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ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5521 Room 4, Frances Perkins Building
Washington, DC
August 24, 2016

Minutes of Meeting

Council Chair Mark Schmidtke called the meeting to order at 9:10 a.m. He turned the meeting over to Deborah Tully, chair of the Council issue on Cybersecurity Considerations for Benefit Plans.

The first panel to present testimony consisted of Tim Oxborough-Powell of Tata Consultancy Services and Rebecca McQuilling and Kevin Stadmeyer of Google. Mr. Oxborough-Powell said there should be a standardized approach for comprehensive cybersecurity solutions, not a piecemeal approach. He suggested using standards already established, such as the government standard 142 for encryption. NIST (National Institute of Standards and Technology) standards, he said, can address (1) the basis for contractual agreements; (2) off-the-shelf encryption products; and (3) small entities' strategies for training, etc. Mr. Oxborough-Powell said the top priorities depend on the size of the entity and what it does. He suggested any implementation of government guidelines or requires be coordinated with industry and with other government agencies to avoid overlap.

Ms. McQuilling said cybersecurity is a way to protect privacy. Sharing of data, she said, should be restricted to needed use, including the use of the Social Security number (SSN) as an identifier. Ms. McQuilling pointed out that the cost of encryption is less than the cost of a cyber breach. She said Third Party Administrators (TPAs) must be held responsible contractually to ensure data security for their service providers. Ms. McQuilling suggested automating technologies and managing access to data it the technology connects to others. Mr. Stadmeyer suggested restricting physical access to data storage and deletion of data that is no longer needed. He pointed out those back-up data needs the same level of protection as the main data. Mr. Stadmeyer said companies need to (1) establish an incident response plan and team, (2) check logs regularly, (3) perform penetration testing, (4) uninstall software that is no longer supported, and (5) institute multi-factor authentication.

Debbie Smith asked what off-the-shelf solutions are good for small plan sponsors. Mr. Oxborough-Powell said they should turn on e-mail encryption by default. Mr. Stadmeyer said automatic network scanning is a basic service at low cost offered by many vendors. Ms. Smith asked about tools to redact or shorten SSNs. Ms. McQuilling said industry needs to reach consensus on SSN use. Cindy Levering asked what the alternatives are to the use of SSNs. Mr. Stadmeyer said it is a challenge, but most importantly, the SSN use should be limited. Ms. Smith asked if there is training available for small plan sponsors. Mr. Stadmeyer suggested an open web security program. Jeff Stein asked what to advise plan sponsors who lack technical experts. Mr. Stadmeyer said plan sponsors need to hire a security expert and use vendor security assessment questionnaires. Ms. McQuilling added that periodic checks are necessary

because security changes frequently. Stacy Scapino asked if sponsors should allow access by mobile devices. Mr. Stadmeyer said people expect that, but access should be limited to end users, not people in benefits administration. Mr. Oxborough-Powell suggested limiting the kinds of transactions allowed on a mobile device. Elizabeth Leight asked about the use of offsite data storage. Mr. Stadmeyer said it is important to look at how data gets there, security issues, and data transfers back. Ms. McQuilling said multiple levels of encryption are required, applying to data in transit and then at rest. Tazewell Hurst asked about the use of open source programs in a cloud-based environment. Mr. Oxborough-Powell said opinions differ on open source software.

Next, the Council heard from Dan Nutkis of Health Information Trust Alliance (HITRUST), who said his organization began in 2007 out of the need for healthcare stakeholders representing all segments of the industry to formally and collaboratively address information privacy and security. He said HITRUST integrates and harmonizes a multitude of regulations, standards and other policy requirements into a single comprehensive privacy framework that can be used by all types of healthcare organizations, including health plans and third-party administrators of all sizes. Mr. Nutkis described the HITRUST third party assurance program that obviates the numerous privacy and security assessment or attestation requests some entities received annually. He recommended applying the HITRUST standards and assurance program to retirement benefit plans.

Jeff Stein asked if HITRUST's services are available at low cost for small plan sponsors. Mr. Nutkis said there is a free service to download. Mr. Stein asked about guidelines for cybersecurity and Mr. Nutkis said the guidelines should not be another set of requirements. Ms. Smith asked if the framework for health benefits would work for retirement plans. Mr. Nutkis said yes, by offering standard controls and universal reporting guidelines. Mr. Stein asked about the interaction of NIST and HITRUST standards. Mr. Nutkis said NIST tasks each sector with implementing its standards and HITRUST does that. Ms. Tully asked how long it took to implement the standards. Mr. Nutkis said that hospitals and insurers adopted the standards first, followed by several years of adoption by others. Mr. Stein asked what is most helpful for small plans. Mr. Nutkis said they should adopt standards to avoid a situation where numerous parties ask different question aimed at the results that the standards achieve. Chris Hwang asked how companies get certification that they are abiding by standards. Mr. Nutkis said some organizations are so far behind, they start with an assessment and certification can take years. Ms. Smith asked about interaction with accounting standards (SOC2). Mr. Nutkis said the accounting standards help to identify what is missing from privacy and security controls. Mr. Stein asked about cybersecurity insurance. Mr. Nutkis said some insurers offer 30 percent discounts to entities certified under the HITRUST program. He added that underwriters need more data to assess risk and that current pricing is too high for some vendors relative to their revenues.

The next panel consisted of Eric Nordman of NAIC (National Association of Insurance Commissioners), Doug Peterson of Empower Retirement on behalf of SPARK, and Ben Taylor of Callan Associates on behalf of SPARK. Mr. Nordman described the state of insurance for cybersecurity. He said the average cost of breaches, mostly for loss of business, is $7 million. Mr. Nutkis said insurance covers liability for privacy, network security, technical services, media, and social media. He said that beginning in 2014, some commercial liability policies have exclusions for cyber breaches. Mr. Nutkis offered the following advice for cybersecurity:

(1) limit network access as much as possible, (2) build in redundancy to systems, (3) implement strong user name and password controls, (4) update software frequently (automated updates when possible), (5) encrypt data whenever possible, (6) train your employees, and (7) consider the purchase of cybersecurity insurance.

Mr. Peterson described the process of SPARK's recent initiative to bring together various industry players with recordkeepers to collaborate on cybersecurity standards. Thus far, the Data Security Oversight Board has decided that certification should be pass-fail rather than graded. The Board will issue a RFP for help in developing a certification process. Mr. Taylor said standards can help limit questions asked in contracting negotiations to those that are useful. He said there is no guidance now on fiduciary responsibilities when cyber breaches occur.

Ms. Tully asked whether NIST standards are usable for plan sponsors and their service providers. Mr. Peterson said the NIST framework can be the basis for an effective cybersecurity policy. Ms. Tully asked what should be included in guidance to plan sponsors. Mr. Peterson suggested including links to references such as NIST, plus advice to update software often to take advantage of the security measures in the software. Mr. Stein asked whether small plan sponsors will be able to choose recordkeepers based on SPARK certification and Mr. Peterson said that is the goal. Ms. Leight asked whether small plan sponsors can get help from service providers. Mr. Peterson said they should seek that help and also from their e-mail provider. Rennie Worsfold asked if there are industry specific differences in cybersecurity needs. Mr. Taylor said the needs differ by industry, especially where some are more knowledgeable technically. Mr. Worsfold asked if there is a role for insurance in the SPARK initiative. Mr. Taylor said the group wants to coordinate what the recordkeepers need to have covered by insurance. Ms. Scapino asked if there is any interaction with HITRUST. Mr. Peterson said he will contact HITRUST to find out what steps were taken in that effort.

Brian Finch of Pillsbury Madison testified on the state of cyber threats. He said computer forensic experts cannot keep pace with the malicious software that is developed daily, nor with the low cost of that software development and hacking. Mr. Finch said the push for cyber-insurance operates under the erroneous assumption that cyber attacks will be sporadic and will rarely succeed. He suggested cyber insurers use a health maintenance organization (HMO) model to establish an infrastructure that supports constant care and promotes wellness, not merely reimbursement for periodic losses. The cyber HMO approach he advocates would give the insured access to a vast network of cybersecurity vendors and professionals at discounted rates that could be called upon in the event of a problem and provide low cost or free access to basic "cyber hygiene" care, such as routine diagnostic examination of information technology systems and perimeter defense systems. Alternatively, Mr. Finch suggested groups of similarly situated companies form a risk purchasing or retention group in order to obtain cyber security insurance and agree to use certain security standards or technologies. The pool arrangement would enable companies to collaborate and establish a baseline of security that each would commit to maintaining, and also allows for regular reviews to determine what security controls need to be adjusted. Mr. Finch also outlined steps that benefit plan administrators can undertake to ensure higher levels of security from their third party providers.

Ms. Smith asked about barriers to cyber insurance. Mr. Finch said nobody should expect one insurance policy to cover everything – it usually just covers data theft losses and not data corruption. Ms. Smith asked if it is difficult for companies to achieve SAFETY Act protection.

Mr. Finch said it is hard but not impossible, that companies need to have well documented procedures and update those procedures constantly. Ms. Tully asked how long certification takes and Mr. Finch said at least one year. Ms. Hwang asked what are the advantages of contracting with a SAFETY Act approved vendor. Mr. Finch said that helps the plan avoid liability if a breach occurs. Ms. Hwang asked whether large companies have adequate coverage. Mr. Finch said even many large companies lack coverage for some risks, such as ransomware, though there is a trend toward improved coverage. Mr. Stein asked for advice to give plan sponsors. Mr. Finch suggested (1) set realistic expectations, because nobody can prevent all threats, and (2) determine most critical assets and processes, then allocate resources based on what they can prevent or at least identify. Kevin Hanney asked what a fiduciary should do. Mr. Finch said the problem for a fiduciary is knowing if the protection is sufficient, but the SAFETY Act offers some help.

The last panel consisted of Brian Smith of Segal Select Insurance Services, Eugene Eychis of the Beazley Group, and Matt Prevost of Chubb. Mr. Smith said many plans are resistant to buying cyber insurance and other types of insurance will not cover them. He enumerated reasons he has heard for not making the purchase, and in some cases those reasons are misguided. Mr. Smith said the overall resistance is because cyber insurance is relatively new and not mandated. He suggested a single, national breach reporting standard for all employee benefit plans. Mr. Prevost said benefit plans sometimes ask for a list of cyber incidents for such plans and the costs of the breach. He said insurers lack sufficient experience with cyber incidents affecting benefit plans. He said the SAFETY Act is practical only for the largest plans. Mr. Eychis said in pricing cyber policies, insurers consider past claims data plus measures in place, such as encryption for internal and external communications and data storage security. He said coverage should include breach response services, regulatory defense, and website media content liability. Mr. Eychis said cyber insurance policies exclude plan administrators errors and omissions liability.

