

Abridged Version of  
Regulatory Agenda Chat with EBSA  
Held on January 4, 2011  
(Retirement Plan Related Questions Only)

**Prepared by The SPARK Institute on January 11, 2011**

Please note that input received during the course of this web chat is not part of the formal rulemaking process. You can find DOL's proposed regulations, and submit comments, by visiting [www.regulations.gov](http://www.regulations.gov).

If you are having trouble submitting questions, you can also submit them via e-mail at [webmaster@dol.gov](mailto:webmaster@dol.gov) during the live chat session.

You can also use the [interactive page](#) to enter your questions.

**1:51 Moderator:** Good afternoon. The chat will begin at 2 p.m. ET but you can submit your questions at any time. This is a text only chat, so there won't be any audio or video.

**2:00 Phyllis Borzi:** Good afternoon. I am Phyllis Borzi, Assistant Secretary for the Employee Benefits Security Administration. My staff and I are very excited to participate in this web chat concerning the Agency's regulatory priorities for the next several months.

As you probably know, EBSA's regulatory and enforcement responsibilities under the Employee Retirement Income Security Act – ERISA - extend to almost 718,000 private pension plans, approximately 2.6 million employer-sponsored health plans and a similar number of other welfare plans. The plans together hold more than \$6 trillion in ERISA assets.

On behalf of Secretary of Labor Hilda L. Solis and the entire EBSA staff, I can say – without reservation – we are committed to protecting the interest of the millions of America's workers who are dependent on ERISA-covered plans for their economic well-being – whether for retirement, health care or other benefits. We believe this commitment is evidenced, in part, through a regulatory program that is designed to strengthen the protections America's workers both need and deserve.

While regulations implementing the Affordable Care Act are an important priority for the Agency, the focus of today's web chat is on the pension initiatives appearing in our most recently published Semiannual Regulatory Agenda.

In this regard, the Agency will focus on completing work on its fee transparency initiatives. Specifically, we will work to finalize the interim final rule relating to reasonable contracts and arrangements under section 408(b)(2) of ERISA. We published this interim rule in July and requested public comments on a few discrete issues. We are encouraged by the feedback on the interim final regulation and are sensitive to the need to finalize the rule on the earliest possible date, given the July 16, 2011, effective date. This regulation will give fiduciaries valuable information about compensation and revenue sharing, and the disclosure of this information will benefit millions of participants and their families. As we work to finalize this rule as applicable to pension plans, simultaneously we will move forward with our related welfare plan initiative. The welfare plan initiative involves a consideration of whether, and to what extent, service relationships in the welfare plan context should be subject to similar fee and compensation disclosure requirements. As most of you are aware, we recently held a public hearing to consider issues relating to

the welfare plans and are currently working our way through the information provided by the witnesses at this hearing.

In addition, the new Agenda includes a number of other important items aimed at assuring retirement security, protecting participants' rights, and helping them understand their employee-benefit programs. Specifically, we are proposing to amend current regulations to clarify the circumstances under which a person will be considered a "fiduciary" when providing investment advice to employee benefit plans and their participants and beneficiaries of such plans. This initiative is intended to assure retirement security for workers in all jobs regardless of income level by ensuring that financial advisers and similar persons are required to meet ERISA's strict standards of fiduciary responsibility. Taking into account significant changes in both the financial industry and the expectations of plan officials and participants who receive investment advice, the proposed amendments would change a thirty-five year old rule that we believe may inappropriately limit the types of investment advice relationships that give rise to fiduciary duties. We also will continue with our "lifetime income" initiative, which involves consideration of steps we can take to encourage the offering of lifetime income options to participants and beneficiaries of defined contribution plans and the education of participants and beneficiaries with respect to such options. This initiative is intended to improve retirement security for all workers by helping to ensure that participants and beneficiaries have a greater degree of choice and flexibility in how they will receive their retirement benefits. We intend to continue working with plan sponsors, participants and other retirement experts to identify steps that we can take together to improve the likelihood that participants' plan savings will last throughout retirement.

