

**EBSA Response to Draft Report**

U.S. Department of Labor

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



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MEMORANDUM FOR: ELLIOT P. LEWIS  
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SUBJECT: EBSA Response to OIG Performance Audit  
Draft Audit Report No. 09-12-002-12-121

Thank you for the opportunity to comment on the recommendations in your above referenced Audit Report on the Employee Benefits Security Administration's (EBSA's) oversight of annual financial audits of employee benefit plans required under the Employee Retirement Income Security Act (ERISA).

EBSA is responsible for the administration and enforcement of most of the civil provisions of Title I of ERISA and assists in enforcing criminal provisions in ERISA and related statutes. EBSA oversees approximately 707,000 private retirement plans, 2.5 million health plans, and similar numbers of other welfare benefit plans, such as those providing life or disability insurance. The employee benefit plans under our jurisdiction hold more than \$6 trillion in assets and cover approximately 140 million participants and beneficiaries.

Congress enacted ERISA in 1974 to remedy certain abuses in the nation's private pension and welfare benefit plan system. ERISA contains provisions that were enacted in recognition of the fact that protecting plan participants and beneficiaries required the establishment of effective mechanisms to detect and deter abusive practices. These provisions include annual reporting of financial information and activities of employee benefit plans to the U.S. Department of Labor (Department). An integral component of ERISA's annual reporting provisions is the requirement that employee benefit plans be subject to an annual audit performed by an independent qualified public accountant (IQPA). The audit requirements apply to most large funded employee benefit plans. Plans with fewer than 100 participants are exempt from this requirement if they meet certain conditions.

The Department is committed to ensuring continued confidence in the financial information reported by employee benefit plans that is relied upon by plan participants and beneficiaries, employers and other organizations sponsoring ERISA-covered plans, and the public. We have been and continue to be concerned about what appears to be failures among some plan auditors to comply with their professional standards and with ERISA's reporting and disclosure requirements. A particular concern is inadequate audits of plans holding hard to value assets. For example, the Department has had ongoing problems with audit quality in cases where plans

buy employer stock for more than its fair value. Auditors should be reviewing these issues as part of their audit engagement, and the Department has brought enforcement actions citing auditors for having knowingly participated in fiduciary breaches. These concerns have been the focus of a series of studies by the Office of Inspector General (OIG) and EBSA's Office of the Chief Accountant (OCA).

As described in your Audit Report, EBSA has made consistent and comprehensive efforts to improve audit quality and those efforts have evolved over time and been adapted to take into account the size of the filing universe and the resources available. We have also long advocated statutory reform because several statutory provisions of ERISA limit the Secretary's ability to combat audit quality deficiencies. Specifically, section 103(a)(3)(A) of ERISA generally requires administrators of employee benefit plans to engage an IQPA to conduct an examination of the financial statements and other books and records of the plan in accordance with generally accepted auditing standards (GAAS) and to prepare an opinion as to whether the financial statements (and schedules required to be included in the annual report) are presented fairly in conformity with generally accepted accounting principles (GAAP). The IQPA's opinion must be made part of the plan's Annual Return/Report (Form 5500) as required by section 103(a)(1)(A). However, ERISA section 109 prohibits the Department from requiring that the financial statement and opinion prepared by the IQPA be submitted on a prescribed form. GAAP and GAAS standards are set by the Financial Accounting Standards Board (FASB) and the American Institute of Certified Public Accountants (AICPA), respectively. These statutory provisions provide no authority to the Secretary to set special audit standards and accounting principles for employee benefit plans.

Section 103(a)(3)(D) of ERISA defines a "qualified public accountant" as a person who is a State regulated certified public accountant or licensed public accountant, as well as a person practicing in a State that does not regulate accountants provided that the Secretary certifies such person pursuant to regulation. Since the vast majority of states regulate accountants, the Secretary has no ability to establish special competency standards for most public accountants auditing ERISA employee benefit plans. ERISA also provides no authority for EBSA to impose civil penalties directly on accountants for deficient audit work or for filing a deficient accountant's opinion as part of an employee benefit plan's annual report. When accountants fail to follow accounting procedures or fail to meet auditing standards, EBSA's statutory authority under ERISA section 104(a)(4) is to reject the plan's annual report and penalize the plan administrator under ERISA section 502(c)(2). This indirect impact on the auditor through its business relationship with the plan has proven to be an inadequate deterrent.