Mr. Stein asked if other liability insurance covers any cybersecurity risks. Mr. Smith said liability insurance generally excludes cyber incidents and that cyber insurance policies broadly cover first party claims. Mr. Stein asked what advice to give plan sponsors regarding cyber insurance, such as what questions they should ask. Mr. Prevost said educational awareness is key. Mr. Eychis said plan sponsors need to ask what would happen in the event of a breach. Mr. Smith suggested comparing the cost of a breach vs. the cost of security measures. Ms. Tully asked if coverage pertains to prior acts and asked what risks will the insurer assume. Mr. Smith said coverage usually goes back three years. Ms. Tully expressed concern plan sponsors might have that premiums will increase once benefit plans have incidents. Mr. Prevost said that would go against the specific plan sponsor, not benefit plans in general. Ms. Tully asked about deductibles and catastrophic levels. Mr. Smith said for policies in the $1-2 million range, the liability deductible is usually $5,000 and first party coverage usually is $2500, but it could be $10,000 for large sponsors. Ms. Haverland asked if third party administrators and recordkeepers are buying cyber insurance. Mr. Prevost said the industry is seeing increases in general.

Mr. Schmidtke asked for public comments and there were none.

The Council discussed the draft guidance document as described by Ms. Tully. She said she wants to avoid prescriptive solutions because appropriate actions will vary. Mr. Hanney

suggested avoiding (1) endorsing one service over another and (2) the use of the word "guidance" so that plan sponsors will not think they face an effective mandate. Mr. Worsfold said awareness is more desirable than guidance because guidance entails a moving target. Ms. Scapino said the communications should target events, not the fiduciary role. Ms. Smith commented that many participants do not understand the amount of their data that is shared, and how extensively. Ms. Levering said she like the idea of emphasizing "cyber wellness."

The meeting adjourned at 4:40 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5521 Room 4, Frances Perkins Building
Washington, DC
August 23, 2016
Minutes of Meeting

Council Chair Mark Schmidtke called the meeting to order at 9:10 a.m. He turned the meeting over to Rennie Worsfold, chair of the Council issue on Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation.

The first panel to present testimony consisted of Glenn Hutto of AonHewitt, Jeff Harris of Fidelity Investments, and Sheryl Craun of TIAA. Mr. Hutto called for common terminology to facilitate plan-to-plan transfers. He also said there should be a central database with plan names and identifiers that the receiving plan can check. Mr. Hutto said a clearinghouse for the transfer process would involve a trustee role. He said there is some flexibility with accepting loans, but the receiving plans need lots of data to transfer loans.

Jeff Harris said standardization is needed to speed data flow and simplify the rollover process for participants. Investment options, he said, are particularly problematic because there might not be a match in the new plan, especially where plan sponsors use custom funds that are not available to the public. Mr. Harris said the Treasury rules do not go far enough, calling for an effective safe harbor for receiving plans. He added that the lower cost of rolling over to IRAs makes them more attractive to participants in many cases.

Sheryl Craun described the process and problems with transferring accounts from one plan to another. First, the receiving plan must determine if the assets being transferred are: (1) funded by an employer or employee, (2) pre-tax or post-tax, (3) characterized as Roth or non-Roth, and (4) from what kind of plan. Next, the plan has to determine in what investments are the participant's assets invested, and in what percentages? Then, the receiving plan must match transaction forms and assets with fund and source information. If the transferred assets do not have the matching form, the transaction is deemed "Not in Good Order" (NIGO) and the plan cannot apply the funds for the participant. Providers who send funds or checks sometimes fail to spell out funds and sources. There are no standard naming conventions for listing funds and sources. Also, the rules for some retirement plans do not permit plan-to-plan rollovers. Ms. Craun called for industry standards, and for the Department of Labor to facilitate (1) standardized asset transfer forms; (2) common/consistent nomenclature; (3) common fund/source specification; and (4) ordered transmission of information and funds.

Mr. Worsfold asked if the data challenge (the need for standardization) is the biggest obstacle to plan-to-plan rollovers. Mr. Harris and Ms. Craun said yes. Mr. Worsfold asked how to get the recordkeeping industry to collaborate on standards for electronic transactions. Mr. Harris said the problem is regulatory (government and industry) uncertainty, that recordkeepers need assurance for legitimate requests. He blamed the current cumbersome paper process on plan

sponsor caution. Ms. Craun added that there is a need to protect privacy if moving to electronic transfers and that spousal waivers are particularly challenging for electronic transfers. Mr. Worsfold asked if adoption of an ACATS standard would make recordkeepers more comfortable. Mr. Harris said what is needed is a central clearinghouse, tied to regulatory safe harbors for plan-to-plan transfers. Mr. Worsfold asked how realistic are plan sponsor concerns with transfers that turn out to be disallowed, and Mr. Hutto said there is not much risk of that. Mr. Worsfold asked how the government can work with industry to educate plan sponsors. Ms. Craun said recordkeepers have an educational role. Patricia Haverland asked if potential cost savings could provide an incentive to standardization and electronic transfers. Mr. Harris said there needs to be critical mass to address the concern that many plans do not adhere to standards. Dennis Mahoney asked how much complexity comes from different plan types. Mr. Harris said it is difficult for participants to figure out different plan names. Mr. Schmidtke asked how to solve the problem of investments that cannot transfer. Mr. Harris said the solution is to liquidate the old account.

Angela Antonelli of Georgetown University's Center for Retirement Initiatives reviewed the status of various state efforts to establish state-based plans to allow workers without an employer plan to save for retirement in a payroll deduction plan. She said states are acting out of necessity, because of lack of coverage for half of American workers. She said the long-term consequences of inadequate coverage would include pressure on government to provide income assistance to poor retirees.

Dana Muir of the Ross School of Business at the University of Michigan said research shows that timing of communications matters and the unique access to participants enjoyed by current plan service providers give those service providers an advantage. If the first information that a participant receives is about an opportunity to rollover to an IRA, then the participant may lock in, at least psychologically, to that IRA rollover. She recommended one practical approach that would not require legislation would be to leverage the existing power of plan sponsors in order to decrease the advantage enjoyed by plan service providers. Sponsors, she said, could preclude plan service providers, preferably through contractual provisions, from initiating direct communications about rollovers and distributions with plan participants until after a participant receives a simple and salient disclosure outlining each of the participant's options. Ms. Muir said this could be accomplished with language that would accompany model notices and forms. She also recommended as a more effective approach, to preclude any distributions or rollovers for a reasonable minimum time period after the participant leaves employment. The timing delay, she said, would have to be sufficient to ensure that participants do not make a decision without understanding all of their options.

Warren Cormier of Boston Research Technologies reviewed research his firm and others have done to identify barriers to participants saving for retirement and rolling over accounts to a new plan when they leave their employers. He said automatic features in retirement plans do not suffice. He said the use of too much jargon by plan sponsors and their providers is a barrier for participants and reduces their trust in the retirement system. Mr. Cormier said another barrier is math anxiety, as participants are asked to calculate their various options relative to one another.

Kevin Hanney asked how the federal government can help the state plans. Ms. Antonelli said they are open to cooperation and welcome input from the federal government. Mr. Hanney asked what can be done to facilitate transfers between private plans and state plans, especially

given the non-transferability of Roth IRA accounts, which many state plans contemplate. Ms. Antonelli said states developing these plans are not focused on portability. Mr. Cormier emphasized the need to standardize accounts to reduce friction. Mr. Worsfold asked what the ERISA Advisory Council can do to encourage collaboration. Ms. Antonelli said it could help to encourage the states to consider the importance of portability. Mr. Worsfold asked if average participants are able to make good decisions on what to do with their retirement accounts when they leave an employer. Ms. Muir said they are not capable of making good decisions, they do not want to face tough decisions, and that financial education does not help.

Josh Newmister of Facebook said the central problem with plan-to-plan rollovers is that workers are accessing their retirement plan accounts via technology and processes created more than two decades ago. He praised financial technology ("fintech") companies that use technology to make financial services more efficient so that all transactions can be completed with a few clicks and a swipe via a mobile or desktop device, using the capabilities of e-Signature. Mr. Newmister said complaints about complexities with electronic transfers are similar to complaints from large financial companies in other instances, leading to much smaller firms filling the need. He said electronic transfers they avoid lost or stolen checks and are completed within a few days without any intervention from the individual. However, Mr. Newmister said currently some retirement accounts, such as IRAs, are not transferred electronically because they do not support ACATS – the industry standard for electronic transfer.

Megan Yost of State Street Global Advisors (SSGA) recommended making plan-to-plan transfers easier by (1) automating the movement of savings from one employer to another, which would help decrease the likelihood that employees cash out savings and (2) simplifying, standardizing and digitizing roll-in application paperwork. She advised providing safe harbor protection to plan sponsors who proactively encourage, promote and accept roll-in savings from an employee's previous 401(k) plan, IRA or both. Ms. Yost also recommended providing safe harbor protection to allow plan sponsors to proactively promote the plan's default fund. She enumerated ways plan sponsors can help encourage plan-to-plan transfers by framing the options available to departing employees in the following order: (1) roll the account into your new employer's plan, (2) keep it in your existing plan, (3) roll it over to an IRA, or (4) cash out the account. Ms. Yost said plan sponsors should be proactive in notifying participants about the option to roll in existing accounts from prior employer plans.

Beth Almeida asked Mr. Newmister if he favored plan sponsors inserting language in recordkeeper contracts to discourage them from marketing IRAs to the plan's participants. He said he has put that in contracts but it is difficult to enforce. Mr. Hanney asked how to get plan sponsors to appreciate the importance of benefit innovations. Mr., Newmister said participants do not want to concern themselves with complexities such as rollover transactions and that plan sponsors need to ease their burdens. Ms. Haverland asked whether the roll-in toolkit SSGA developed was done on its own or in response to plan sponsor requests. Ms. Yost said it was developed in response to interest from sponsors. Mr. Worsfold asked if plan sponsors want to retain accounts of former employees. Ms. Yost said some sponsors do not want to be bothered with maintaining accounts of former employees, but that is changing. Mr. Newmister said 75 percent of plan sponsors think they should promote account retention, and that the cost model is moving toward a per participant charge. Mr. Worsfold asked how helpful it is to have live help available for participants. Mr. Newmister said it helps a lot but most companies lack the

resources to do that. Mr. Worsfold asked what new issues the recent fiduciary rule raises. Ms. Yost said that based on guidance from outside ERISA counsel, sponsors are more cautious about transfers. Mr. Schmidtke asked if plan transfer defaults would help alleviate those concerns and Ms. Yost said yes. Mr. Hanney asked and both witnesses confirmed that it is external counsel voicing these concerns to plan sponsors.

Terry Dunne of Millennium Trust recommended eliminating the current patchwork system with a new network of plan data and participant data that offers standardized and consistent information. This would include name, address, social security number, date of birth, beneficiary information, and plan name and identifying numbers. At the point of transfer or rollover, there would be clear direction of the plan name and identifying number and an electronic signature by the participant giving authority. He said there should be an independent clearinghouse to protect the confidential information and to maximize the efficiencies.