Before turning to your questions about the other Agenda items, it should be noted that we will be making your questions - with our responses - available on the EBSA website for future review. With that announcement, we will turn to the first question ----

**2:01 Comment From Public:** Will a transcript be available after the chat?

**2:01 Moderator:** The entire transcript of the chat will remain available on this page after the chat has ended.

**2:07 Comment From Guest:** what is the difference between "effective date" and "applicability date" as those terms are used in the 404(a) regulations?

**2:07 Della:** Thank you guest. The effective date is the date on which the regulation is formally codified into the Code of Federal Regulations. The applicability date is the date on which plan administrators must begin complying with the requirements of the regulation. The applicability date of this regulation is for plans years beginning on or after Nov. 1, 2011.

**2:08 Comment From Mark L:** As an investment advisor to Retirement Plans I approach many Executives and HR Professionals regarding their Fiduciary Duties to the plan. In most cases they are unaware and also they just don't seem to care. They do not monitor expenses or the appropriateness of funds. In most cases they just want to keep their heads in the sand. Also, you have the vast majority of these plans serviced by generalists who do not know or care about the regulations and requirements and in some cases brush it aside with indignation. What can the DOL do to make plan sponsors more aware of their duties and responsibilities? I don't think the booklet on line is forceful enough.

**2:09 EBSA:** Thank you, Mark L,

EBSA regularly reviews its publications. We will take a look at those currently available on our web site for possible improvement. In addition to our publications, we have been conducting a number of outreach programs intended to educate plan fiduciaries. We would also note that our recently published regulation under section 408(b)(2) will help ensure that plan fiduciaries get the information they need and should consider in selecting plan service providers.

**2:09 Comment From Guest:** Will you be issuing any further guidance or Q/A on 408b2?

**2:09 EBSA:** The next step will be to finalize the Interim Final Rule. We hope to do this by April 2011. At this juncture we have no plans for interim guidance before the Interim Final Rule is released.

**2:10 Comment From Guest:** Does the DOL anticipate issuing any guidance on electronic delivery of proxies? The SEC has approved the use of e-proxy for delivery of our proxy materials to shareholders. But this approach does not fit 100% within the DOL guidelines for electronic delivery of documents. For many of my clients 401(k) participants account for 50% of the proxy printing costs. Also, we are using a lot of paper and other resources that could be avoided. Thanks

**2:10 EBSA:** We are aware of the SEC guidance and are looking at the issue from the ERISA perspective. We are planning to publish a Request for Information (RFI) in the Federal Register to assist the Department in evaluating whether, and possibly how, the current regulatory standards for electronic distribution of required plan disclosures under ERISA should be updated to reflect changes in technology and the workplace. We encourage you to raise this issue in connection with that RFI. We are aware of the SEC guidance and are looking at the issue from the ERISA perspective. We are planning to publish a Request for Information (RFI) in the Federal Register to assist the Department in evaluating whether, and possibly how, the current regulatory standards for electronic distribution of required plan disclosures under ERISA should be updated to reflect changes in technology and the workplace. We encourage you to raise this issue in connection with that RFI.

**2:13 Comment From Larry Goldbrum, SPARK Ins:** This question relates to the seller's exception in the pending fiduciary definition regulation. The exception allows for the "provision of advice or recommendations if ... such person can demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as ... a seller of a security or other property, or as an agent of...such a ... a seller...." Following the release of the proposed rule it was reported that DOL representatives said that the seller's exception does not cover agents selling another company's product. Please discuss this issue and the rationale for such limitation if the reports are true. Thank you.

**2:13 EBSA:** Thank you Larry G. for your question. The seller's exception in the proposed rule on the definition of a fiduciary investment adviser is not limited to agents selling their own products. If you are concerned about the language, please feel free to send in a comment. We have also announced that we plan to hold a public hearing on the proposed rule. Watch our website for updates.