The statutory and regulatory requirements for auditing an ERISA-covered plan are also somewhat unique from other company and entity audits because ERISA's statutory authorization of the limited scope audit allows plan administrators to choose to have the plan audited in a manner that would not otherwise be consistent with GAAS. Specifically, ERISA section 103(a)(3)(C) provides an option for a limited-scope audit under which the auditor, generally, need not audit investment information certified by certain banks or insurance carriers. The regulations at 29 C.F.R. § 2520.103-8 implement the limited-scope audit provision.

We have the following responses to the recommendations on page 4 of your draft report:

**OIG RECOMMENDATION: EBSA should continue to seek repeal of the limited scope audit exemption and obtain authority over plan auditors.**

Historically, the Department has advocated for congressional consideration of statutory amendments to ERISA that would repeal the limited scope audit exemption and provide EBSA with more effective regulatory authority over ERISA plan auditors. Congress, however, has not enacted any legislation in this area. We appreciate the OIG looking at the audit quality issue again, and believe the OIG report will give the Department another opportunity to advocate for legislative change. The Department agrees with the recommendation.

**OIG RECOMMENDATION: EBSA should use existing authority to clarify and strengthen limited scope audit regulations and evaluate the ERISA Advisory Council recommendations.**

EBSA continually evaluates the effectiveness of its existing regulations and the appropriateness of amendments to them. This evaluation is the basis for EBSA's regulatory agenda, which is published as part of the Unified Agenda of Federal Regulatory and Deregulatory Actions pursuant to Executive Order 12866. The evaluation is informed by retirement plan trends, stakeholder input, experience gained through EBSA's enforcement and participant assistance programs, and various external factors such as legislative and technological developments. The Department's limited scope audit regulations implement an express statutory authorization in ERISA section 103(a)(3)(C). Thus, the Department would not have the authority by regulation to eliminate limited scope audits. We will, however, examine what authority we have to clarify and strengthen the limited scope audit regulations, and our related guidance for plan administrators and auditors, in the areas described in the Audit Report and in the recommendations of the ERISA Advisory Council. Any amendments to the existing regulations would require the Department to comply with the Administrative Procedure Act, which generally requires agencies to provide public notice and seek comment prior to enacting regulations, and other applicable rulemaking and regulatory impact analysis requirements.

**OIG RECOMMENDATION: EBSA should make better use of available enforcement tools over IQPAs and improve procedures in audit quality reviews.**

Through its civil and criminal enforcement program, EBSA plays an essential role in protecting the integrity of retirement and welfare benefits of more than 140 million people. EBSA has a comparatively small enforcement staff relative to the size of the employee benefit universe, and is always looking for ways to make better use of available enforcement tools. In that regard, OCA is currently updating the guide that its auditors use to evaluate the work performed by employee benefit plan auditors. This renewed guidance will conform the existing version of the guide with newly issued audit and accounting standards and guidance. Prior to its release, OCA leadership will conduct training to ensure that all staff have a solid understanding of the guide, its content, and the importance of consistent and thorough documentation of IQPA work. Also, as the OIG noted, EBSA has authority to enforce fiduciary standards against plan administrators who repeatedly hire poor performing IQPAs to conduct plan audits. EBSA will evaluate OIG's

suggestion that it advise plan administrators of the potential for fiduciary breaches from selection of IQPAs known to produce deficient audits. EBSA will also consider the other suggestions in the report regarding enforcement tools.

**OIG RECOMMENDATION: EBSA should perform a reassessment of audit quality.**

While EBSA has not conducted a statistically-based study to evaluate audit quality since 2004, OCA continues to evaluate audit quality among the various strata of IQPAs. Utilizing information contained in the Form 5500, OCA has created a multi-tiered inspection program designed to evaluate audit quality based on the size of an IQPA's benefit plan practice. Since 2004, OCA has conducted more than 100 inspections of firms with large benefit plan practices and more than 2,400 reviews of audit work performed by IQPAs with smaller benefit plan practices. The agency continues to work diligently to assess audit quality within all segments of the IQPA population as a part of its multi-tiered inspection program. We intend to evaluate the merits of another statistically-based reassessment of audit quality as we develop future work plans.

We appreciate the opportunity to provide our comments on your report and hope that they will be helpful to you in developing a final document.