

Appendix D

EBSA Response to Draft Report

U.S. Department of Labor

Assistant Secretary for
Employee Benefits Security Administration
Washington, D.C. 20210



DATE: September 29, 2010

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: PHYLLIS C. BORZI
Assistant Secretary of Labor *Phyllis C. Borzi*

SUBJECT: EBSA Response to OIG Draft Audit
Report No. 09-10-001-12-121

Thank you for the opportunity to review and comment on the subject draft audit report.

At the outset, we would like to commend the OIG staff for their work on the report. In brief, we believe that, contrary to the title of the draft, the subject report not only supports, but confirms and endorses, the important work that EBSA has been pursuing for a number of years in both the enforcement and regulatory areas with respect to conflicts of interest and protecting the retirement security of millions of America's workers.

As recognized in your report, section 404(a)(1) of the Employee Retirement Income Security Act (ERISA) clearly requires plan fiduciaries to act prudently and solely in the interest of the plan's participants and beneficiaries when discharging their responsibilities with respect to an employee benefit plan, including the selection of service providers. EBSA has long held the view that satisfaction of these standards requires fiduciaries to understand and consider those conflicts of interest on the part of a service provider that may affect the quality of the services to plan. As also recognized by the report, EBSA has successfully relied on these standards in pursuing a number of cases involving conflicts of interest, notably EBSA's Consultant/Adviser Project.

Most importantly, however, the report reinforces EBSA's view that more can and should be done to address potential conflicts of interest and other issues arising in connection with the selection of service providers. Specifically, the report recommends that EBSA broaden the definition of fiduciary to align the definition with the current environment of investment financial services. EBSA could not agree more. In this regard, EBSA started work over a year ago to update the regulation that defines when parties become fiduciaries by virtue of rendering investment advice under section 3(21) of ERISA (§ 2510.3-21(c)) to take into account not only changes in the financial services industry, but many years of investigative experience involving conflicts, self-dealing and other breaches of fiduciary responsibility. A proposed regulation encompassing those changes has been drafted and is expected to be published shortly.

The report further recommends requiring full disclosure of all conflicts of interest by service providers to create transparency and accountability in plan activities for plan assets and participant benefits. Again, EBSA agrees with OIG that identifying conflicts of interest by service providers is an important issue and is currently engaged in rulemaking to address this problem. One of EBSA's highest priorities has been the adoption of a regulation that would ensure that plan fiduciaries, when entering into arrangements with service providers to their plan, are furnished the information they need to make informed decisions about both the reasonableness of the compensation to be paid for services and potential conflicts of interest that may affect the quality of the services to be provided. On July 16, 2010, EBSA published an interim final regulation (§ 2550.408b-2) representing a major step forward in the ability of pension plan fiduciaries to assess the impact of potential conflicts on the provision of services by their providers.

In summary, EBSA not only agrees with the recommendations included in the report, we are committed to completing work on both recommendations on the earliest possible date. Again, we thank you the opportunity to comment on the report and for the support of the OIG staff in EBSA's pursuit of initiatives critical to the retirement security and savings of America's workers.