Michele Hillery of DTCC said her firm serves as a neutral and trusted third party for the transmission of data from one broker to another. She described DTCC's Automated Customer Account Transfer Service (ACATS) as a model which automates and standardizes procedures for the transfer of assets in a customer account from one brokerage firm and/or bank to another. She said ACATS provides a standardized workflow for brokers to follow and provides standardized formats with industry agreed-upon guidelines on what data to pass and the formats of that data. Ms. Hillery said the service can accommodate input from large players in the market through file input and smaller players through a web interface. She characterized ACATS as a communication protocol and a system that centralizes, standardizes, automates, and accelerates the transfer of customer accounts in between three to five business days. DTCC acts as the central hub for the transmission of data and creates a single point through which data can be passed from one broker to any other broker within the system.

Ms. Haverland asked how the industry could replicate ACATS development. Mr. Dunne said DOL or recordkeepers could initiate collaboration, facilitated by a private clearinghouse. Thomas Sakaris, accompanying Ms. Hillery, pointed out that the push for ACATS originated from the industry self-regulatory body (FINRA). Mr. Hanney asked if DTCC could be the retirement account clearinghouse and if users of the service would have to be member firms. Ms. Hillery said DTCC could do that, it is an authoritative, trusted source, and that users would have to be member firms or contract with a member firm. Mr. Worsfold asked if Millennium Trust receives in-kind assets. Mr. Dunne said yes, including alternative investments and real estate partnerships. Mr. Worsfold asked what happens in the ACATS system if there is no comparable account to transfer funds to and Ms. Hillery said the money then stays in the original account until a match is identified. Mr. Worsfold asked if Millennium Trust facilitates transfers to plans. Bob Kunimara, accompanying Mr. Dunne, said the company has electronic data formats for that, as part of a built-in process to move away from forms, providing for authentication of customers and their addresses.

Amy Kelly and Marla Kreindler of Morgan, Lewis & Bockius told the ERISA Advisory Council that the Department of Labor's new fiduciary rule impacts plan rollovers by raising questions about when communicating to plan participants about participant plan transfers, rollovers and account consolidations will trigger fiduciary status. They said without rollover assistance and advice, plan participants may be less likely to take steps toward consolidating their retirement plan accounts. Their testimony included in the possible obstacles to plan rollovers that some

plan sponsors do not accept rollover contributions because of the need to administer the verification process. They added that some plan sponsors do not want to incur the cost and difficulties required to administer the plan for former employees. They recommended the ERISA Advisory Council call for DOL guidance (1) to clarify the employee exception in the fiduciary rule, with examples; (2) in the form of a tip sheet or Q&A that could be issued to further advise plan sponsors on how to promote roll ins and account consolidation in compliance with the conflict of interest rule; and (3) in the form of a model notice to participants that includes a balanced description of distribution options.

David Levine of the Groom Law Group testified on potential legal concerns that can serve as obstacles to plan-to-plan transfers. He said the recent conflict of interest rule, notwithstanding the special carve out from fiduciary status for company employees providing investment advice, raises concern that a recommendation to roll funds into a plan could indirectly benefit an employer thus leading to fiduciary exposure for plan sponsors. Mr. Levine said plan sponsors are wary of taking efforts to increase rollovers because of this new rule. Also, he said service providers who have not functioned previously as plan fiduciaries are concerned with possibly triggering fiduciary status through rollover “capture” activities. He said DOL should provide guidance on using electronic transfers and on charging plans for costs associated with transfers.

Mr. Worsfold asked if recordkeepers’ communications are subject to the fiduciary rule. Ms. Kreindler said the exception to the rule applies to general communications, but not to some specific communications. Mr. Worsfold asked what kind of DOL guidance the witnesses sought. Mr. Levine suggested starting with Q&As, especially for recordkeepers of the receiving plan so that they know whether the prospect for increased assets under management is a conflict when they encourage participants to roll in their old accounts. Stacy Scapino asked what could make the process clearer for accepting that rollover money is from a qualified plan. Ms. Kelly suggested putting all the relevant existing guidance in one place, possibly in Q&A format. Mr. Levine added that the Treasury Department should clarify electronic communications from one recordkeeper to another.

Mr. Schmidtke asked if any members of the public wanted to comment and there was no response. He then moved to a discussion of the general parameters of recommendations on this topic. Mr. Worsfold said the recommendations could include asking DOL to encourage more electronic processes. He said the drafting group is developing examples DOL can use on (1) standardization of data elements and (2) a clarification of the fiduciary role and the determination process for plan sponsors and their providers. Ms. Haverland stated that besides any DOL actions, industry cooperation is needed on creating an infrastructure to implement standardized data elements that would facilitate plan-to-plan transfers. Mr. Schmidkte noted that MEPs could offer some solutions, and the group might want to suggest a future Council look into that.

The meeting adjourned at 4:40 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5521 Room 4, Frances Perkins Building
Washington, DC
August 25, 2016

Minutes of Meeting

Council Chair Mark Schmidtke called the meeting to order at 9:04 a.m. He welcomed Deputy Assistant Secretary Judy Mares, who presented an update on EBSA actions. Ms. Mares described the changes in the 5500 form proposed on July 21 as (1) requirements for more granular information; (2) merger information, and (3) a new schedule for health care. She said EBSA is working on Q&As on the conflict of interest rules issued earlier this year. Ms. Mares noted the final rules were issued on facilitating state plans by allowing them to cover otherwise uncovered workers by distinguishing what constitutes a plan. Kevin Hanney noted that recent testimony to the Council on state initiatives revealed that the states need more awareness on their design to allow participants to transfer accounts between those state plans and private sector retirement plans. Ms. Mares said EBSA is happy to provide technical assistance upon receiving requests from state governments.

The Council next discussed the work it is doing on its two issues. Rennie Worsfold led the discussion on the issue of Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation. He read a list of possible recommendations. Council members discussed using a list of data needed for account transfers, rather than proposing a standard form. One recommendation would ask EBSA to encourage an industry coalition to agree on standard terminology, data, and processes for facilitating plan-to-plan transfers. Mr. Stein asked what form of encouragement that might entail. Mr. Hanney cited the example of the Australian government convening industry representatives for a similar endeavor. Mr. Schmidtke said the recommendation could be to convene an industry group. Ms. Scapino asked about issues with lost income during the rollover transaction period. Mr. Hanney said it is a problem because of the overly long transaction time.

The Council discussed providing ideas for educating plan sponsors, including a clarification of how they can promote their plans without the risk of failing to qualify for an exception from the conflict of interest rules. Mr. Stein said the Council should be careful not to create a bias for moving accounts to a new plan vs. staying with the old plan, adding that the clarification should provide advice more broadly than just from the receiving plan. Mr. Hanney expressed concern with the conflict of interest rule reference, suggesting the report could note the concern from service providers and their outside counsel. Mr. Schmidtke commented that the Council could provide questions for a Q&A list, but not the answers.

Mr. Schmidtke recommended the Council propose a supplement to the Treasury guidance (the 402(f) notice) for participants who are separating from their employer, one that is more succinct. In discussing a possible recommendation that DOL collaborate with Treasury to clarify the

guidance, Ms. Scapino said that is not something that is actionable by DOL. Mr. Schmidtke suggested the issue group work on the language.

On multiple employer plans (MEPs), Mr. Worsfold said instead of a recommendation, the group could suggest that a future Council study whether MEPs might be helpful.

Next, the Council discussed the cyber security issue. Deb Tully, who chairs the issue group, said she foresees just one recommendation, for education of plan sponsors and service providers, plus deliverables to help DOL with the task. Ms. Tully opened up the discussion with the question of who is the audience the Council wants DOL to address. Ms. Haverland suggested vendor management is a key, that the deliverables should focus on offering the legal and benefits people at plan sponsors help in negotiating contracts with service providers. She added that it would help to identify all the departments in a company that will have an interest in this issue. Mr. Stein said the educational materials need to reach anyone who handles data. Mr. Hanney argued that they also should reach participants for their protection and be mindful of costs to participants of plan improvements for cyber protection. Debbie Smith suggested inclusion of a tip to remind sponsors they are operating as a plan and need to bear in mind their responsibility to participants, rather than aiming specifically at participants.

The Council discussed “guidance” terminology and the possible alternatives. The consensus was to add a clarification at the top of the document outlining effective steps for cybersecurity that these are useful hints for those who want to take security measures.

The Council briefly discussed audit reports and decided the final document will explain what those reports can do and not do for cybersecurity.

Mr. Schmidtke asked for public comments and there were none.

The meeting adjourned at 12:05 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

Washington, DC

November 9-10, 2016
Minutes of Meeting

The meeting was convened on November 9 at 1:10 p.m. by Council Chair Mark Schmidtke, who turned the program over to Deb Tully, the issue chair on the day's first topic, Cybersecurity Considerations for Benefit Plans.

Ms. Tully read the draft of the Council recommendations:

1. Make this Report and its Appendices available via the Department's website as soon as administratively feasible to provide plan sponsors, fiduciaries, and service providers with useful information on developing and maintaining a robust cyber risk management program for benefit plans.

2. Provide information to the employee benefit plan community of plan sponsors, fiduciaries and service providers to educate them on cybersecurity risks and potential approaches for managing these risks. The Council has drafted a sample document titled "Employee Benefit Plans: Considerations for Managing Cybersecurity Risks" for the Department as an illustration.

There were no comments on these recommendations, which the Council had discussed and approved at its previous meeting.

The Council next discussed recommendations on Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation. Issue Chair Rennie Worsfold read the recommendations, which were:

1. The Council recommends the Department issue a Request for Information to explore how it can encourage and support the adoption of secure electronic data standards for the development of a process, system, platform and/or clearinghouse to facilitate acceptance and expedite processing of eligible rollovers into qualified retirement plans. This includes:

   a. Standard data elements
   b. Electronic forms and processing
   c. Electronic transfer of funds

2. The Council recommends the Department publish retirement plan sponsor education to encourage sponsors to support participant-initiated plan-to-plan transfers, and publish sample participant communications that educate participants on the potential benefits of and process for

consolidating accounts in a qualified retirement plan. The Council has drafted materials on these topics for the Department's consideration, which are included as Appendices to this report.

3. The Council recommends the Department clarify the application of the Final Conflict of Interest Rule, its exceptions and any applicable Prohibited Transaction Exemptions as they relate to communications by plan sponsors and their service providers to encourage or promote plan-to-plan transfers and account consolidations into qualified retirement plans.

4. The Council recommends the Department encourage and/or collaborate with the Treasury Department (Treasury) to:

   a. Consolidate and clarify existing guidance with respect to the safe harbor requirements to grant Relief from Disqualification for Plans Accepting Rollovers, and
   b. Revisit the §402(f) notice and provide accompanying guidance to encourage plan-to-plan transfers and account consolidations into qualified retirement plans.

5. The Council recommends the Department engage in ongoing dialogue and outreach efforts with States considering and/or pursuing state-administered retirement initiatives, as well as with Treasury as it develops and oversees its myRA program, in order to identify impediments to portability between these and other qualified plans and facilitate the portability and consolidation of participant accounts.

The Council made a small change in the wording of recommendation #5.