**2:15 Comment From Mark L:** How does the Dept feel about allowing for "in force distributions" around age 59 so a participant can roll out into one of the newer offered annuity products that has a guaranteed withdrawal or income options?

**2:15 EBSA:** Thank you for this suggestion. The Department is closely considering options to make lifetime income streams more available. Together with the Department of Treasury, we held a hearing on this issue where a number of ideas were offered. We are currently reviewing comments submitted to the official record. You can view the received comments and hearing testimony on the EBSA website. We have not settled on any specific policy option at this time. Tuesday January 4, 2011 2:14 EBSA

**2:16 Comment From Pamela Everhart:** When will the e-delivery RFI be issued?

**2:16 EBSA:** Hi Pamela, thank you for your question. EBSA is currently completing work on a RFI on e-disclosure and hope to have it published in the Federal Register within the next six to eight weeks.

**2:20 Comment From Jennifer:** Regarding the proposed regulations on Target Date Disclosure, will a current prospectus satisfy the new disclosure requirements, or will the DOL prescribe a specific format for the information that must be provided to participants?

**2:20 EBSA:** Jennifer,

The new target date fund disclosure proposal would amend two existing regulations – the QDIA Regulation and the Participant-Level Disclosure Regulation. It is not likely that the delivery of a prospectus will, in and of itself, satisfy the requirements of the proposal. However, information from a current prospectus may be used to satisfy at least some of the content requirements of the proposal. Finally, we have no plans at this juncture to develop a model format for the disclosures. The comment period on this proposal ends on January 14, 2011.

**2:20 Comment From Doug:** Are you planning to issue a proposal on lifetime income during 2011?

**2:20 EBSA:** The Department issued a request for information and received a number of comments. In addition we recently conducted a hearing regarding lifetime income options. The Department is now reviewing the comments submitted to the public record.

**2:22 Comment From Guest:** Many of us are still struggling to fully understand the new Schedule C fee reporting requirements. Will you be providing further guidance and education related to these reporting requirements.

**2:22 EBSA:** We do not have additional FAQ guidance currently in the works to supplement the sets of Schedule C FAQs that were previously released and posted on EBSA's website. However, we encourage people to contact us if they're confronting specific issues where they believe additional guidance would be helpful. You can call EBSA's Office of Regulations and Interpretations at 202-693-8500.

**2:22 Comment From Janet:** Did the DOL play any part in the IRS' recent decision to exempt 5500s from PTIN requirements? Do you anticipate a similar such requirement coming from the DOL anytime soon?

**2:22 EBSA:** Thanks Janet, IRS consulted with the EBSA before it released its decision related to the PTIN and the Form 5500. The PTIN is a IRS requirement and EBSA does not need to issue a separate decision on this matter.

**2:22 Comment From Rebecca Moore:** Are there any concerns or initiatives relating to 403(b) plans that EBSA is considering following Form 5500 filing and audits?

**2:22 EBSA:** Thank you for your question Rebecca. The department does not have any special initiatives targeted at 403(b) plans, although we will continue to work with 403(b) plan sponsors in complying with the new annual reporting requirements.

**2:27 Comment From Mark L:** On the EBSA website it says the a plan filing a late 5500 is required to pay a late fee irregardless of if it is filing under an extension. I have been told that is not true. Which is it? the Calculator produces a penalty without respect to an extention

**2:27 EBSA:** Thank you Mark. The EBSA website is correct. If a Form 5500 is filed late after an extension the civil penalty is calculated from the original due date.

