins@gt.com; Lisa Winton, Tax Technical Manager, at (202) 434-9234 or lwinton@aicpa.org; or Teighlor March, PFP Senior Technical Manager at (919) 402-4804 or tmarch@aicpa.org.

Sincerely,

Jeffrey R. Hoops
Chair, Tax Executive Committee

Dick Fohn
Chair, PFP Executive Committee

Encl.

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Comments on Proposed Regulations on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans
August 27, 2008

We commend the Department of Labor for developing a program to require the disclosure of certain plan and investment-related information, including fee and expense information, to participants in participant-directed individual account plans. It is critical to ensure that all participants in such account plans have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings.

In general, the regulations provide sufficient guidance for plan sponsors and third party administrators to disclose the required information in participant-directed accounts. However, there are areas within these regulations that we feel require further clarification.

Coordinate Efforts with IRS

We support the movement toward total fee transparency and the disclosures presented in these proposed rules. However, considering these disclosures are added to several already required disclosures, we are concerned that participants may become overwhelmed with the amount of information provided. We recommend that some coordinated effort be made with the IRS to issue a sample disclosure notice document with standard paragraphs that can be customized to a particular plan.

We would envision that this sample notice would combine various required notifications into one easy to understand document that can be distributed annually. Sample notices, issued in the past by the Department of Labor and or the IRS, have been extremely helpful in complying with various notice requirements. We believe that a sample notice issued jointly would be more beneficial than plan administrators/TPAs creating their own combined notices because it would standardize the language and format of the information. This would also be helpful to participants as they change employers as disclosure information would be similar as they move from plan to plan.

We recognize that combining many of these disclosures into one annual notice may create some timing issues due to the various timing requirements of the different disclosures. We recommend that consideration be given to changing the timing of the required disclosures so that communication can be made in one annual document. Such a document would reduce costs incurred by administrators/TPAs that would most likely be passed on to the plan sponsors. Possible notices to include in one document are (1) safe harbor notices, (2) qualified default investment alternatives (QDIA), (3) automatic enroll information, and (4) summary annual reports.

Extend the Effective Date

We have a concern with the proposed effective date of January 1, 2009, especially for small employers using an "unbundled" arrangement. We do not believe that service providers will have time to make changes to systems to comply with the required disclosures. With the comment period ending September 9 and final regulations issued thereafter, it appears that there is a relatively short timeframe for actual compliance. We believe the effective date should be extended until at least January 1, 2010.

Extend the Eligibility Period

We believe that the requirement that information must be furnished to an individual on or before the date he/she becomes eligible to participate may be problematic for those plans that have immediate or near-immediate eligibility. We believe that there should be some consideration to changing this requirement to 30 days after becoming eligible, or coordinating the timing with the timeframe for furnishing the summary plan description, which is 90 days after becoming eligible.

Clarification as to whether the Proposal Applies to IRA Accounts

It is unclear as to whether the proposed regulation is intended to extend to certain individual retirement accounts (IRAs). The operative language of section (a) of the proposed regulation refers to "individual account plan" as defined in section 3(34) of ERISA. ERISA defines "individual account plan" 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.[1] Current Reg. Section 2510.3-2(d), which clarifies the limits of the terms "employee pension benefit plan" and "pension plan," states that IRAs are not intended to be included in these terms, provided that four conditions are met.[2] One such condition is that no contributions can be made by the employer/employee association (in order for the IRA to be excluded from the term "pension plan" and hence not be covered by the proposed regulation).

There are two types of IRAs which provide for employer contributions – "Simplified Employee Pension Individual Retirement Account" (SEP) and "Savings Incentive Match Plan for Employees" (SIMPLE) plans. The employer's contributions to SEP plans, which

[1] Section 3(34) reads in full: "The term 'individual account plan' or 'defined contribution plan' means 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."

[2] (d) *Individual Retirement Accounts.* (1) For purposes of title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 (hereinafter "the Code") and an individual retirement bond described in section 409 of the Code, provided that— (i) No contributions are made by the employer or employee association; (ii) Participation is completely voluntary for employees or members; (iii) The sole involvement of the employer or employee "organization" is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and (iv) The employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

are also widely-used by self-employed persons, are treated as part of a profit-sharing plan. SIMPLE plans require a certain minimum contribution from the employer. A literal reading of the proposed regulation in conjunction with existing definitions and the cited regulation indicates that both SEP and SIMPLE plans fall in the definition of "individual account plan" and hence, are covered by the proposed regulation. We therefore recommend that clarity be provided as to whether the proposed regulation is intended to extend to SEP and SIMPLE IRAs.

Exclude Smaller Plans from the Disclosure Requirement

Plan fiduciaries will likely expect the plan service providers to prepare the data and the disclosure. Ultimately, this will increase costs of maintaining plans. It is our experience that small employers are looking for ways to cut costs of maintaining retirement plans. As a cost savings measure for plan sponsors, we recommend that these proposed regulations exclude smaller plans from gathering information on investment options.

If an exclusion for smaller plans is not granted, we request that if a determination is made that the proposed regulation is intended to cover SEP plans, an exception be carved out for self-employed and single-employee SEPs. The rationale for this request is that these types of plans are no different in nature from a traditional IRA. Imposing additional disclosure requirements upon the plan sponsor (in this case, the self-employed person also directing the investments in the account) would only create an unnecessary compliance burden and further, is not a necessity to ensure that participants have the information they need to make informed decisions about the management of their accounts.

Clarification on the terms "participant" and "beneficiary"

The proposed regulation refers to "participants" and "beneficiaries" interchangeably. We suggest that there be clarification regarding the term "beneficiary," and whether the appropriate term is (1) "participant" or (2) "participants" and <u>not</u> "beneficiary". Most participant-directed individual account plans (e.g., 401(k)s, SEP IRAs) direct that beneficiary designations be established in the event of a participant's death, the usage of which is also consistent with the statutory definition of "beneficiary" in ERISA[3]. The terms "beneficiary" and "participant" have distinct and different legal meanings.

A primary purpose of this proposed regulation is to ensure that individual plan participants are made aware of their rights and responsibilities with respect to managing their individual plan accounts and are provided sufficient information regarding the plan to make informed decisions about the management of their individual accounts. This purpose suggests that the targeted recipients of this information are the plan participants, since beneficiaries, by definition, are not involved in the management of individual plan accounts. Further, in many cases we believe that plan participants would be opposed to their named beneficiaries being made aware of specifics of an account for which they are a named beneficiary. Per ERISA, a beneficiary "is or may become entitled to a benefit." Until vesting of such benefit occurs, beneficiaries do not participate or make decisions about the management of individual accounts for which they are a named beneficiary.

---

[3] ERISA 3(8) defines beneficiary as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."