

**TESTIMONY OF PHYLLIS C. BORZI
ASSISTANT SECRETARY OF LABOR
EMPLOYEE BENEFITS SECURITY ADMINISTRATION
BEFORE THE
SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE
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Introductory Remarks

Good afternoon Chairman Kohl, Ranking Member Corker, and Members of the Committee. Thank you for inviting me to discuss small business retirement plan issues. I am Phyllis C. Borzi, the Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA). I am proud to represent the Department of Labor (Department), EBSA, and its employees, who work to safeguard retirement and other employee benefits for America's workers, retirees and their families and to support the growth of our private benefits system. Secretary Solis' overarching vision for the Department is to advance good jobs for everyone, and a good job, among other things, is one that provides a secure retirement. We are committed to promoting opportunities and helping America's workers to achieve a secure retirement.

Helping workers to achieve a dignified and secure retirement means encouraging employers to establish and maintain retirement plans and protecting workers' benefits. We know we must work particularly hard to assist small businesses because of the challenges small businesses face in providing retirement plans. There are six million businesses with fewer than 100 employees employing 42 million workers.¹ Less than half of these businesses offer a retirement plan.²

¹ U.S. Small Business Administration, Office of Advocacy, based on data for 2008 provided by the U.S. Census Bureau, Statistics of U.S. Businesses.

² U.S. Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in the United States, March 2011, Bulletin 2771. Private Industry Tables. Table 1, Establishments offering retirement and health care benefits.

To expand access for workers to employer-based retirement plans, the Department has long recognized that we need to reach out to the small business community. Employer-sponsored plans are the best way for most workers to accumulate savings for a financially secure retirement. It is not easy for workers to save and invest so that they will be able to maintain their current standard of living in retirement. According to experts, workers will need to replace 70 to 90 percent of preretirement income.³ Therefore, we need to do all we can to assist small employers in establishing and operating retirement plans.

Background

EBSA is responsible for the administration, regulation, and enforcement of the fiduciary, reporting, and disclosure provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). EBSA assists small employers in evaluating their options for establishing a retirement plan and provides compliance assistance to help employers understand their fiduciary and reporting responsibilities for employer-sponsored plans. We accomplish this through comprehensive education, outreach,⁴ and regulatory programs.

EBSA's Office of Participant Assistance (OPA) reaches out to small businesses through comprehensive campaigns designed to help them make knowledgeable choices and assist them in complying with the law. The goal of the campaigns is to provide comprehensive information and tools to assist small business owners. EBSA's Office of Regulations and Interpretations

³ Alicia H. Munnell, Francesca Golub-Sass, and Anthony Webb. "How Much to Save for a Secure Retirement." Center for Retirement Research at Boston College, Issue Brief #11-13, November 2011. Bruce A. Palmer. "2008 GWU/Aon RETIRE Project Report," Research Report Series Number 08-1, June 2008.

⁴ Section 516 of ERISA requires the Department to maintain a program designed to effectively promote retirement income savings by the public, including information on the forms of retirement income savings.

(ORI), Office of Chief Accountant (OCA), and OPA also provide compliance assistance to employers and employee benefit plan officials.

In order to leverage our education and outreach efforts, the Department continues to build on our relationships with strategic partners from within the federal government and among external stakeholders. In particular, we partner with the Internal Revenue Service (IRS), the Small Business Administration (SBA), the American Institute of Certified Public Accountants (AICPA), and the Consumer Federation of America, and others to reach small businesses. In addition to these partnerships, we work to maximize the impact of our announcements of new materials, tools and events by coordinating the timing with high profile events such as America Saves Week, Financial Literacy Month and National Save for Retirement Week.

Education, Outreach and Compliance Assistance to Small Businesses

The Department understands that small employers need assistance in choosing a retirement plan appropriate for them and their workers. As the research has demonstrated over the years, there are many factors that impact a small business owner's decision to sponsor a retirement plan, including the focus on growing a new business, employees' preference for higher wages or health benefits before a retirement plan, as well as the economy. We work hard to address the challenges that we can through our education and outreach to assist small businesses in establishing and maintaining a plan.

Expanding Coverage by Assisting Small Employers in Choosing a Retirement Plan

In 2000, the Department launched a formal dedicated small business campaign partnering with the Small Business Administration and the U.S. Chamber of Commerce. The *Choosing a*

Retirement Solution for Your Small Business campaign helps small businesses that do not have a retirement plan understand the many options available and determine which options might be appropriate for them. The campaign highlights the tax incentives available for the various options and provides more detailed information on how to establish and operate the various plan options.

