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December 18, 2013

*Submitted Electronically*

Mr. John J. Canary  
Director, Office of Regulations and Interpretations  
U.S. Department of Labor, Employee Benefits Security Administration  
200 Constitution Ave, NW, Ste N-5655  
Washington, DC 20210

Re: Required Annual Disclosures under 29 CFR §2550.404a-5

Dear Mr. Canary:

We write in response to Field Assistance Bulletin No. 2013-02 (the “FAB”), in which the Department of Labor announced a temporary enforcement policy with respect to the deadline for furnishing the annual disclosures required to participants in participant-directed individual account plans pursuant to 29 CFR §2550.404a-5 (the “Regulation”). In the FAB, the Department indicated that it is considering a regulatory amendment to the Regulation’s timing requirement to provide reasonable flexibility to plan administrators on a permanent basis. The Investment Company Institute<sup>1</sup> supports a regulatory amendment to allow for greater flexibility in determining when to provide the annual disclosures.

As you know, the Regulation requires plan administrators to provide certain plan-related and investment-related information to participants and beneficiaries on or before the date on which a participant or beneficiary can first direct his or her investments and “at least annually thereafter.” The Regulation defines “at least annually thereafter” to mean at least once in any 12-month period, regardless of whether the plan operates on a calendar or fiscal year basis. Many plan administrators and service providers to plans interpret this rule to require each subsequent annual disclosure to be furnished within 12 months, or 365 days, from the previously-made disclosure. For example, in the case of a plan administrator that provided the initial round of disclosures on August 30, 2012 (the initial deadline for calendar year plans), the second round of disclosures would be due by August 30, 2013. The FAB recognized concerns that this timing rule would prevent many plans from combining the participant disclosures with other notices or mailings to participants and beneficiaries (such as annual

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<sup>1</sup> The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$16.1 trillion and serve more than 90 million shareholders.

enrollment materials or benefit statements), and would result in an arbitrary annual deadline of August 30, unless the plan administrator determines to provide an extra set of participant disclosures during the year, at considerable expense. Accordingly, the FAB provided a one-time opportunity to reset the Regulation's deadline by furnishing either the second or third round of disclosures no later than 18 months after the prior disclosure materials were furnished.

According to the FAB, the one-time reset permitted under the temporary enforcement policy does not address concerns about a fixed annual deadline for the comparative chart and plan-related information. The Department indicated that it is considering whether to allow a 30-day or 45-day window during which subsequent annual disclosures<sup>2</sup> would have to be furnished, and requested views from interested parties. While we support the idea of providing a compliance window, and believe that a 45-day window would be a reasonable approach to providing necessary flexibility, the Institute believes that an 18-month standard (as opposed to 12 months with a 45-day window) would be optimal and still preserve participants' and beneficiaries' receipt of regular and timely information. Specifically, the definition of "at least annually thereafter" in 29 CFR §2550.404a-5(h)(1) could be revised to read "at least once in any calendar year period, but no more than 18 months after the information required to be provided at least annually was last furnished." Even with an 18-month window, plans are likely to continue to provide the disclosures every 12 months so as to maintain regularity, but will have greater ability to adapt to changing circumstances.

There are many different circumstances that may implicate the need for the additional flexibility that an 18-month window would provide. For example, it is common for plans to periodically change the menu of investment options available to participants and, in such circumstances, a plan may find it helpful to slightly delay distribution of an otherwise due comparative chart until the new investment options are set. In addition, a new plan year or change of service provider could impact the optimal timing of participant notices. Furthermore, having additional flexibility built into the regulation would be helpful in light of the ever-changing landscape of participant notices and disclosures required under ERISA and the Internal Revenue Code. As the Department knows, many plan sponsors and service providers try, where possible, to consolidate participant communications in a way that ensures effective disclosure and avoids overloading participants with information too frequently. An 18-month window would better enable consolidation of the plan-related and investment-related information required under the Regulation with other required communications.

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<sup>2</sup> In this section of the FAB the Department specifically refers to the annual comparative chart without including the plan-level information described under paragraph (c) of the Regulation. We assume that this is an oversight and that any regulatory amendment or other guidance in this area will specifically apply to both plan-related and investment-related annual disclosures.

We appreciate this opportunity to present our views on the timing of the annual participant disclosures and would be pleased to discuss our letter at your convenience. Please do not hesitate to contact me at (202) 326-5920 ([david.abbey@ici.org](mailto:david.abbey@ici.org)) or Elena Chism at (202) 326-5821 ([elena.chism@ici.org](mailto:elena.chism@ici.org)).

Sincerely,

/s/ David M. Abbey

David M. Abbey  
Senior Counsel – Pension Regulation