There was discussion of the wording of "qualified plans" in the last recommendation. Kevin Hanney suggested the terminology "eligible employer sponsored retirement plan." Jeff Stein said that would require defining "eligible." Mr. Worsfold suggested adding an endnote instead of correcting the term. Mr. Stein questioned whether the terminology should apply to defined benefit plans. Cindy Levering and Chris Hwang stated that sometimes defined benefit plans allow transfers, so they should be included.

The Council members discussed the report appendices. Nobody suggested any changes to the Sample Communications and Sample Plan Sponsor Education documents prepared by the issue group.

Next, the Council members discussed the slide presentation they would use the next day. Ms. Tully suggested a change from "audit" to "monitoring" in the section on Contracting with Service Provider, in the bullet "Include automatic notification and audit obligations." Otherwise, the Council members made minor wording or formatting changes.

Mr. Schmidtke asked if there were public comments and one person asked about the recommendation in the Plan to Plan Transfers report for clarification of the conflict of interest rule. Mr. Schmidtke explained the comments on that issue which the Council received and how that formed the basis for the recommendation.

The meeting resumed on November 10 at 9:35 am.

The Council decided to change the wording in several places in the Participant Plan Transfers recommendations from “qualified retirement plans” to “retirement plans covered by ERISA,” both in the report and the slides.

There was extensive discussion about whether to change the wording in Participant Plan Transfers recommendation #3 from “Clarify” to an alternative word. Mr. Stein suggested “address questions regarding” instead of “clarify” and the Council agreed to that change. Also in that recommendation, Mr. Hanney suggested and the Council accepted changing the wording from “communications by plan sponsors and their service providers” to “communications by employees of plan sponsors and their service providers.” This change, he said, more closely reflected the testimony the Council heard.

In recommendation #5, Mr. Stein suggested removing the words “and outreach efforts” from the “the Department engage in ongoing dialogue and outreach efforts with States,” and the Council agreed.

The Council members unanimously approved the recommendations from both reports. Also, the Council unanimously approved a motion allowing the Chair and Vice Chair to make clerical changes in the reports that do not affect the substance of the recommendations.

Mr. Schmidtke asked if there were any comments from the public and there was a comment that the term “ERISA plans” in #5 would include top-hat plans. Mr., Stein said he did not think the recommendation would apply to top-hat plans and it did not hurt to leave the language as the Council agreed.

In the afternoon session, Assistant Secretary Phyllis Borzi thanked the outgoing members for their service and presented them with Certificates of Appreciation. Ms. Borzi provided an update on EBSA activity since the last Council meeting, starting with the issuance of a final regulation on a safe harbor for state-sponsored retirement plans for individuals. She said that several cities requested expansion of the safe harbor to political subdivisions and so DOL simultaneously issued a proposed rule for that extension. Ms. Borzi noted there are concerns about the consistency of requirements and of overlapping jurisdictions. Some cities, she said might be inhibited from implementing ERISA plans in a state with a non-ERISA plan. Also, Ms. Borzi emphasized the need for states to provide consumer protections normally available under ERISA, such as ensuring that individuals’ contributions actually go to their accounts. Among comments already received on the proposed regulation, she said common themes addressed included (1) provisions that political subdivisions need authority over employers (regulatory or tax) to qualify and (2) the overlapping jurisdictions issue.

Ms. Borzi discussed the work going on for an updated Form 5500 for reporting on benefit plans, with a goal of providing a more sophisticated database with new information about health plans and about investment of plan assets, among other items. She said the form update will require Congress to fund the effort.

On the conflict of interest regulation, Ms. Borzi said DOL issued its first set of FAQs on October 27 and expects to issue two more sets by the end of 2016.

Ms. Borzi said the disability claims regulation will be issued soon. She said more Affordable Care Act FAQs are possible. She noted the Mental Health and Substance Abuse Disorder Parity Task Force delivered its report to the President, with six deliverables for EBSA, including disclosure guides and more FAQs. Ms. Borzi said the DOL regulatory agenda will be released soon.

Ms. Tully and Mr. Worsfold led the presentations of their respective issue group recommendations and background. On cybersecurity, Ms. Borzi asked if there is an increasing awareness on the part of plan sponsors to take steps to protect plans from cyber threats. Ms. Tully said there is a lack of people who understand both cybersecurity and benefit plans, and that this appears to be an early stage of awareness and action. Mr. Stein said there is more awareness of risks, but not solutions. Ms. Borzi agreed with the report's caveats that it is not opining on fiduciary issues connected with cybersecurity, then noted that ERISA might not be the appropriate legal framework for these issues.

On Participant Plan Transfers, Mr. Worsfold emphasized the Council's suggestion for future study of issues related to (1) loans and (2) partial rollovers. Ms. Borzi stated that communications to participants on transfers rest mostly with recordkeepers, especially for small plan sponsors, who do not have much leverage on the communications. She described the nature of how EBSA can interact with state and local governments on their state- and local-administered retirement initiatives, guided by the fact that EBSA has no jurisdiction over non-ERISA plans. Mr. Schmidtke said the Council wants whatever can be done to help state officials understand the implications of plan design for lifetime income.

On the conflict of interest rule questions, Ms. Borzi said there is always an effort to strike a balance between protecting participants and not burdening plan sponsors. The rule, she said, was mindful of the need for plan sponsor flexibility and comfort in educating participants. Ms. Borzi suggested comments on potential liability arising from these communications are driven by lobbyists with an agenda. She said that this is not an issue for plan sponsors, who are not investment fiduciaries because they do not receive fees for investment advice. Joe Canary, Director of EBSA's Office of Regulation and Interpretation, added that the conflict of interest rule specifies that plan sponsor employees are not affected unless they provide investment advice. Mr. Hanney said the confusion was planted with plan sponsors by "influential stakeholders within the system," but that the Council heard from several witnesses on this. Mr. Worsfold said it is mostly a service provider issue, and the Council was intending to remove any impediments to plan to plan transfers. Mr. Hanney added that some service providers are not facilitating transfers and that was the Council's big concern.

Mr. Schmidtke asked if there were any comments from the public and there were none.

The meeting adjourned at 3:45 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5320 Room 6, Frances Perkins Building
Washington, DC
June 7, 2016

Minutes of Meeting

Council Chair Mark Schmidtke called the meeting to order at 9:07 a.m. He turned the meeting over to Deborah Tully, chair of the Council issue on Cybersecurity Considerations for Benefit Plans.

The first panel to present testimony consisted of Alan Brill of Kroll Cyber Security and Hervia Ingram of Xtreme Solutions. Mr. Brill said any recommendations must pass the test of simplicity. He said manipulation of data by hackers is a growing concern and plan sponsors must periodically check data integrity. One of the most worrying predictions is that attackers may move from just stealing data to changing it. Mr. Brill advised that companies should go on a data diet – avoid collecting information unless there is either a documentable legal requirement for the data or a demonstrable business process in which it is actually used. Also, he emphasized that once information is no longer needed, it should be deleted. He said the key differentiator between companies that recover well from a data breach incident and those that do not is the extent to which the risk of a breach was recognized and a plan was developed, tested and regularly updated, with pre-identification of outside resources that the company might need. Those resources could include forensic and investigative specialists, specialist legal counsel and crisis communication organizations. Mr. Brill said financial services firms and those holding significant amounts of personal information – including many firms in the ERISA field – should at the very least have a conversation with their risk managers and insurance brokers to determine whether cyber-insurance is right for them, what it would cover (and not cover) and costs.

Mr. Ingram said vulnerabilities are from people and procedures and procedures as much as IT. He explained the different types of audits of cybersecurity as (1) a Network Audit to map and identify the network with the purpose of identifying any holes (hacker exploits) in the network; (2) a Security Audit to determine the effectiveness of the security components (hardware or software) that are in place to protect the network from infiltration; and (3) a Process Audit to review all of the security process that are in place (and those that are not) to determine feasibility and effectiveness to protect PII. He said many third party administrators (TPAs) are required to comply with extensive regulations regarding privacy and security of data, and it is critical that a retirement plan sponsor take affirmative measures to vet its TPA’s cybersecurity program. Mr. Ingram said a solid vendor risk management strategy should include (1) a contract outlining the business relationship between the organization and the TPA; (2) consistent monitoring and audit of vendor performance to ensure that contract stipulations are being met; (3) Guidelines regarding who will have access to what information as part of the vendor agreement; and (4) Stipulations to ensure that vendors meet regulatory compliance guidelines for the industry, and a method to monitor this compliance.

Jeff Stein asked for small organizations, what are the musts to do. Mr. Brill said they should recognize that cybersecurity is a legal and management issue, not just a technology issue. There are no absolutes musts, e.g., encryption might not be practical. Mr. Ingram said they should prioritize training and behavior. Mr. Stein asked if a cybersecurity plan is a necessity. Mr. Brill said a risk assessment should come first. He added that for small organizations, cloud storage of data usually increases security. Mr. Stein asked what monitoring steps a small plan sponsor should follow. Mr. Brill said the sponsor needs a compliance plan and should give others the minimum trust and access they need for specific purposes. Debbie Smith asked if they are hearing concerns about cybersecurity issues for benefit plans. Mr. Ingram said that matters more at the corporate level, and that plans should find out if they can tap some of the insurance protection their vendors already have. Kevin Hanney asked about using the block chain approach. Mr. Brill said that is very valuable to ensure the access permissions have not changed. Elizabeth Leight asked how participants can verify their data and assets are safe. Mr. Brill said it is the same problem financial service companies face generally – they need of code of good practices, possibly with some regulatory oversight. Tazewell Hurst asked what to advise plan sponsors in using open source software. Mr. Ingram said he recommends they not use open source software, because not all of it is safe.

The second panel consisted of Scott Esposito and James Fox of PricewaterhouseCoopers and Kevin Schlotman of Benovation. Mr. Esposito said plan administrators have a responsibility to implement processes and controls to restrict access to a plan's systems, applications and data, including third party records and other sensitive information. In situations where plans choose to outsource key functions to third parties, their responsibility extends to include the control environment of the service provider(s). He emphasized that it a critical step for plan administrators in evaluating the risks associated with information security is understanding the flow of data between the plan administrator and third parties. Mr. Esposito described the audit reports, noting that SOC1 reports do not address broader operational and compliance control needs by user organizations. He said that while SOC 2 reports are voluntary, these reports can be a useful vehicle for service providers to convey additional information about their controls around the trust principles. Currently, he said the trust principles do not provide a comprehensive cybersecurity assessment, however they do cover some key elements of an information security program that would be helpful for user organizations to understand. There is not currently a commonly accepted, industry-wide attestation reporting standard that provides a comprehensive cybersecurity framework assessment over service providers. Mr. Esposito said service providers often receive multiple and varied questionnaires regarding information security measures from a significant number (hundreds, in some cases) of plan administrators, at unpredictable times, which can significantly strain resources and may result in an inconsistent level of quality in their responses. Mr. Fox added that third parties often represent the weakest cybersecurity link. Therefore, benefit plans need to monitor, measure, and manage third party cybersecurity risk. He said plan sponsors should determine the minimum amount of data that third parties need to get the job done, and recommended all organizations prepare an incident response plan ahead of a breech.