To provide a comprehensive one-stop resource for small business owners, the Department has worked with the IRS to develop a series of publications and materials geared to small businesses that describe all of the plan options available and the highlights of each. The options range from the basic to those with more design flexibility and include individual retirement arrangements (IRAs), defined contribution plans, and defined benefit plans. Many small businesses will be able to find and establish more than one of these options through financial service providers and retirement plan practitioners. The publication, *Choosing a Retirement Solution for Your Small Business*, provides a comparison chart of all of the options and the key features and is available on our website at www.dol.gov/ebsa/publications/choosing.html.

The other EBSA publications developed with the IRS provide more detailed information on the individual options, providing overviews of the law for establishing and operating the respective plan option. These publications are all posted on the EBSA, IRS and SBA websites and include links to the resources noted in the publications so that a small business owner who is interested in finding more information has easy access to it. In addition, we work with the IRS to keep the publications current and to include new options as they become law. For example, in 2008 we released a publication on automatic enrollment 401(k) plans that incorporates the safe harbors for both ERISA and the Internal Revenue Code as added by the Pension Protection Act.

We also provide outreach to small business owners and their accountants through workshops and webcasts. The IRS and AICPA have participated with us in the workshops and webcasts and we have worked closely with the SBA, the Department's Small Business Programs Office and local Chambers of Commerce along with State CPA societies, local Society for Human Resource Management (SHRM) chapters and other organizations to promote these workshops and webcasts. Webcasts enable us to reach a wider audience that we can't reach in person. For example, recently we held a webcast on February 23 with the AICPA, the Consumer Federation of America and NACHA, the Electronic Payments Association, as part of America Saves Week. The archive is available at <http://www.dol.gov/ebsa>.

After receiving feedback from small businesses that they tend to look to their accountants for help in determining if they should offer a plan, the Department began working with the AICPA. Members of the AICPA frequently join the local workshops we conduct and help to promote the events and our materials. Our work with the AICPA includes a video with accountants, their small business clients and some of the employees of those businesses talking about their experience in selecting a plan option. We also developed the interactive website, www.choosingaretirementsolution.org, that helps accountants and small business owners evaluate those options most suitable for their situation after they answer a few questions about their businesses and a few key plan features (such as whether they want to make contributions). This website links to the publications the Department developed with the IRS for additional information on the options.

Helping Small Businesses Comply When Sponsoring a Plan

In order to assist service providers and employers, including small businesses with compliance issues once they have set up a retirement plan, the Department developed with others the *Fiduciary Education* campaign in 2004 partnering with the SBA, SHRM, AICPA, Chamber and the National Federation of Independent Business (NFIB). This campaign creates an awareness and understanding of the law and responsibilities involved in operating a retirement plan. This includes highlighting some of the most common problems that EBSA encounters in our enforcement program and steps on how to avoid them. The campaign helps plan sponsors and other fiduciaries to:

- Understand the terms of their plans;
- Select and monitor service providers carefully;
- Make timely contributions to fund benefits;
- Avoid prohibited transactions; and
- Make timely disclosures to workers and their beneficiaries and reports to the government.

As part of the campaign, the Department developed a number of publications, as well as tips and other tools, providing an overview of the fiduciary responsibilities and other provisions under Title I of ERISA. We developed additional publications and full day seminars, which are joined by the IRS, on areas of the law such as the tax qualification requirements, reporting and disclosure and voluntary correction programs. The cornerstone publication, *Meeting Your Fiduciary Responsibilities*, is also available in Spanish. We keep the publications and seminars updated for new law and guidance. To reach a wider audience, we provide assistance by

contributing a column for the IRS' quarterly newsletter for small businesses where we provide information on new guidance, tools and outreach that is available on the EBSA website (with links). We also hold annually a two-part webcast series and have developed an interactive website for the campaign. This year, the two-part webcast will be held on March 27-28. Registration is available on the EBSA website homepage.

The Department also provides assistance to small business employers through our Benefits Advisors, located in EBSA's field offices, who answer inquiries and complaints received by phone, mail, electronically or in person. In FY 2010, EBSA's Benefits Advisors responded to more than 233,700 telephone, written and electronic communications from plan participants, employers and plan sponsors, assisting them in understanding their rights and obligations under the law and in obtaining benefits.

EBSA's Office of Regulations and Interpretations also helps employers, plan sponsors and plan service providers in understanding the ERISA fiduciary duties and regulatory requirements through its telephone and web inquiry technical assistance program. In this regard, ORI's employee benefits law specialists are available to answer technical questions on regulations, advisory opinions and other non-regulatory guidance provided by the Department.

Similarly, EBSA's Office of Chief Accountant provides compliance assistance activities with respect to ERISA's reporting and disclosure requirements. Since FY 2000, our EFAST Help Desk has handled over 800,000 filer inquiries with the scope of the inquiries ranging from routine, general information requests to working with plan filers to resolve the most complex filing scenarios. EBSA's recent Gallup survey also rated the EFAST Help Desk highly with respect to customer satisfaction. We saw a significant increase in filer inquiries during FY 2010

in conjunction with the transition year of EFAST2 – the new electronic filing system. We are now down to normal levels of filer inquiries which indicate we have successfully helped many small businesses through the transition year.