**2:27 Comment From guest:** Going back to an earlier question: It would help in some ways if the DOL were more forceful making sure plan sponsors (particularly small ERS) understand their fiduciary duties

re their 401(k) plans. The potential downside, however, is that many small ERS might stop offering 401(k)s if they seriously understood their fiduciary duties. Has DOL considered proposing a "Nationwide 401(k) Plan" to members of Congress -- where EEs could contribute to this Nationwide plan rather than to individual IRAs? Perhaps some ERs would also match EE contribs, since the ER would not have the admin or fiduciary responsibility. And many small ERs are offering smaller matches (or zero) in the past 2 years.

**2:28 EBSA:** The Department is interested in encouraging more small employers to offer retirement plans. There are a number of simple low-cost options available now. These include payroll deduction IRAs. These options are explained in publications available on the EBSA website. The Department is always willing to consider other options that might emerge through the legislative process.

**2:30 Comment From guest:** if final 408(b)(2) regs are not published until April, will you consider a delay in the effective date. all documentation will need to be sent to the printer prior to april in order to meet the July 1 deadline.

**2:30 EBSA:** Thank you for the question. EBSA is working to complete its work on the 408(b)(2) regulation on the earliest possible date. Having said that, we are sensitive to the needs of the regulated community to have adequate time for implementing any changes that might be required by the final rule.

**2:33 Comment From Guest:** Regarding the model benefits statement for defined benefit plans to be provided every 3 years, with regs. proposed for June, can you give us any preview of this?

**2:33 EBSA:** As you may know, the department has issued two Field Assistance Bulletins under the new pension benefits statement requirements under section 105 of ERISA. As the Regulatory Agenda indicates, we hope to publish a proposed regulation by June 2011. At this juncture, we are unable to provide a description of any specifics of what will be in the rule. However, the starting point for the development of the regulation are the statutory requirements in section 105 of ERISA, rather than the specific guidance set forth in the two Field Assistance Bulletins. As to multiemployer plans in particular, as you are probably aware, section 105 of ERISA no longer provides special rules for multiemployer plans.

**2:33 Comment From Guest:** When do you anticipate publishing the RFI on electronic disclosures? Any chance that changes could be implemented by the participant fee/investment disclosure effective date of 11/1/11?

**2:34 EBSA:** The Department plans to release a Request for Information regarding electronic delivery in the near future. It is unlikely that a regulation will be issued by the participant fee/investment disclosure effective date.

**2:35 Comment From Patty Kujawa, Workforce M:** Do you intend to amend the fiduciary regulation this year?

**2:35 EBSA:** Thanks for your question Paddy. We cannot give a specific timeframe at this time. We will be accepting comments on the proposed regulaton until February 3, 2011. EBSA also will be holding a public hearing on March 1. After we work through the information and testimony, we will make decisions on the next steps.

**2:35 EBSA:** Ellen,

As noted in the regulatory agenda, we expect to issue a proposed regulation on the benefits statement provision in the PPA by June 2011. Please watch our website for updates.

**2:35 Comment From Ellen:** When does EBSA anticipate that further guidance will be provided regarding the PPA benefit statement requirement, including a model statement?

**2:40 Comment From Travoris Culpepper:** What is the any new regulations that we can expect with regard to multi-employer pension plans?

**2:40 EBSA:** The new Regulatory Agenda includes a number of regulatory initiatives that will impact multiemployer plans of all types. One initiative in particular is the regulation implementing the new annual funding notice requirements for defined benefit pension plans under section 101 (f) of ERISA. We published a proposed regulation, with model notices, on Thursday, November 18, 2010. The comment period on this regulation ends on January 18, 2011.

**2:40 Comment From Guest:** Post-RFI and public hearing, what are some specific areas the Agency is focused on in regards to its Lifetime Income initiative?

**2:40 EBSA:** Thanks for the question. The RFI and joint agency public hearing on lifetime income options produced a wealth of information. We are now considering approaches to addressing possible impediments to the offering of lifetime income options by plans and the selection of those options by participants. We are looking at what EBSA can do to encourage education of participants about lifetime income options and can be done to assist plan fiduciaries when considering the providers of such options. EBSA is working with the Department of Treasury to determine the most appropriate next steps.

