



Statement of the U.S. Chamber of Commerce

ON: Beyond Plan Audit Compliance: Improving the Financial Statement Audit Process

TO: 2019 Advisory Council on Employee Welfare and Pension Benefit Plans

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Written Statement of
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Before the
2019 Advisory Council on Employee Welfare and Pension Benefit Plans
Meeting on
“Beyond Plan Audit Compliance: Improving the Financial Statement Audit Process”
June 25, 2019

Summary

The Employee Retirement Income Security Act was enacted over 45 years ago, and there have been significant changes in the law and plan design since then. The purpose of the audit requirement was to allow plan administrators and participants an opportunity to assess the plan’s financial soundness. However, the complexity of plan designs and the rules and regulations are such that an ERISA audit alone is not enough to educate plan sponsors, administrators or participants. Rather than imposing additional compliance requirement on auditors, the Department of Labor should turn its focus to educating plans sponsors, administrators and participants in the key areas that affect plan financials and retirement security.

Background

Audit Requirement

As enacted in 1974, the Employee Retirement Income Security Act (ERISA) included the requirement that a certified public accountant audit each plan. Specifically, ERISA Section 103(a)(3)¹ requires that

The administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual reports ... are presented fairly in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules [as required on the annual report] ... and the summary material... present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole.

As the ERISA Advisory Council (Council) noted in its previous report on ERISA audits, there is little in ERISA’s legislative history explaining the purpose of the audit requirement or

¹ 29 U.S.C. § 1023(a)(3)

explaining what should be included.² The legislative history suggests that part of the purpose of the audit was to “allow better assessment of the plan's financial soundness by administrators and participants alike”³ In addition, the Council concluded that “a primary purpose of the audit requirement is to protect plan participants.” However, as noted below, given all that has changed since ERISA’s enactment, it may be too much to expect a financial audit to provide the information that administrators and participants need to understand their plans and ensure compliance.

Employee Plans: 45 Years Later

In 1975, there were 101,214 defined benefit plans and 207,437 defined contribution plans.⁴ Although there was nearly a 2 to 1 ratio of defined benefit plans to defined contribution plans, there were \$163,984 million in defined benefit plan assets and only \$73,323 million in defined contribution plan assets.⁵ Most defined contribution plans were structured as profit sharing plans,⁶ and they were not meant as a primary source of retirement income.

The first 401(k) plan emerged in 1980, based on a change in the Internal Revenue Code (Code) in 1978 that did not tax deferred income. By 1982, a number of large employers began offering 401(k) plans to their employees to allow employees to defer taxation on income. However, in 1982, many large employers still maintained defined benefits plans as the main retirement plan.⁷ By 1984, there were 17,303 401(k) plans covering 7,526 thousand active employees with assets of \$91,754 million.⁸ By 2016, there were 560,373 plans covering 67,121 thousand active employees with assets of \$4,738,481 million.

Although loans and hardship distributions initially were included as part of the 401(k) structure in the 1978 rules, the use of such features and regulatory complexity has increased exponentially.

Not only has the responsibility for funding retirement shifted, but the responsibility for investing retirement funds has shifted. In a traditional defined benefit plans, the plan fiduciaries were responsible for investing assets to assure that the money held in trust was sufficient to cover benefits and expenses. In 1992 ERISA was amended to provide fiduciary protection for plan sponsors with plans that allow participant-directed investments. According to the DOL, since

²See “Advisory Council Report on Employee Benefit Plan Auditing and Financial Reporting Models”, <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2010-employee-benefit-plan-auditing-and-financial-reporting-models#footnotes>. Last accessed June 17, 2019.

³ S. Rep. 93-127, 1974 U.S.C.C.A.N. 4,838, 4,863-64 (Aug. 18, 1973).

⁴ “Private Pension Plan Bulletin Historical Tables and Graphs 1975-2016”, Employee Benefits Security Administration, United States Department of Labor, December 2018 at <https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf>. Last accessed June 14, 2019

⁵Id.

⁶ See “401(k) Plans: A 25-Year Retrospective”, Investment Company Institute, November 2006 at <https://www.ici.org/pdf/per12-02.pdf>. Last accessed June 14, 2019.

⁷ “History of 401(k) Plans: An Update”, Employee Benefit Research Institute, November 2018 at https://www.ebri.org/docs/default-source/fast-facts/ff-318-k-40year-5nov18.pdf?sfvrsn=1b773e2f_6, Last accessed June 12, 2019.