Partnership with SBA

The Department has partnered with the SBA to help expand our reach to the small business community in both the *Choosing a Retirement Solution for Your Small Business* and the *Fiduciary Education* campaigns. We actively work with the SBA on an ongoing basis and provide information on Department events and resources to SBA.

Information on our events as well as our resources for employers with and without retirement plans is provided on BusinessUSA (business.usa.gov), a website formed as a result of a Memorandum issued by President Obama on October 28, 2011. The Presidential Memorandum calls for this website to be the central portal for small businesses, providing information from all of the Federal executive departments on the issues of interest to small businesses. The goal is to make it easier for small businesses to access the full range of government programs and information. We continue to work with the SBA and the Department of Commerce staff to keep our information both updated and expanded on the website. The BusinessUSA site also attracts service providers to small businesses looking to assist their clients.

Regulatory Initiatives to Help Small Employers

Millions of workers rely on their employer-sponsored retirement plans to finance their retirements, making it critical that the retirement system be safe, transparent, and well-regulated. The Department has a number of ongoing initiatives designed to improve the transparency and

adequacy of retirement savings plans, in particular focusing on 401(k) plans where a number of investment and other risks have been shifted onto the shoulders of workers. Our goal is to make sure that employers and workers have good retirement savings options and the information to make the best choices about retirement savings.

Guidance to Fiduciaries on Target Date Funds

Chairman Kohl, I know that you have devoted significant time and energy to looking into target date funds, or TDFs, which have become an increasingly popular investment option in 401(k) plans and similar employee-directed retirement plans. That is why I want to be sure to highlight the guidance that the Department expects to soon release providing tips for ERISA plan fiduciaries on these funds. A TDF can be an attractive investment option for employees who do not want to actively manage their retirement savings, as it offers a long term asset-allocation strategy that automatically adjusts as the individual ages. Many plan sponsors, including small business plan sponsors, have also opted to use TDFs as their plan's qualified default investment alternative (QDIA) under Department regulations. This means that plan fiduciaries can obtain some legal protections under ERISA by choosing such a default investment option for participants who fail to make an election regarding investment of their account balances.

In many cases, especially for small businesses sponsoring a 401(k) plan, a broker or record keeper/administrator may offer an investment platform with a group of investment options which include a TDF option. In selecting a TDF as an investment option for a plan, it is important that plan fiduciaries understand the differences in investment strategies, asset allocations, and investment-related fees among TDFs offered by different providers, even with the same target date. We anticipate that this guidance will help plan fiduciaries to meet their responsibilities in

the review and selection of a TDF by setting forth a number of fiduciary considerations in choosing a TDF as an investment option.

408(b)(2) Regulation

On February 2, the Department issued a final rule that will provide employers sponsoring pension and 401(k) plans with information about the administrative and investment costs associated with providing such plans to their workers.⁵ The rule requires service providers to furnish information that will enable pension plan fiduciaries to determine both the reasonableness of compensation paid to the service providers and any conflicts of interest that may impact a service provider's performance under a service contract or arrangement. This final regulation improves the transparency of 401(k) fees to help workers and plan sponsors make sure they are getting investment, recordkeeping, and other services at a fair price. This is important in an environment where the plan administration and investment-related expenses are often borne by the plans' participants and beneficiaries. In particular, we believe that small business plan sponsors will greatly benefit from the final regulation, as they typically have not had the leverage of larger employers to obtain comparable information on fees and expenses. This regulation will put small businesses on the same playing field as larger employers by allowing them to obtain information sufficient to enable them to make informed decisions about an employee benefit plan's services, the costs of such services, and the service providers.

⁵ 29 CFR 2550.408b-2(c).

Fiduciary Regulation

On September 19, the Department announced it will repropose the definition of a fiduciary. The agency is seeking to update a 1975 regulation, which defines when a person providing investment advice for a fee becomes a fiduciary under ERISA, in order to adapt the rule to the current financial services marketplace. The proposal's goal is to ensure that potential conflicts of interest among advisers are not allowed to compromise the quality of investment advice on which millions of America's workers rely.

This initiative will especially help small business employers in the design and implementation of a retirement plan. Selecting investment options for such plans is a fiduciary function under ERISA, and many small employers rely on advice from financial professionals to prudently select investment options. A revised fiduciary definition would protect these small employers (and of course other employers) by making it more difficult for these advisers to steer small employers to investment options that pay the adviser higher fees. It also would hold the advisers responsible for losses that result when they recommend imprudent investments. Under the current rule, such advisers can avoid responsibility for these losses and leave the small employers as the sole fiduciary and therefore the sole responsible party under ERISA. The proposed regulation will hold the advisers accountable for imprudent and conflicted advice, and the harm this advice causes to plans and participants.