**2:42 Comment From Guest:** Does EBSA intend to make every effort to finalize its proposed regulation on the definition of "fiduciary" in 2011?

**2:42 EBSA:** The Department had scheduled a March 1, 2011 hearing on the Fiduciary Definition rule and will consider the public record before finalizing the rule. We cannot at this point say with any certainty the rule will be finalized in 2011.

**2:43 Comment From DK:** What are our obligations regarding returned mail with paper copies of required notices, proxies, etc? We have thousands of returned mail for 401k and Pension participants who do not provide current address information.

**2:43 EBSA:** Thanks DK, the fiduciary of the 401k or pension plan has an obligation under ERISA to take prudent steps to maintain accurate contact information on plan participants. The situation you described of getting thousands of returned mail suggests that there may be a problem in appropriately maintaining up-to-date contact information. EBSA has issued guidance on the fiduciary obligations under ERISA to locate missing participants in connection with benefits distributions and related disclosures ([http://www.dol.gov/ebsa/regs/fab\\_2004-2.html](http://www.dol.gov/ebsa/regs/fab_2004-2.html)). We would need more information on the specific circumstances involved to evaluate the extent of the obligation of the fiduciary to follow up in the case of any particular returned mail sent to a plan participant.

**2:44 Comment From Guest:** Could the EBSA add a page to their web site that shows standard letters that they may send to plan sponsors? The VFCP letter related to delinquent contributions is a good example. I am anticipating that there will be new letters generated by EFAST2. It would be good to be familiar with these before a client calls because they receive one.

**2:44 EBSA:** Thank you for your thoughtful suggestion. We will certainly look at the feasibility of your suggestion as we review our website. Meanwhile, you may be interested in noting that the EBSA Enforcement Manual (also available on our website) contains sample letters that we use in connection with our investigations.

**2:48 Comment From guest:** on the definition of fiduciary regulation, why can't the comment period stay open until we have had the benefit of hearing the views of those who testify at the hearing?

**2:48 EBSA:** Thank you for your question. As we indicated earlier, we do plan to hold a public hearing on this topic on March 1, 2011. Following a public hearing we usually keep the public record open for a reasonable period of time for this purpose and expect to do the same in this case.

**2:53 Comment From Guest:** The proposed fiduciary regs seem to pick up anyone who provides any tailored information about any investment to a plan, including lawyers and accountants, and brokers who provide "advice incidental to brokerage" (all of which are excluded under the Investment Advisers Act). Was it intended that all these people become fiduciaries?

**2:53 EBSA:** The primary focus of the proposal is on function – providing investment advice and recommendations – and not labels such as lawyers, accountants and brokers. If you think this needs to be addressed in the Final Rule, please provide us with your thoughts by making a submission to the public record. Comments will continue to be accepted until February 3, 2011, and we plan on holding a public hearing on March 1.

**2:55 Comment From Chris:** Given all of the other disclosure requirements now in place, will the day ever come when the SAR for DC plan participants is no longer required?

**2:55 EBSA:** Chris,  
The requirement to furnish participants and beneficiaries with a summary of the 5500 annual report (SAR) is a statutory requirement for DC pension plan participants, and we have no plan to change our regulations that implement that SAR statutory requirement.

**2:56 Comment From Elizabeth:** When do you anticipate returning to the level-fee regulation that you have been working on?

**2:56 EBSA:** Elizabeth –  
We hope to publish the final investment advice regulation, which include fee leveling and computer models, by May 2011.

**2:56 Comment From Sue:** Are you considering a special exemption from the proposed fiduciary rules for enrolled actuaries working with DB plans? I am specifically concerned about the effect on enrolled actuaries preparing asset-liability modeling studies for defined benefit plans. In almost all situations, their role is educational, presenting alternate scenarios using broad investment classes. Yet, the proposed wording (that the advice "may be considered" and that is "individualized based on the needs of the plan") would seem to throw us into a fiduciary role. In general, the skill set to provide this analysis exists only with the actuary. I am concerned the rules as proposed will limit the analysis available to plan sponsors.