Mr. Schlotman said that regardless of size and funding mechanism (fully insured vs. self-funding), plan sponsors rely on their service partners to protect their sensitive data. These service partners, such as third party administrators (TPAs) often maintain all of the plan’s operating data, with access granted to authorized individuals for the operation of the plan. He

said some plans request information about Cyber security and data protection from prospective third party vendors prior to engagement. Many do not, in significant part because they do not know where to begin. Mr. Schlotman suggested an easy to comprehend and use guide would provide them a reference point to begin, and that the HIPAA Security Rule Crosswalk to the NIST Cybersecurity Framework is a suitable starting point/ He said any checklist should emphasize a Cyber security training program that includes every employee.

Ms. Smith asked if most organizations know about SOC2 reports. Mr. Esposito said most people do not know about them, or what to do with the reports. Ms. Smith asked about the role and scope of a cybersecurity attestation. Mr. Fox said it is to evaluate the effectiveness of a plan, to identify risk, and to set up controls and methodology. Mr. Fox said the third party attestation defines the scope. Mr. Stein asked what happens in the monitoring process – who gets to dictate terms – and what are appropriate monitoring steps. Mr. Schlotman said for plans with fewer than 500 participants, the third party administrator (TPA) sets the terms, and monitoring is based on standards. Mr. Fox said he would provide a list of monitoring steps. He said plans need the ability to ask for data traffic, especially logs of access to the data base. Ms. Leight asked if plan sponsors push back when asked by TPAs to confirm their responsibilities. Mr. Schlotman said some do, and that provides the TPA an opportunity to explain to plan sponsors what they should be doing. Ms. Smith asked what questions plan sponsors should ask vendors. Mr. Fox said it would be helpful if plan sponsors could agree on standard questions and provide an explanation of why they need to know the information they seek.

Next, the Council heard from Matthew McCabe of Marsh and Kathy Bakich of Segal Consulting. Mr. McCabe noted that the number of his firm's U.S.-based clients purchasing standalone cyber insurance increased 27 percent in 2015 compared with 2014, following a 32 percent increase in 2014 over 2013. He commented on the hazards encountered by benefit plans because administration of the plan requires information sharing among participants, third party administrators, actuaries, auditors, and trustees. Mr. McCabe said cyber insurance will reimburse the costs that a company pays to respond to a cyber incident, such as complying with requirements to notify and protect affected individuals in the wake of a data breach; paying the expense to recreate corrupted or destroyed data; or even paying the demand of an extortionist. Secondly, he said cyber insurance covers the fees and damages that a company might pay in response to litigation resulting from a cyber incident. Third, cyber insurance reimburses revenues lost or expenses incurred due to a disruption related to a cyber incident. Mr. McCabe pointed out that the very act of applying for insurance forces an assessment of the applicant's cyber practices, including technical defenses, incident response plan, procedures for patching software, policies for limiting access to data and systems, and monitoring of the vendor network.

Ms. Bakich said the key is to conduct risk assessments on a regular basis. Plan sponsors need to know how they may communicate disclosures electronically. She said that under the HITECH statute, business associates (BAs) have a statutory duty to comply with the BA Agreement, including protection of privacy and security under HIPAA. She said the covered entities include health care providers, ERISA-governed employee welfare benefit plans and multiemployer welfare plans, and health insurers. Ms. Bakich said the "red flag issues" under HIPAA and HITECH include inadequate encryption policies and procedures and a lack of IT governance, indicated by standards, inventory control, and basic security procedures. She suggested that plans should perform a risk assessment every two-three years or when (1) changing a health

plan from insured to self-insured; (2) putting in a new electronic service, such as a server, cloud, database, or website; (3) moving the HR Office; (4) developing a mobile health application; and (5) giving HR staff devices such as i-Pads, tablets, or smartphones.

Ms. Tully asked whether (1) plan sponsors should have cyber insurance and (2) whether they should require that their providers have that insurance. Mr. McCabe said cybersecurity insurance is increasingly common as a contractual requirement for providers. Ms. Smith asked if there are standards for how long to retain records. Ms. Bakich said it is important to know all places records appear, including copying machines. Mr. McCabe said there should be a plan for data retention. Mr. Hanney asked if cybersecurity insurance policies cover the theft of assets, and asked who is responsible for theft losses. Mr. McCabe said insurance applies to legal obligations of the insured and there is a need to extend coverage to plan sponsors. He added that the insurance is intended mostly to cover the theft of data. Rennie Worsfold asked if there are limits on coverage. Mr. McCabe said a large policy is for $200 million. Mr. Worsfold asked if insurers have access to plan sponsors' SOC 2 reports. Mr. McCabe said that is subject to negotiation, but insurers can do a better risk assessment and possibly price a policy more favorably if they have access. Chris Hwang asked if fiduciary liability insurance would cover the cost of a breach if it involves fiduciary responsibility. Mr. McCabe said even if that were so, plan sponsors still should get cybersecurity insurance because there usually are questions of who was responsible for a breach. Mr. Stein asked if cybersecurity insurance is mostly for health plans or also for retirement plans. Mr. McCabe said increasingly retirement plans are asking for this insurance. Ms. Smith asked for guidelines on what cybersecurity insurance should include and what exclusions to expect. Mr. McCabe said insurance should cover contractual provisions, first party services, third party breaches, regulatory coverage, and vendor coverage. He offered to provide additional information. Mr. Schmidtke said he would appreciate getting a comparison of what is covered in specimen policies for cybersecurity and fiduciary liability insurance.

Mercedes Tunstall of Pillsbury Madison and Jonathan Falk of Siemens testified together. Mr. Falk said one problem is there is no comprehensive data privacy law in the U.S. There are four basic types of data privacy laws with differing regulatory authority, besides laws of 47 states. Plan sponsors need to make sure that vendors comply with laws that apply to the sponsors. Ms. Tunstall said plan sponsors need to know the standards to meet to protect data security. She said there are no comprehensive laws for sectors other than those such as financial services and health care that are subject to specific laws. She made several suggestions to help plan sponsors. First, establish a due diligence standard for TPAs, including how to limit information going to vendors and a formal RFI to ask vendors what their cybersecurity plan is, who oversees it, and their history of data breaches. Second, Provide plan sponsors with contractual provisions they should seek, including identifying sensitive date, how to protect it, restrictions on use, and location(s) of the data. Third, using the Safety Act as a model, to limit or eliminate third party liability. Fourth, organize a way for the industry to share information on threats, solutions, and effective approaches.

Mr. Stein asked about guidelines for small plans. Mr. Falk said the same laws about breaches that apply to large organizations apply to small plans. Ms. Tunstall said thresholds in federal law might take precedence over state laws. Ms. Hwang asked whether the applicable state laws are those for where retirees live, and Mr. Falk said yes. Ms. Tully asked whether parts of the Safety Act are useful for benefit plans. Ms. Tunstall said the applicable provisions are (1) the

location of data, and she suggested using a data map, (2) a systems map to keep track of hardware, software, and updates, (3) a policy on use of personal devices, and (4) responses to a data hack, such as who to call and when, who in the company is responsible with the proper authority to respond to a hack.

Tim Rouse of SPARK and Doug Peterson of Empower Retirement, on behalf of SPARK, testified next. Mr. Peterson said no single standard applies to all enterprises' systems. Recordkeepers, he said, now receive hundreds of questions in RFIs, so they recognize the need to win the trust of clients without divulging useful information to hackers. Mr. Rouse said that SPARK is organizing a board of members to discuss cybersecurity standards in response to members' expressions of a need for such standards, tempered by concerns that the standards could provide a road map for hackers. The board SPARK is creating will bring together plan sponsors, consultants, and recordkeepers. The interest in recordkeepers is avoiding having to answer hundreds of varying questions from plan consultants in RFIs. He said the goal is to get sponsors to accept the recordkeepers standards certification, provided by one or more independent agents, and also could lead to reductions in premiums for cybersecurity insurance. Another goal is to provide a set of standards to recordkeepers.

Jennifer Tretheway asked about the size and composition of the new board. Mr. Rouse said there is no set limit, that it is open to all SPARK members. Dennis Mahoney noted that certifications usually are based on meeting minimum standards, but that might not suffice for cybersecurity. He asked whether there will be different levels of standards. Mr. Rouse said that would be difficult because of the various levels of size and sophistication of those seeking certification. Mr. Hanney asked who owns the logs, and Mr. Peterson said the recordkeeper does. Mr. Hanney asked how plan sponsors can be sure of what the recordkeeper is doing or not doing without revealing criteria for cybersecurity protection. Mr. Rouse said there is a need to balance disclosure and security. Mr. Hanney asked how confidential the standards can be if multiple vendors are involved. Mr. Rouse said the standards will not be in the public domain. Stacy Scapino asked if it would be possible to certify the likelihood of a breach if an organization is following standards, as opposed to publishing the actual architecture of the security. Mr. Rouse said that would be grading recordkeepers, and that he likes the idea of creating industry competition. Mr. Schmidtke asked if a sponsor has have multiple benefits plans, would SPARK standards be uniform among those plans and whether it is possible to have one set of cybersecurity standards for all benefit plans. Mr. Peterson said payroll calculations for plans provide a common criteria and to look to payroll administration plans for help.

The Council discussed whether to work on general standards vs. specific standards for each type of plan, and whether it is even possible to have one set of standards. Mr. Schmidtke said lawyers might drive the issue and most benefit plan lawyers are not well steeped in cybersecurity. Ms. Smith suggested inviting the Department of Homeland Security to comment on what off-the-shelf products might be available to plan sponsors. Mr. Stein suggested trying to find case studies that would provide examples of effective cybersecurity measures.

Mr. Schmidtke asked for public comments and there were none.

The meeting adjourned at 4:25 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5320 Room 6, Frances Perkins Building
Washington, DC
June 8, 2016

Minutes of Meeting

Council Chair Mark Schmidtke called the meeting to order at 9:04 a.m. He turned the meeting over to Rennie Worsfold, chair of the Council issue on Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation.

The first panel to present testimony consisted of William Bonk of Techtronic Industries North America and Allison Borland and Krista Cooper of Aon Hewitt Retirement & Investments. Mr. Bonk identified the stakefolders as (1) recordkeeping services; (2) investment/asset management services; and (3) trustee services. He said all stakeholders, to varying extents, are motivated to maximize the amount of plan assets (employee contributions/employer matching funds) they have under management. They are motivated to retain assets of terminated employees as well as to obtain assets of employees with account balances from prior employers Due to the large amount of assets that reside within employer-sponsored plans, employers enjoy reduced administrative and investment management fees. The fees are markedly less than what plan participants would incur if they had the same assets in individual accounts.

