

MEMO# 33961

December 16, 2021

ERISA Advisory Council Presents Recommendations on 2021 Study Topics

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: ERISA Advisory Council
Presents Recommendations on 2021 Study Topics

On November 19, the ERISA Advisory Council (the "Council")^[1] held a virtual meeting to present its recommendations to the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) on its topics of study for 2021: (1) Gaps in Retirement Savings Based on Race, Ethnicity and Gender, and (2) Understanding Brokerage Windows in Self-Directed Retirement Plans.^[2] The Council's two presentation documents are attached below. The full report will be available on EBSA's website in 2022.

Understanding Brokerage Windows in Self-Directed Retirement Plans

The Council's stated objective in examining brokerage windows in participant-directed individual account retirement plans was primarily fact-gathering—to gain a better understanding of their design, prevalence, and usage.^[3] In the Council's discussion with EBSA, one Council member noted that a suggestion on this topic would be a solution in search of a problem. The Council also explained that brokerage windows were often used by plan sponsors as a "noise reduction tool," i.e., to satisfy participant requests for additional investment options.

Concerns Regarding Brokerage-Window-Only Plans

While the Council's goal for this topic was to present information, not recommendations, to EBSA, the Council did agree on one recommendation: that DOL should consider further fact-finding related to "brokerage-window-only" (BWO) plans—i.e., plans that have no designated investment alternatives and brokerage accounts are the sole investment option.

The Council noted the concerns it heard from witnesses, but also made clear that there is no evidence suggesting that employers are using BWO plans to avoid the participant-level fee disclosure requirements (DOL Reg. §2550.404a-5). The Council also noted that while concerns were raised, it did not receive enough information to determine whether there is a

"problem" regarding BWO plans. For this reason, the Council recommended further fact-finding, limited to BWO plans, and noted that further investigation might uncover reasons to act.

Other Observations and Issues Raised by the Council

The Council explained that it considered but made no recommendation regarding three items:

- The definition of "brokerage window;"
- Additional participant disclosure regarding investment risks in brokerage windows, including:
 - absence of fiduciary monitoring;
 - possible lack of adequate diversification; and
 - possible additional fees or expenses; and
- A DOL educational campaign regarding brokerage windows.

The Council also noted the following observations:

- The low utilization of brokerage windows mitigates the seriousness of the concerns;
- Participants who utilize brokerage windows have greater average investment experience; and
- The Council does not recommend against DOL actions, but as a matter of priorities, the Council currently discerns no urgent need for DOL to intervene.

Gaps in Retirement Savings Based on Race, Ethnicity and Gender

Regarding the second topic, the Council made the following observations and recommendations.

To address the Council's observation of the lack of retirement plans for fifty percent of the American workforce,[\[4\]](#) EBSA should:

- Expand on prior guidance (EBSA Interpretive Bulletin (IB) 2015-02[\[5\]](#)) to facilitate and encourage the development of ERISA retirement plans, such as multiple employer plans (MEPs), pooled employer plans (PEPs)[\[6\]](#), and state-sponsored prototype defined contribution plans to increase retirement plan access to underserved groups, with a glide path for plan creation and administration that makes the process simple for employers, including the sharing of fiduciary responsibility with sophisticated professional entities.

The Council observed that the current US retirement system is fragmented, with each plan sponsor managing its own plans with no holistic approach to individual retirement. To address this issue, EBSA should:

- Work with other federal agencies to establish an interagency working group to coordinate a federal approach to retirement policy among the disparate agencies addressing retirement issues of underserved populations (e.g., Retirement Commission, periodic Retirement Adequacy Report);
- Notwithstanding the limitations of DOL's authority, work with the Department of Treasury and the IRS to:
 - Review penalties on involuntary small payments, hardship withdrawals, and relieve the penalty tax for early distributions of small amounts;

- Encourage employer matches on employee contributions (pre-tax, after-tax and Roth) and permit matches on contributions to emergency funds and student debt payments. Promote non-elective (profit-sharing) contributions, and Roth contributions as the default under automatic enrollment; and
- Study the feasibility of a national portability system to encourage and facilitate account consolidation and retirement savings preservation for individuals with small account balances in several plans.

The Council observed that a real need exists to enhance financial education and outreach to underserved groups on the importance of financial literacy to promote retirement savings and security. To address this need, they recommend that EBSA:

- Update IB 96-1 and define or clarify the fine line between advice and education so that the goal of providing meaningful participant financial and retirement education to achieve financial wellness is not lost;
- Promote the availability of EBSA education, tools and resource development, and promotion efforts (including employers, outreach/partnership with underserved community and advocacy groups) on financial literacy/retirement security and financial wellness for people of color, different ethnicities, and women; and
- Include financial education in the curricula of the DOL-funded/regulator training programs (Apprenticeship Standards, Women's Bureau, ETA grants, Job Corps), and work with the other agencies for middle and high school financial and investment curriculum.