⁸ “Private Pension Plan Bulletin Historical Tables and Graphs 1975-2016”

1999, the number of plans that are participant-directed has doubled and the assets have quadrupled. Specifically, in 1999, there were 249,779 self-directed plans with assets of \$1,045,465 million, and by 2016, there were 503,348 plans with \$4,042,775 million in assets.⁹

With all of these changes since 1974, the audit that was contemplated at that time cannot serve as a means to educate plan sponsors, administrators and participants or ensure compliance. However, instead of demanding more of the audit and the auditor, we recommend that the Department of Labor partner with outside entities (such as trade associations, service providers and employers) to educate plans sponsors, administrators, and participants.

Plan Sponsor Concerns

In over 23 years of practice, I have never encountered an employer or plan sponsor who willfully disregarded ERISA or the Code with respect to their employee benefit plans. However, as these rules become more complex, compliance becomes more and more difficult. Requiring auditors as part of an ERISA audit to focus on compliance rather than the financial statements will not solve this problem, but would result in added cost with limited benefit.

Although each plan sponsor's concerns may vary depending on size, sector and demographics, the following sections explain the areas of concern that are common for many plan sponsors and employers.

Missing Participants in Ongoing Plans

In recent years, some traction has been made with respect to dealing with participants who are either unresponsive to plan requests or who have not updated their contact information. For example, the Pension Benefit Guarantee Corporation opened its missing participant program to defined contribution plans. However, much more work needs to be done, especially in light of recent regional DOL audits.

Employers and plan sponsors recognize the importance of locating participant and beneficiaries with vested accounts, and they are willing to do what is necessary and cost-effective for the plan to locate these individuals. However, consistent guidance on a national level is necessary to make sure that their actions benefit those who are missing and the plan as a whole. Furthermore, guidance on a national level would protect plan participants in knowing that all participants are treated the same, rather than having different standards depending on where a plan may be located.

No amount of auditor intervention or auditor and plan interaction will matter on this topic without effective guidance from the DOL on a national level. As such, we recommend that the DOL issue guidance in this area, whether through regulations or sub-regulatory guidance. A number of trade associations and the industry as a whole have shown a willingness to be part of the solution and work with the DOL in developing this guidance.

⁹ Id.

Service Providers/Plan Investments

Because of the complexity of administering a plan, no plan sponsor or administrator is able to run a plan without outside help. Plan fiduciaries exercise their fiduciary responsibilities when selecting service providers, and they have an ongoing fiduciary duty to monitor such providers, and, where appropriate, look elsewhere for other providers. This is not a new concept; however, many small and medium plans sponsors may not have the knowledge or resources necessary to fulfill this responsibility.

As explained above, more and more plans have moved to a self-directed format. However, the fiduciary obligation to select the investment lineup remains with the plan fiduciary. This is a daunting task even for large, sophisticated employers. It is also an area fraught with litigation risks, which increasingly could stifle innovation in investment options at best and discourage employers from sponsoring plans at worst.¹⁰

The DOL has provided resources in this area, such as the “Meeting Your Fiduciary Responsibilities”¹¹ guide and various fiduciary seminars and webinars over the years. However, in light of the recent uptick in litigation, even against plans with relatively small assets, more work in this area is needed. Recognizing the hard work that DOL has invested in this area and the limited resources, it is recommended that DOL partner with outside groups such as trade associations, service providers and large employers to come up with more detailed vendor selection checklists, FAQs or best practices to assist small and medium size plan sponsors who may not have the resources to do this on their own. This also should be done with respect to selection of investment lineups.

At the end of the day, the auditors rely on assurances from management that certain obligations have been fulfilled. However, if management does not understand these obligations, the certification is meaningless.

Plan Loans

As noted above, plan loans have been part of the 401(k) structure since 1978. However, even today, compliance with plan loan provisions remain challenging. According to the Internal Revenue Service, plan loans not conforming to the plan document or the Code requirements are in the top ten of 401(k) non-compliance issues.¹² My testimony in no way is meant to demean the role of the audit in assuring that loans are in compliance with the plan document and the Code; however, given that more than 35 years after these provisions were introduced to the Code these remain a top non-compliance issue, something more needs to be done. In fact, in response to a request for information in preparing this testimony, one consultant stated that in that

¹⁰ See “401(k) Lawsuits: What Are the Causes and Consequences” Center for Retirement Research at Boston College at https://crr.bc.edu/wp-content/uploads/2018/04/IB_18-8.pdf. Last accessed June 14, 2019. Finding that in 2016 and 2017, there were 107 lawsuits filed, the highest since 2008 and 2009, when 169 lawsuits were filed.