Ms. Borland said participants overwhelmingly are rolling over from a plan to an IRA rather than another plan because it is much simpler. She said the process for moving money from plan to plan is especially difficult and inhibits the retention of dollars in the employer plan system. Ms. Borland said participants frequently send forms without attaching the rollover check, they forget to send required documentation, or they have the former employer plan mail the check directly to their new employer's plan without required documentation. Ms. Cooper noted that approximately two-thirds of workers with an outstanding loan default on it at the time of termination with the sponsor or retirement, and that 25 percent of workers have at least one loan outstanding. Outstanding loans discourage plan-to-plan transfers because they prevent individuals from retaining their entire balance in a single place until the loan is repaid. Ms. Borland said in the rollover process, failure rates can exceed 30 percent. She made three recommendations to facilitate successful plan-to-plan transfers. First, streamline the process by designing a standard form, in both online and paper format, for plan participants to authorize the automatic rollover of their retirement account balance from the former plan into the new employer's plan. Tax identification numbers would be required for each plan, and a centralized database managed by a third party entity would be available to confirm qualification, thus negating the need for special letters or other documentation. Second, create an automated clearing house, based on the Automated Customer Accounts Transfer Service (ACATS) that standardizes the ability to transfer funds and speeds transaction settlements. Third, facilitate the transfer of loans from plan-to-plan by adding repayment flexibility upon plan transfer.

If employers agree to accept loans, allow a 90-day grace period prior to loan payment commencement, with flexibility to amortize the loan over a different set of parameters consistent with the new plan's provisions. Fourth, she recommended updating the model form for rollovers, to be completed online or in paper, to include needed information about the loan and to create consistency across the industry.

Pat Haverland asked if participants ask many questions about transferring to another plan. Br. Bonk said no, and that means people are choosing the simplest option. Ms. Haverland asked for suggestions of what DOL can do to help. Ms. Borland said plans need guidance that gives them a comfort level with advising participants to rollover to other plans. Mr. Worsfold asked if plan sponsors would accept a new default, for instance to move money to a new plan of the departing participant. Mr. Bonk said employers have no motivation to guide participants on moving money out of their plan. Mr. Worsfold said education frequently is ineffective at changing behavior, so the plan to plan transfer could be automatic. Ms. Borland said she would not favor a mandate for plan sponsors. Mr. Worsfold asked about trends. Ms. Borland said recordkeepers want to get and retain assets, while some plans want to offload risks by reducing the number of participants. Kevin Hanney asked why plan transfers cannot be accomplished electronically, rather than by paper checks, Ms. Cooper dais there is no process for wire transfers from one trustee to another, and there would be security concerns. Ms. Borland added that there is no infrastructure for electronic transfers. Beth Almeida asked if plans force out participants with small balances. Ms. Borland said administrative fees make small balances inefficient, so forceouts are common when permissible. Dennis Mahoney asked about re-amortization of loans that participants want to transfer, and whether guidance is limited. Ms. Borland said the existing guidance is limited. Jennifer Tretheway asked why there is no progress toward setting up an automated clearinghouse for transfers. Ms. Borland said everyone is waiting for someone else to figure it out and pay for it. Deborah Smith asked if there are partial transfers of assets. Ms. Borland said many plans now allow partial transfers. Mr. Worsfold asked why more plans are not offering partial distributions. Ms. Borland said it is inertia, that there is not a high priority to allow.

The second panel consisted of Allison Klausner of Xerox HR Services, for the American Benefits Council, Kent Mason of Davis & Harman, and Michael Barry of Plan Advisory Services Group, for the Practicing Law Institute. Ms. Klausner recommended modifying the fiduciary rule to broaden (or clarify) the exception for employees of the plan sponsor. She also suggested creating incentives for rollovers without a current determination letter. Ms. Klausner said recipient plans receiving rollovers from another employer's DC plan will want greater assurance that no liability would attach for transactions whereby a rollover is not accompanied by a determination letter. Also, she said recipient plans might want the rules modified to provide that, absent a finding of fraud or abuse, rollover contributions need not be returned if they came from a plan that is later determined to be disqualified.

Mr. Mason also asserted that if a plan sponsor employee or a call center employee were to encourage participants to retain their assets in the plan sponsor's plan, that would make the plan sponsor employee or the call center employee a fiduciary. He made four recommendations to faciliatate plan to plan transfers: (1) require plans to provide a separate one-paragraph supplemental cigarette-type warning to employees regarding the adverse effects of cashing out,

(2) clarify that under a plan or an IRA may accept rollovers based solely on an employee's certification that the amount comes from a retirement plan or IRA, (3) allow employers to provide notices in certain electronic ways unless a participant elects paper, and (4) extend the 60-day rollover period to the due date for the tax return for the taxable year in which the distribution occurred.

Mr. Barry said the best default is to transfer an employee's retirement assets to the plan of his or her new employer, a money-follows-the-employee rule. He recommended building an infrastructure that makes such an approach practical, including reconciling different recordkeeping systems and matching assets with employees as they change jobs. Mr. Barry said a priority should be a set of rules that make that process easy, by allowing administrators to rely on a representation (a simple box-check) about the eligibility of assets for such a transfer, providing a simple, boilerplate disclosure, and providing a simple process for opt-outs.

Mr. Worsfold noted that if money always follows the employee, that could lead to participants having assets at small plans which have high fees. Mr. Barry suggested a requirement tht plans have brokerage windows with low cost index funds. Mr. Hanney asked what differences in plans could be obstacles to simplifying plan to plan transfers. Mr. Barry said current solutions are ad hoc and inadequate. Mr. Mahoney noted most leakage is from participants with small balances that almost always are qualified, so why not create a presumption that the distributing plan assets are qualified. Mr. Mason supported that idea. Ms. Havrland asked whether warnings about cashing out should come from the new or former plan sponsor. Mr. Mson said both, unless that creates new burdens. Mr. Barry said that presents a fiduciary issue, to which Ms. Haverland suggested it is possible to distinguish between providing factual information and encouraging certain behavior. Mr. Mason said there remains a concern where the facts might be slanted one particular way. Mr. Worsfold asked why the 60-day limit on tax-free rollovers is a problem. Ms. Klausner said people lose track of checks and sometimes there delays in effecting a rollover, especially if participants are not very knowlegable and proactive. Mr. Worsfold asked what is a reasonable extension of the period of time allowed and Mr. Mason said until the tax return due date.

Next, the Council heard from Tom Johnson of Retirement Clearing House and Craig Copeland of EBRI. Dr. Copeland said accounts with less than $5,000 have the highest cash out rates, partly because they are subject to a mandatory distribution provision and can be forced out of their employer plan into a Safe Harbor IRA without the participant consent. Mr. Johnson touted the advantages of auto portability, which would alter the current manual plan-to-plan transfer practices by introducing technology to create a new, automatic default. It would enable the routine, standardized and automatic movement of an inactive participant's small balance retirement account (less than $5,000) from a former employer's retirement plan to an active account at a new employer's retirement plan, when a participant changes jobs. The idea uses electronic records to match across a network of financial institutions to locate, match & move an account between employer-sponsored plans and incorporates negative consent to authorize and automate the process. Mr. Johnson said the accepting institution's staff may not be fully aware of documents or other items needed to complete a rollover, causing stress for the participant once the funds arrive and are rejected. He also pointed out that distributing institutions often mail

distribution paperwork, rather than using e-mail, or the web. Mr. Johnson said distribution paperwork can be up to 10 pages and can appear complex.

Mr. Hanney asked it would take to get an advisory opinion to allow auto portability. Mr. Johnson said it would have to be a priority, and that it would be more efficient to be able to fit into safe harbor regulations.. Mr. Hanney asked if Retirement Clearing House would be willing to work with others on an authentication model. Mr. Johnson said RCH uses query function technology to check with recordkeepers without exchanging PII, thus limiting the need for authentication. He mentioned there is a legislative proposal to establish a government clearing house. Mr. Worsfold asked how to overcome the certification challenge. Mr. Johnson said technology keeps costs down, and standards currently under development will be useful. Stacy Scapino asked for the breakdown of accounts under $5 thousand between small and large plans. Dr. Copeland said there is more turnover with large plans. Ms. Scapino asked about the need for employer consent with automatic rollovers. Mr. Johnson said those wishing to have automatic rollovers must be active participants in their new plan. Ms. Tully asked about the motivation for the players involved. Mr. Johnson said recordkeepers are motivated by their desire to accumulate assets under management, which enables them to hold down costs for small accounts. Ms. Haverland asked whether plan sponsor would need to amend their plans. Mr. Johnson said 65 percent of plans already have safe harbor IRA provisions and others would need to adopt a change.

The next panel was Chris Hulse of NE Retirement Systems and Mike Westhoven of DST Retirement Solutions. Mr. Hulse said the ERISA world needs a “middleware” solution that will act as a transfer station for the movement of all money types, to facilitate rollovers and temporarily take over loan repayments. He said the difficulty of plan to plan transfers is an issue primarily with smaller account balances. Mr. Hulse noted the prior employer might not be motivated, and the new employer is not motivated to assist in the transaction. The new plan might not allow the immediate transfer of rollovers, the plan design might not include all money types, there sould be concerns over the qualification of the transferring plan, and accepting loan liability out of the question. Mr. Hulse said a middleware solution would (1) accept all money types (traditional and Roth) and holds those types not accepted by new employer; (2) verify the qualification of the prior plan; (3) accepts loan repayments; (4) standardize secure data exchange and money transfer; and (5) provide a simple file format for recordkeepers and custodians.

Mr. Westhoven outlined the obstacles in processing a plan-to-plan rollover: (1) how to process the distribution from the prior recordkeeper, (2) paperwork, lack of cooperation, and various levels of approvals to fully accommodate plan-to-plan rollovers require accommodations specific to the receiving recordkeeper and plan, (3) plan rules and existing distribution and transfer processes that are not uniform across plans or providers, and (4) requiring participants to know that their destination plan is able and willing to take the rollover before even starting the distribution process. He recommended setting standards at a recordkeeper level versus a plan level, including forms on distributions from plans and forms for transfer into plans. Also, Mr. Westhoven said the use and acceptance of ACH wire for the movement of money would reduce the complexity and time considerably.

Mr. Hanney asked whether ACH could become the standard for transferring funds. Mr. Westhoven said some entities accept ACH only for payroll. Mr. Hulse said the technology exists to do that easily. He added that it is expensive to wire money, as opposed to ACH. Ms. Almeida asked how ACATS (Automated Customer Accounts Transfer Service) relates to ACH. Mr. Hulse said those systems are proof of the concept of the industry agreeing on standards to enable efficient technology solutions. Mr. Worsfold asked about the timing of transfers. Mr. Westhoven said they can be simple and quick if both incoming and outgoing recordkeepers agree on what is needed, but some will take longer to ensure they are accepting only qualified money. Mr. Worsfold asked how to combine technology with loan payoffs. Mr. Westhoven said through a partnership with firms that handle the technology.