Proposals to Expand Small Business Coverage

Administration Proposal

There are a number of existing proposals to expand small business retirement plan coverage. In the Administration's FY 2013 budget proposal released on February 13, the Department's budget request contains a proposal to establish Automatic Workplace Pensions, commonly known as "Auto-IRAs." Under the budget proposal, the Administration projects that the new system of automatic workplace pensions will expand access to tens of millions of workers who currently lack pensions. Coverage will be expanded by requiring employers who do not currently offer a retirement plan to enroll their employees in a direct-deposit IRA account compatible with existing direct-deposit payroll systems. Employees would be permitted to opt-out if they choose. Employers with ten or fewer employees and employers in existence for less than two years would be exempt. Employers with fewer than 100 employees who set up these arrangements would be eligible for temporary business tax credits.

Legislation introduced in both the House and Senate contained Auto-IRA provisions similar to the proposal included in President Obama's FY 2013 budget. On February 16, Rep. Richard Neal (D-MA) introduced a bill entitled the "Automatic IRA Act of 2012," and in September 2011, Senators Jeff Bingaman (D-NM) and John Kerry (D-MA) also introduced an Auto-IRA bill, also entitled the "Automatic IRA Act of 2011."

Multiple Employer Plans

While it is clear from my testimony that the Department supports efforts to expand small business coverage, it is just as important that ERISA's protections for workers' pensions be

maintained. In that regard, the Department has more recently become aware of promoters marketing multiple employer plans, or “MEPs,” that do not involve collective bargaining with an employee representative. These arrangements, often called “open MEPs,” purport to allow totally unrelated businesses to join together to offer a collective pension plan. Promoters claim that these arrangements relieve businesses of their ERISA reporting and fiduciary obligations in connection with administering the plan or monitoring the plan investments and service providers. Proponents say such arrangements can provide the participating employers with a way to pool resources and reduce administrative costs. There are several bills pending in Congress which call for the Department, in coordination with the Treasury Department, to provide fiduciary relief and simplified administrative, reporting and disclosure obligations for multiple employer plans. We are currently analyzing these proposals.

Under ERISA, employee benefit plans must be sponsored by an employer, by an employee organization, or by both. ERISA expressly recognizes the idea of a “multiple employer plan” by including in the definition of “employer” any “person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.”

For example, a MEP operated by a *bona fide* employer association or group of related employers is a well-established concept in ERISA. Such plans in fact can provide the participating employers with a way to pool resources and reduce administrative costs. The idea of “open MEPs,” however, is not an established concept in ERISA. Indeed, EBSA has had difficult experiences with similar “open” employee benefit structures in the group health area. These arrangements, called “MEWAs,” or multiple employer welfare arrangements, can be provided

through legitimate organizations, but they sometimes are marketed using attractive, but unsound, organizational structures and generate large, often hidden, administrative fees for the promoters. In addition, certain promoters try to use ERISA's general preemption of state laws as a way to avoid state insurance or other regulation. That fact, together with the claimed separation of the employer from accountability for the plan's administration, too often put workers at risk of not getting the benefits they were promised. Bringing this type of product to the pension marketplace presents a number of complicated and significant legal and policy issues. We understand that the Government Accountability Office is actively studying this development in the pension marketplace.

We have also heard about this "open MEP" development from regulated financial institutions, including insurance companies and other financial service providers, who currently are allowed under Internal Revenue Code rules to offer "prototype" plan products to employers. These prototype plans are another way to reduce legal and administrative costs of offering employees a tax qualified pension plan. Some financial institutions have expressed reservations about developing competing "open MEP" products. Their lawyers, based on a review of the many Department of Labor opinions and other guidance on "open MEWAs," have expressed concerns about whether these "open" benefit arrangements can fairly be classified as a "single" plan as opposed to a collection of separate plans being collectively administered much like the prototype plans they already offer. We have been informally asked to provide guidance in this area by some of those groups, and we have two formal requests for guidance, one directly presenting the open MEP issue and the other indirectly. We are actively working on answering these requests.

Conclusion

Thank you for the opportunity to testify at this important hearing. We recognize the challenges small businesses face in providing retirement plans. As I noted, our partnerships from within the federal government and among external stakeholders are a key component to these efforts to develop and disseminate the information. We will continue to expand our efforts, paying particular attention to feedback we receive from small businesses and their service providers, to provide responsive, timely and comprehensive information and compliance assistance. The Department recognizes the critical role that small businesses play in the economy as employers. The Department remains committed to initiatives which protect both the security and growth of retirement benefits for workers, retirees, and their families.