To address the observation that women, and especially minority women, are more likely to have lower retirement benefits, the Council indicates that EBSA should:

- Leverage DOL's resources to address qualified domestic relations order (QDRO) issues by working with and educating state bars and the family court judiciary on the importance of QDROs to retirement security of women and reduce impediments to obtaining QDROs;
- Working with plan sponsors and all stakeholders, develop simplified model standard QDRO templates for defined contribution plans to help reduce the cost of interaction with the court system;
- Address gaps in spousal rights with respect to communications, protection, and access to information in defined contribution plans, which significantly impacts women and their potential retirement savings income; and
- Encourage plan sponsors to treat absences of up to twelve weeks for caregiving as continuous service so as to prevent a break in service.

The Council observed that retirement income disparities are real for women, and certain racial and ethnic groups—with lower savings rates during their working lifetime, lower savings accumulation at retirement and lower levels of financial literacy. To address these disparities, the Council indicates that EBSA should:

- Review safe harbors and provide guidance for enhancements including automatic enrollment, re-enrollment, escalation features, non-discrimination testing, and qualified default investment alternatives (QDIA);
- Recognizing the changes in the economy since 1976 and where possible, update the regulations under ERISA section 202(a)(3) (regarding periods of service) to provide retirement plan eligibility for part-time, seasonal, and contingent workers;
- Provide guidance that the promotion of Diversity, Equity and Inclusion (DEI) initiatives is not at odds with ERISA fiduciary responsibilities, including:

- The tracking of participant behaviors and targeting education and communication based on employee participation, education, cultural priorities, and different long-term goals by race, ethnicity and gender; and
- Clarify that a plan fiduciary does not breach its fiduciary duty when including questions relating to diversity and inclusion in a request for proposal in the selection of ERISA plan service providers.

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endnotes

[1] The ERISA Advisory Council is made up of 15 members appointed by DOL, tasked with providing recommendations to DOL on selected topics under ERISA. For more information, see <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council>.

[2] For a description of the scope of the topics, see the Council's Issue Statement, *available at* <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2021-advisory-council-issue-statement-gaps-in-retirement-savings.pdf> and <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2021-advisory-council-issue-statement-brokerage-windows.pdf>. Note that both topics were initially suggested to the Council by EBSA staff.

[3] In its issue statement, the Council explained that its examination would focus on the number and types of plans that offer a brokerage window and the extent to which assets are invested in brokerage windows. The Council also said that it would study the nature and extent of disclosures that plan participants receive, which plan participants use brokerage windows, and in what manner.

[4] The Council's presentation does not provide a source for the claim that fifty percent of the workforce is not covered by a retirement plan. Some studies report higher coverage rates, such as the Bureau of Labor Statistics, which reports that sixty-seven percent of private industry workers had access to employer-provided retirement plans in March 2020. Bureau of Labor Statistics, U.S. Department of Labor, *The Economics Daily*, at <https://www.bls.gov/opub/ted/2021/67-percent-of-private-industry-workers-had-access-to-retirement-plans-in-2020.htm> (visited December 16, 2021).

[5] IB 2015-02 describes the parameters under which states could operate an ERISA-covered plan for private-sector workers without running afoul of ERISA preemption, including using state-sponsored MEPs and prototype plans. For a summary of IB 2015-02, see ICI Memorandum No. 29502, dated November 18, 2015, available at <https://www.ici.org/memo29502>. Although Congress nullified DOL's regulation regarding state auto-IRA programs, issued at the same time as the IB, the IB still stands. See ICI Memorandum No. 30711, dated May 19, 2017, available at <https://www.ici.org/memo30711>.

[6] Section 101 of the Setting Every Community Up for Retirement Enhancement Act (the SECURE Act) allows otherwise unrelated employers (of any size) to band together and participate in open MEP arrangements referred to as "pooled employer plans" or "PEPs."

DOL established registration requirements for providers of PEPs in November 2020, including creating new Form PR (Pooled Plan Provider Registration). See ICI Memorandum No. 32921, dated November 18, 2020, available at <https://www.ici.org/memo32921>. In September 2021, DOL, the Internal Revenue Service (IRS), and Pension Benefit Guaranty Corporation (PBGC) jointly released proposed revisions to the Form 5500 Annual Return/Report forms required for employee pension and welfare benefit plans, which addressed reporting by PEPs. See ICI Memorandum No. 33783, dated September 22, 2021, available at <https://www.ici.org/memo33783>.

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