The last panel consisted of Mark Iwry and William Evans of the U.S. Treasury Department. Mr. Evans explained the tax rules for rollovers, noting that rollovers can be taxable if they occur outside the prescribed time limits. He distinguished among transfers and direct and indirect rollovers. He provided the statutory citation (IRC section 401(a)(31)) for the rules stipulating that plans cannot accept nonqualified money, unless they have taken appropriate steps to avoid doing so. He described the guidance applicable to rollovers, including the 402(f) notice. Mr. Iwry commented that the notice could not be clear and spefici and complete while on a simple one-page form. Mr. Iwry said Treasury is working on making rollovers easier, especially with regard to helping plan sponsors avoid tainting their plan with non-qualified money and trying to put plan-to-plan transfers on an equal footing with plan to IRA rollovers by stipulating that incoming plans do not need letters attesting to a plan's qualification. Treasury, he said, has clarified that the incoming plan merely has to tak appropriate steps, such as looking at the Form 5500 for the distributing plan to make sure the plan administrator checked the box indicating that the plan is intended to be qualified. Howver, he said recordkeepers have pointed out that it still is not a simple matter, because the distributing plan sponsor might maintain several plans and some plan names are similar. Mr. Iwry also said Treasury is trying to make it easier for people to consolidate their past accounts.

Mr. Worsfold asked about the Form 5500 search making the process more difficult for some plan sponsors. Mr. Iwry said there is no requirement for plans to use the Form 5500, that it is merely an option. Mr. Worsfold asked about recommendations to extend the 60-day period by which rollovers must be made. Mr. Iwry said Treasury is considering what it can do regarding that restriction, but noted it is a statutory rule so Treasury's actions are limited to broader exemptions or standardizing waivers. Mr. Hanney asked why IRA trustees are more comfortable than plan sponsors with using ACAT. Mr. Iwry said IRAs have more incentives to make transfers work. Mr. Evans added that the stakes are higher for plans. Mr. Hanney asked if plans could use boiler plate language on an account statement that would help incoming plan sponsors determine the money they are receiving is qualified. Mr. Iwry said Treausry is looking at that, but statements generally are produced by recordkeepers, so it might not be seen as effective as an up-to-date statement from the distributing plan sponsor. Cindy Levering asked if the distributing plan could simply put the plan number on the distribution check. Mr. Iwry said recordkeepers complained they would have to hire someone to look up the plan number, and they do not want the added cost. Mr. Worsfold asked about plan sponsors accepting transfers appropriately and qubsequently finding out the money was not qualified. Mr. Evans said Treasury is looking into resolutions for instances where former participants receive a letter from their former plan stating

the distribution was too much and the plan needs to get some money back from the participant. Mr. Iwry said one possibility is to extend the self-correcting program to erroneous rollovers, adding that the receiving plan would not be disqualified. Mr. Mahoney aslked about re-amortizing plan loans that are outstanding when transferring to a new plan. Mr. Iwry said the difficulty is keeping the loan outstanding, e.g. if the loan is not properly transferred. He noted two other possibilities: (1) creating an automatic debit from participants' personal accounts and (2) allowing a grace period to re-pay outstanding loans.

Mr. Schmidtke asked for public comments and there were none.

The meeting adjourned at 4:50 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5320 Room 6, Frances Perkins Building
Washington, DC
June 9, 2016

Minutes of Meeting

Council Chair Mark Schmidtke called the meeting to order at 8:35 a.m. He welcomed Deputy Assistant Secretary Judy Mares, who presented an update on EBSA actions. Ms. Mares explained the DOL's consideration of facilitating state IRAs for employers to use in the context of the systemic lack of coverage and low savings for many workers. She said DOL wants to give the states the opportunity to help these workers in the absence of federal action. The DOL role, she explained, is narrow, simply distinguishing what constitutes a plan. Ms. Mares said most comments in response to the APRN fell into one of the following categories: (1) whether there would be a voluntary system for employers, (2) ERISA preemption concerns, (3) allowing cities as well as states do establish the IRAs, (4) allowing what amounts to MEPs for the private sector as well, (5) clarification of employers' direct expenses, and (6) whether there could be withdrawals for hardships or other reasons, and the effect of such withdrawals on leakage. Ms. Mares noted the work EBSA is doing on disability claims procedures, following up on a 2012 ERISA Advisory Council recommendation that EBSA update the procedures.

In the health care arena, Amber Rivers of the Office of Health Plan Standards and Compliance Assistance (OHPSCA) described the efforts by EBSA on mental health parity, working with a task force representing all stakeholders. She cited several documents on the EBSA website, such as (1) the warning signs for mental health issues that provide a guide for plans and for EBSA investigators and (2) a compliance checklist used by auditors. Elizabeth Schumacher of OHPSCA updated the Council members on EBSA actions on the Affordable Care Act (ACA), particularly affecting excepted benefits. Travel insurance, she said, qualifies as an excepted benefit. Also, she said proposed rule released on June 8 provides that short term supplemental plans of less than three months exempts some provisions from the ACA.

The Council next discussed the work it is doing on its two issues. Rennie Worsfold led the discussion on the issue of Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation. Mr. Hanney said the Council received some bad information on roll-ins and transfers from IRAS and it needs additional legal background. Mr. Worsfold agreed that was true for the determination process and also the conflict of interest rule, noting he has spoken with ERISA lawyers who are interested in testifying. He said it would be helpful to get input on forms. Kevin Hanney said and on the acceptance of IRA rollovers, there is a misunderstanding because so much as changed since the rules were implemented. Jeff Stein agreed there needs to be more in the record on the conflict rules, specifically on the comment that employees advising participants to stay in plan cross a fiduciary line.
Pat Haverland said there is a lack of awareness by plan participants, pointing to a need to counter messages from other stakeholders and the lack of incentive for plan-to-plan stakeholders. She said testimony from recordkeepers in particular would be useful. Stacy

Scapino suggested the need for legal clarity and operational ideas for a clearinghouse or other automated environment. Elizabeth Leight said there is a need for clarification and ways to guide participants through steps, suggesting someone who can offer basic ways to communicate to participants. Chris Hwang said a simple message cannot encompass everything, but what the Council needs to do is take a step toward messaging that will help participants avoid the lost opportunity to save for retirement. Cindy Levering said participants do not know the basic vocabulary, pointing to an educational role.

Mr. Stein said there is no incentive for employers to participate in a national retirement policy, unlike with defined benefit plans and transfers are just one part of that problem. Mr. Hanney said employers do have incentives, but they are confused by misinformation. Ms. Haverland said employers have an interest in participants being able to retire when they want, in part for workforce planning.

Mr. Worsfold said he wants a work product of actionable recommendations to advance the issue, for example sample sponsor guidance and help for participants regarding plan-to-plan process. He also wants to ask DOL to work with Treasury and private stakeholders on the simplifying process. Ms. Hwang suggested FAQs in addition to a broader education piece. Mr. Worsfold said he is looking at 4 deliverables – (1) sponsor guidance, (2) participants guidance, (3) a distributing sponsor form, and (4) an accepting sponsor form. Mr. Hanney said any recommendations should be mindful of the need for flexibility in an automated approach, by focusing on data requirements more than specific forms or other products.

Dennis Mahoney suggested DOL could be useful in helping to bring about dialogue between recordkeepers and plan sponsors on this problem. Ms. Haverland said besides recordkeepers, the Council needs trustees to testify about their role. Jennifer Tretheway agreed. Mr. Worsfold said he hopes to get input of work products from outside groups to air at the August meeting. Mr. Hanney raised the question of whether the Council will be in a position to recommend guidance to DOL on a clearinghouse. Ms. Scapino said she thinks that is doable, that the operating infrastructure is there.

Debbie Smith asked about the risk of receiving plans accepting non-qualified assets. Mr. Schmidtke said the issue is reaching reasonable conclusion that source is a qualified plan, that lawyers worry about what the DOL or IRS or a lawsuit would say about a piece of paper the participant produces. He added that lawyers want a safe harbor or other assurance. Mr. Stein suggested the Council hear directly from people who said using the form 5500 look-up does not always work. Ms. Smith suggested clarifying what year of look-up suffices. Ms. Scapino said there is an industry database used in trades, and that could serve as a model. Beth Almeida said the question of distributing plan qualification should not be an obstacle, that the sending plan should send its form. Ms. Hwang said recordkeepers complained they had to take time for the look-up, but that is a common issue other types of businesses solve (e.g. doctors' offices). Mr. Stein reiterated that the receiving plan needs assurance that its good faith effort suffices.

Deb Tully said the Council should hear from representatives of plans that are not large, or those with many accounts with small balances. Mr. Schmidtke suggested Nationwide does a lot of work with small plans. Mr. Worsfold suggested asking for testimony from recordkeepers of large and small plans. Mr. Mahoney said communications experts helped the Council last year and suggested involving them. Tazewell Hurst said he wants to hear more on myRAs,

especially for small plans, and state plans. Mr. Schmidtke recommended the Council seek someone to give an overview of state actions, and a few possibilities were discussed.

Next, Deborah Tully, chair of the Council issue on Cybersecurity Considerations for Benefit Plans, led the discussion on that topic. Ms. Tretheway pointed to the need for more testimony on cyber insurance, including the cost of coverage, who takes it, what plan sponsors should look for in insurance. Ms. Tully added information on carve-outs and where there is an overlap with other insurance also would be useful. Ms. Scapino said the Council should address the questions of who owns data, who is responsible, and time periods to keep the data. Mr. Hanney pointed out that even if, as a witness testified, plan sponsors do not own data on their participants, the sponsors still have fiduciary responsibility. Ms. Scapino said sponsors think they do not own the data or liability, so they lack incentive to act. Ms. Tully said plan sponsors need to know what questions to ask. Ms. Smith said the key is vendor selection and plan sponsors need to at least minimum of what to look for in vendors. Mr. Stein said sponsors can hire others if exercising prudence.

Ms. Tretheway said the issue group should develop a cyber risk strategy and then send to appropriate organizations for reaction at the August meeting. Mr. Hanney noted that SPARK does not intend to make certification standards public because of security concerns, but plan sponsors need the basics, without handing over the keys. He also said it is not clear to the fiduciary to what extent cybersecurity costs can be paid for with plan assets, and suggested the Council seek clarification.

Ms. Haverland said vendors also need cyber insurance and sponsors need to be sure the vendors are insured. Mr. Schmidtke agreed that a goal should be making sponsors aware this is available and what to look for in insurance coverage. Mr. Worsfold said insurers limit what plans can buy, and it is dangerous to suggest minimal levels for plan sponsors. Ms. Tully said cyber insurance is developing quickly, so she is concerned about recommending anything too specific. She wants to focus on helping plan sponsors know where their data is and limit where it goes based on what vendors need, and no more. Mr. Schmidtke suggested providing help for sponsors to understand the need, in asking vendors questions, to know why they need what they are asking. Ms. Smith noted she sometimes get more data than she needs and then has to figure out what to do with it. She suggested asking NAIC to provide a list of what sponsors need to ask.

Mr. Hanney said he wants a witness on security testing, noting the Safety Act referenced by Tunstall. Ms. Tully agreed the Council should find out more about Safety Act. Ms. Almeida asked about the scope and whether the Council would include recommendations for participants concerned about the security of personal data held by plans and their vendors. Ms. Tully said the focus is not on participant communications. Ms. Hwang mentioned the business associates agreement (BAA) cited by witnesses and Ms. Tully agreed the Council needs more on that. Mr. Stein said one deliverable might be the principles for the BAA. Mr. Mahoney asked if there are special considerations for benefit plans, as opposed to other entities, for preparing a response team and response effort. Mr. Stein said it depends on what got breeched and what law applies.