**2:56 EBSA:** Sue –  
Thanks for your interest in this important proposal. We will be continuing to accept comments until February 3, and also will hold a public hearing on March 1. If you think a specific exception is needed for persons providing services as enrolled actuaries, you can provide us with the written comments, which will be included in the public rulemaking record.

**2:58 Comment From Chris:** The question about electronic distribution of proxies triggered this question. Are you planning on reviewing or updating the electronic disclosure regulations to reflect the wider availability of online connectivity?

**2:58 EBSA:** Thanks for the question Chris. Yes, we are planning to issue a request for information on whether, and to what extent, the current electronic disclosure safe harbor could or should be updated to reflect changes in technology and an increase in access to the internet since the safe harbor was originally published. While it is unlikely that we will publish a final regulation before the applicability date of

the participant level disclosure regulation, as we indicated in the preamble to that regulation, we will provide some form of guidance on this issue in advance of the applicability date.

**2:59 Comment From guest:** i'm confused about your last answer. didn't you say the comment period would remain open?

**2:59 Comment From Guest:** when will we know more about the effective date for the auto enrollment requirement in health plans?

**2:59 EBSA:** To clarify, the comment period for the proposed fiduciary regulation was extended to February 3. The hearing on that regulation is scheduled for March 1. In conjunction with the hearing, we will keep the hearing record open to enable both those testifying and other interested persons to comment on the hearing testimony and other issues. Hope this is helpful.

**2:59 EBSA:** The Departments of Labor, the Treasury and Health and Human Services issued the fifth in a series of ACA implementation FAQs. Those FAQs indicate that, until regulations are issued, employers are not required to comply with the new automatic enrollment requirements in section 18A of the FLSA. The FAQs are available on the EBSA website.

**3:01 Comment From Guest:** Can you please describe the coordination process your agency uses when regulations are related to another agency but aren't jointly issued? How do you assure the two sets of regs align without gaps or overlaps?

**3:01 EBSA:** When we issue a regulation that impacts another agency we consult with that agency during the drafting process. The review of regulations by OMB under Executive Order 12866 also helps ensure coordination among agencies.

**3:02 Comment From Guest:** Upon serving as a QTA, and filing the final termination letter, STRAP, and final 5500, will there be a unique form in the future for the 5500 denoting it as a QTA 5500?

**3:02 EBSA:** Thanks for your question. First, a QTA is not required to file both a STRAP and a complete final Form 5500 after winding up an abandoned plan. As the agenda indicates we are developing amendments to the abandoned plan regulation. At this juncture we have no plans to create a special Form 5500 for abandoned plans, separate and apart from the STRAP. If the STRAP needs to be improved in any respect, please comment on such improvement after we publish the proposed changes, which we hope to publish by December 2011.

**3:03 Comment From Guest:** On your comment on eligibility determinations being subject to the internal review process -- is this a change from your position in the 2001 FAQs (Q&A 3) which said that a determination of eligibility only was not subject to the claims and appeals process.

**3:03 EBSA:** Thanks Guest, under the previous guidance, and the current guidance, a claim that is denied in whole or in part for any reason is eligible for internal appeals, even if that denial is for lack of eligibility under the plan. Now for non grandfathered health plans, rescissions of coverage, in and of themselves, are also eligible for internal appeals.

**3:03 Phyllis Borzi:** Thank you all for your questions. It is always valuable to hear from our stakeholders. We would like to remind everyone that in order for your comments to be considered as part of the rulemaking process, please submit them to us in writing. You can find directions on how to do this at <http://www.dol.gov/regulations/> , or at <http://www.regulations.gov> .