¹¹ See “Meeting Your Fiduciary Responsibilities” guide published in September 2017 by the U.S. Department of Labor’s Employee Benefits Security Administration at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf>

¹² <https://www.irs.gov/retirement-plans/401k-plan-fix-it-guide-participant-loans-do-not-conform-to-the-requirements-of-the-plan-document-and-irc-section-72p>

person's experience, many auditors did not appear to have looked at the plan loan procedure during the audit and made recommendations that were either contrary to or not in accordance to the plan documents.

Knowing that plan loans have been and will remain a compliance issue not only for plans sponsors and administrators but also for auditors, it is incumbent on the industry to train auditor's on not only the loan requirements in the Code, but also on how to test to ensure compliance with plan documentation. If the auditor cannot be engaged on this matter, it is impossible for the auditor to engage plan sponsors.

Participant Concerns

According to a Unum survey, nearly half of those surveyed spent 30 minutes or less reviewing benefits before enrollment.¹³ If participants are not willing to spend the time in understanding their basic benefits, there is no way that they will understand an auditor's report or even the Form 5500 and related schedules. Adding more information to either will not solve this problem. Even assuming a participant actually reviews the Form 5500, schedules and auditor's report, plan information is reported in the aggregate, even though most people are now covered under individual account plans, making most of this information meaningless to the actual individual.

Accumulation

Before a participant can understand his or her retirement plan, the person must actually become a participant in the plan. The provisions in the Pension Protection Act of 2006 that allowed employers automatically to enroll participants are likely one of the reasons that participation has dramatically increased over the past ten years.¹⁴ However, employers remain concerned that individuals are not enrolling in plans, or, if enrolled, are not deferring enough income to provide for a secure retirement. Knowing that an audit will review actual enrollment to ensure compliance with plan standards helps to make sure enrollment is at the highest possible level. However, there is little more that an auditor can do to increase enrollment, and DOL should work with employers to develop participant educational materials to explain the importance of earlier enrollment in employer plans.

Financial Literacy

Plan Leakage

Although participation rates have increased, retirement security is jeopardized by plan leakage, such as hardship distributions and unpaid loans. There is nothing in either the Form

¹³ See "Nearly half of U.S. workers spend 30 minutes or less reviewing benefits before enrollment, Unum finds", August 2018 at <https://www.unum.com/about/newsroom/2018/august/unum-auto-enroll>. Last accessed June 14, 2019.

¹⁴ Unfortunately, while increasing participation, automatic enrollment also has increased the problem of missing participants with small accounts.

5500 or the auditor's report that explain this problem to participants. Currently, the Form 5500 requires that plans report participant loans (and interest received) in the aggregate, but nothing in either the Form 5500 or schedules separately report for each loan or hardship distributions. Requiring an auditor to perform a more robust review of loans or hardship distributions will not help explain the negative consequences to employees, but will add to plan expenses. Similar to enrollment, it is recommended that the DOL partner with outside entities to develop participant materials explaining how plan leakage could impact an individual's retirement security.

Investment selection

Although participation and deferral rates are important in retirement security, if assets are not adequately invested, a participant has a significant risk of not accumulating sufficient funds for retirement. As noted above, in 1992, ERISA was amended to provide a fiduciary safe harbor related to participant-directed accounts. Since that time, most defined contribution plans have converted to participant-directed rather than fiduciary-directed. As such, significant attention has been paid to investment education versus fiduciary action, and both plans sponsor and participants are equally concerned with a participant's ability to invest for their retirement while protecting plan sponsors from claims of a breach of fiduciary duty. However, there is nothing in the audit process that addresses this vital issue, nor is this the appropriate avenue. Instead, the DOL should focus on partnering with industry to provide additional financial education for participants.

Decumulation

As defined contribution 401(k) plans replaced traditional pension plans, the focus was on making sure participants accumulated sufficient assets in plans to secure their own retirement. However, as the first wave of individuals only with such plans retire, a new focus is on decumulation. There has been proposed legislation that would require plans to offer lifetime income options in defined contribution plans. In addition, legislation pending in the United States Senate would provide safe harbor fiduciary protections for plan sponsors that provide such options. As these plans evolve, so should the role of the plan auditor. At this point, we are not making any specific recommendations other than to recommend that whatever role is played, that role must be determined in conjunction with plans sponsors and other industry stakeholders.

Conclusion

Given the legal complexity of current plan design, imposing more compliance requirements on auditors will not help plan administrators, sponsors or participant better understand plans. Instead, the Department of Labor should work with outside partners to expand educational opportunities.