Snell & Wilmer L.L.P.

EMPLOYEE BENEFITS UPDATE

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Benefit Statements Due As Soon As May 15, 2007 for Individual Account Plans That Permit Participant Directed Investments

Background

The Pension Protection Act of 2006 (the "PPA") now requires employee pension benefit plans to automatically provide benefit statements to participants. The PPA also increases the amount of information that benefit statements must include. The changes are effective for plan years beginning after December 31, 2006.

The Department of Labor (the "DOL") has yet to issue regulations. However, in response to many unanswered questions regarding this new requirement, the DOL issued Field Assistance Bulletin 2006-03 ("FAB 2006-03"). Until the DOL issues regulations or other guidance, it will treat a plan administrator as complying with the new benefit statement requirements if the plan administrator operates in accordance with the good faith compliance standards set forth in FAB 2006-03.

Timing of Benefit Statements

The frequency with which a plan administrator must provide benefit statements depends on the type of plan. FAB 2006-03 specifies that benefit statements must be provided:

- at least once each calendar quarter for individual account plans that permit participants to direct investments;
- at least once each year for individual account plans that do not permit participants to direct investments; and
- at least once every three years for defined benefit plans.

Dates for Furnishing First Benefit Statements

- **Individual account plans, such as 401(k) plans, that permit participants to direct investments:** For individual account plans that are required to provide quarterly statements, calendar year plans must provide the first benefit statement for the quarter ending March 31, 2007 and fiscal year plans must provide the first benefit statement for the end of the first quarter. For example, if the plan year starts July 1, 2007, the first statement will be required for the quarter ending September 30, 2007.

- **Individual account plans, such as 401(k) plans, that do not permit participants to direct investments:** For individual account plans that are required to provide annual statements, the first statement must be provided for the calendar year ending on December 31, 2007, regardless of whether the plan operates on a calendar year or a fiscal year basis.

- **Defined benefit plans:** Defined benefit plans are generally required to provide benefit statements at least once every three years. The first benefit statement is due for the 2009 plan year unless the plan elects to comply with the alternative notice requirement. Under the alternative notice requirement, if the plan administrator gives notice each year regarding the availability of the benefit statement and how a participant may obtain the statement, the plan administrator does not have to provide the statement every three years. If a plan sponsor elects to take advantage of this alternative notice requirement, it must provide the required notification by **December 31, 2007**.

> ***Important Note:*** *FAB 2006-03 provides that benefit statements must be furnished no later than 45 days following the end of the period for which they are due. As a result, March 31, 2007 benefit statements must be furnished by* ***May 15, 2007*** *and December 31, 2007 benefits statements must be furnished by* ***February 14, 2008****.*

More Information to be Included in Benefit Statements

The PPA now requires all benefit statements to include the following information:

1. the participant's total accrued benefit

2. the amounts of the participant's vested benefit or the earliest date on which amounts will become vested

3. an explanation of any permitted disparity or any floor offset arrangement included in the plan

Additionally, benefit statements for individual account plans must include the following information:

4. the value of each investment to which assets in a participant's account are allocated (as of the most recent valuation date), including the value of assets held in employer stock

Additionally, benefit statements for individual account plans that allow for participant directed investments must include the following information:

5. an explanation of any limitations or restrictions on the participant's or beneficiary's right to direct investments that are included in the plan[1]

6. an explanation of the importance of a well balanced portfolio, including a statement describing the risk of holding more than 20% of a portfolio in one entity (such as employer stock)[2], and

7. a notice directing the participant or beneficiary to the DOL's website on investing and diversification: www.dol.gov/ebsa/investing.html.

Online Benefit Statements

FAB 2006-03 clarifies that plan sponsors may comply with the new benefit statement requirement by providing participants with continuous access to benefit statement information through one or more secure websites. However, plans providing benefit statements by access to a website must first give participants and beneficiaries a notice that explains the availability of the benefit statement online and how the participant or beneficiary can access the benefit statement. The notice also must explain that participants may request and receive, free of charge, a paper version of their benefit statement. The notice must be furnished in advance of the first date on which the plan is required to provide the first benefit statement, and annually thereafter.

Plan Administrator Checklist

- ❑ Determine type of plan and how frequently you must provide benefit statements.
- ❑ Determine when first statement is due.
- ❑ If you have a defined benefit plan, consider whether to use alternate notice requirement.
- ❑ Revise benefit statement to include all required information.
- ❑ If you will provide benefit statements by online access, give notice before first statement is due regarding how to access online statement and how to get a free paper copy.
- ❑ If you will provide benefit statements by online access, calendar annual (or more frequent) notice regarding how to access online statement and how to get a free paper copy.

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[1] FAB 2006-03 clarifies that this explanation need only include limitations and restrictions on a participant's rights imposed "under the plan" but need not include limitations and restrictions imposed by investment funds, other investment vehicles, or by state or federal securities laws.

[2] FAB 2006-03 includes the following model statement plan sponsors can use to comply with this requirement:

> To help achieve long-term retirement security, you should give careful consideration to the benefits of a well-balanced and diversified investment portfolio. Spreading your assets among different types of investments can help you achieve a favorable rate of return, while minimizing your overall risk of losing money. This is because market or other economic conditions that cause one category of assets, or one particular security, to perform very well often cause another asset category, or another particular security, to perform poorly. If you invest more than 20% of your retirement savings in any one company or industry, your savings may not be properly diversified. Although diversification is not a guarantee against loss, it is an effective strategy to help you manage investment risk.
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> In deciding how to invest your retirement savings, you should take into account all of your assets, including any retirement savings outside of the Plan. No single approach is right for everyone because, among other factors, individuals have different financial goals, different time horizons for meeting their goals, and different tolerances for risk.
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> 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.

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