Mr. Schmidtke asked for public comments and there were none.

The meeting adjourned at 11:35 a.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

Room S-2508 Frances Perkins Building
Washington, DC

March 16, 2016

Minutes of Meeting

Council Chair Mark Schmidtke called the meeting to order at 9:07 a.m.

Assistant Secretary Phyllis Borzi welcomed the Council, introduced new members and the leadership, and presented new members with certificates of appointment.

Assistant Secretary Borzi provided an update on recent activity by EBSA, starting with the conflict of interest rule that is pending final approval. She expects the final rule to be issued soon. Next. Ms. Borzi described the work EBSA is doing to prepare a proposed rule to expand the financial reporting on the Form 5500, and the ability to search the data reported on those forms. She discussed the proposed regulation and interpretive bulletin to states that are trying to expand savings opportunities for their residents without access to retirement plans, by relaxing the rules for ERISA preemption of state plans. She said EBSA is reviewing the comments submitted on the proposed rule. On the proposed regulation to revise disability claims procedures, which Ms. Borzi said are intended to make Affordable Care Requirements for health plans also applicable to disability plans, Ms. Borzi said EBSA has received 145 comments. Posting some of the comments on EBSA's website has been delayed by the task of redacting personal information from commenters, without losing the essence of what they are saying.

Ms. Borzi summarized results of EBSA's enforcement efforts after commending the role of the benefit advisers who handle about 200,000 inquiries annually and serve as the first line on compliance efforts to help participants get their benefits. If voluntary compliance does not work, the investigators then try to help people recover benefits. The investigators, she said, closed 2500 civil investigations last year, mostly with positive results for participants, plus 275 criminal cases with 61 indictments. Ms. Borzi said last year EBSA recovered $668.2 million in criminal monetary results, and of that, $402 million was achieved by the benefit advisers with informal compliance assistance. In addition, she said under the Abandoned Plan Program EBSA recovered almost $14 million for people whose companies had disappeared.

Council Member Rennie Worsfold asked about a multiyear study on saving. Ms. Borzi said the longevity study of individual household savings is essentially a financial literacy study designed to determine how and why people save. Deb Tully asked about efforts to locate missing participants. Ms. Borzi said some EBSA field offices are emphasizing this.

Council Chair Schmidtke noted the Council received several submissions suggesting it study the recent Supreme Court *Gobeille* decision. Ms. Borzi commented that a Council study at this time could interfere with Department of Labor consideration of any actions to take.

Mr. Schmidtke described suggestions for topics to study, taken from input he received from individual Council members, followed by a discussion he and Vice Chair Jennifer Tretheway had with EBSA officials on what topics would be useful to EBSA. He stated that, as was done last year, the Council should limit itself to two topics of study to enable a more-in-depth approach.

He identified three possible topics:

1. Cybersecurity – protection of data and guidance to plan sponsors
2. Plan-to-plan transfers of retirement plan assets – follow up on recommendations the Council made two years ago
3. Financial wellness

Mr. Schmidtke noted that the Council had received several written comments recommending the study of the Supreme Court's recent *Gobeille* decision in which the majority held that ERISA preempts state health data collection requirements but that DOL could change the rules.

Several members expressed interest in the cybersecurity issue. They discussed whether to study both retirement and health and welfare plans, without reaching a conclusion.

On plan to plan transfers, Ms. Borzi suggested the Council look at why these transfers are so difficult. Pat Haverland said she encounters many participants who are frustrated when trying to move assets from one plan to another. Stacy Scapino said the Council could look at consolidating all employer-based savings accounts, not just 401(k) plans. Debbie Smith noted special issues for merger and acquisition situations. Jeff Stein asked what the deliverable would be. Mr. Schmidtke said more uniform guidelines so there is greater commonality of questions on forms. Kevin Hanney added there is no standardization now, even for terminology, and problems in transfers lead to leakage. Beth Almeida said she is interested in transfers between single and multiemployer plans.

On financial wellness, Elizabeth Leight said at the least there should be a minimum financial wellness education for high school students. Rennie Worsfold said he liked the issue, but a lot of outside groups are looking at it now. Mr. Hanney and Dennis Mahoney agreed. Ms. Borzi said the issue might not be ripe for study by the Council.

The Council members decided their two issues this year would be cybersecurity and plan-to-plan transfers. They then discussed the scope they would study for each issue.

On cybersecurity, Mr. Hanney said many requirements currently exist for various types of entities to protect data. Ms. Leight suggested looking into federal and state statutes, plus standards set by the National Association of Insurance Commissioners (NAIC). She said state licensing for select industries addresses some of the issues. Ms. Haverland said the scope should include security of money in accounts, not just personal information. Mr. Stein said the Council should study both plan level issues and vendor contracting issues, plus appropriate responses to a breach. He said plan sponsors need a checklist for best practices by vendors and vendors need to know what they should provide. Ms. Scapino said small plans do not have the leverage to negotiate contract terms with vendors. Ms. Smith pointed out there is a need to secure file transfers and plan sponsors need to know what contract requirements they should insist upon with vendors. She added that DOL could publish a simple list of what vendors should ask contractors. Also, she expressed concern with cross-border relationships. Deb Tully said the best effective security measures constantly change, so there is a need to produce recommendations that are lasting. Ms. Scapino said small employers' ability to pay for

effective security is another concern. Ms. Almeida said the Council also should offer advice to participants on guarding sensitive information. Mr. Schmidtke said the Council needs to decide how to focus its study. Mr. Hanney said the focus should be deliverables that can be useful quickly to EBSA, in addition to longer term recommendations. Mr. Worsfold said guidelines for plan sponsors and vendors should include information on what to do when there is a security breach.

There were no public comments.

The meeting adjourned at 1:50 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

Frances Perkins Building, Room N3437C
Washington, DC
August 22, 2017

Minutes of Meeting

Council Chair Jennifer Tretheway called the meeting to order at 9:15 a.m. She turned the meeting over to Deborah Tully, chair of the Council issue on Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors and to Jeffrey Stein, chair of the Council issue on Reducing the Burden and Increasing the Effectiveness of Mandated Disclosures with Respect to Employment-Based Health Benefit Plans in the Private Sector.

The first panel to present testimony consisted of David Kritz of Norfolk Southern, on behalf of the American Benefits Council (ABC) and, on behalf of the Society for Human Resource Management (SHRM), Pat Castelli of Niles Bolton Associates and Glen Willocks of TradeWinds Island Resorts.

Mr. Kritz recommended no increase in the number, frequency, or overall length of disclosures, plus consolidation of existing notices and elimination of any redundancies. He said employers should be permitted to (1) combine the single annual notice document with the proposed SPD reference tool and (2) provide the single annual notice electronically. Mr. Kritz supported the goal of making fee disclosures more effective, but expressed concern with fund fact sheet. He said the Quick Reference Guide should be an optional approach for plan sponsors and should replace five notices currently provided annually to 401(k) plan participants. Mr. Kritz said the best communications are created outside the mandated disclosure regime.

Mr. Willocks said certain notices must go to participants, some to all employees, some to all employees who are eligible, and then to their beneficiaries. He said SHRM strongly agrees with the proposal to eliminate the Summary Annual Report (SAR) because the form has very little practical value to plan participants and the information is outdated at the time of issue. Also, he said SHRM supports the Council's proposal to combine annual notices into a single, standardized annual notice. Mr. Willocks said it is important for plan sponsors to have flexibility as to the timing of the notices. He said SHRM agrees with modifying the SPD to serve as a reference tool for employees, but plan sponsors should be allowed flexibility in how they provide this information and the tool should replace current mandatory disclosures rather than being an additional requirement. Mr. Willocks expressed SHRM's concern with replacing the fee disclosure notice with a new notice.

Ms. Castelli said a survey of her firm's plan participants revealed that only 10 percent read disclosures sent to them this year. She offered SHRM's support for the proposal to replace the Summary Annual Report (SAR) with a simple notification of the availability of the form 5500. She liked the proposal to distill the SPD into two parts, with the "Quick Reference Guide" being disseminated to plan participants (which she suggested should be in Q&A format), and the remaining material available upon request. She said DOL should not require the Guide unless it eliminates the requirements for both the SPD and the SAR. Ms. Castelli said the proposed replacement for the fee disclosure notice would confuse participants. Instead, she suggested replacing it with a comparison chart and provided a sample.

Mr. Kritz told the members that the best communications are created outside the mandated disclosure regime. He recommended that the ERISA Advisory Council reduce, not increase, the number or frequency of required disclosures, for instance by substituting the proposed Quick reference Guide as an optional replacement for current disclosures. . Mr. Kritz said the ABC recommends the elimination of the SAR because it no longer is useful, especially for defined contribution plans. He supported the idea of sending participants a notification that the Form 5500 was available and how to obtain a copy. Mr. Kritz criticized the idea of a fund fact sheet to replace the current fee disclosure notice. He urged allowing plan sponsors to issue notices electronically.

Jeff Stein asked how to balance effective communications vs. the need for disclosure. Ms. Castelli said disclosures should be flexible, not prescriptive, such as allowing sponsors to use a checklist. Mr. Kritz said the important thing is to avoid adding another notice. Mr. Stein pointed out that the proposed Quick Reference Guide would remove the annual SPD requirement. Mr. Kritz said for health plans, the issue is the piling on of documents. Ms. Willocks suggested making the Guide optional for employers. Doug Greenfield asked what flexibility entails. Ms. Castelli said plans differ, so sponsors should be allowed to use formats and answer questions pertinent to their participants. She suggested referencing where to find information in the SPD, rather than links, saying some sponsors might have difficulty creating links. Ms. Willocks said electronic disclosures do not work for many participants who lack English skills and e-mail access.

Rennie Worsfold asked what three or five elements were most important for the proposed fund fact sheet. Ms. Castelli said (1) which funds are in which category, (2) performance for benchmarked funds, and (3) what is the default fund. Ms. Willocks said (1) fund options, in terms of aggressiveness, (2) benchmarking, and (3) what happens if participants need to withdraw money. Mr. Worsfold asked what about the role of fees, since this is a fee disclosure notice. Mr. Kritz said fee disclosure rules have driven down fees to the point that they are not much of an issue. Ms. Willocks and Ms. Castelli agreed.

Next, the Council heard from Margaret Hagan of Stanford University. Ms. Hagan summarized the study she conducted for FINRA about millennials not reading disclosures required by the SEC for investors. People were disengaged because the explanations were outside their comfort

zone and said disclosures appeared to be for lawyers. They found graphs to be confusing, preferring plain language text. She found people who want information trust those they are familiar with, such as friends, families, and employers. They want human terms, such as "you" and "I" rather than abstract terms, and they appreciate models of what other people did. They want big fonts and easy comparisons of options.

Deb Tully asked for reaction to the issue group's draft proposals. Ms. Hagan suggested starting with the FAQ and prioritizing the Guide. Bob Lavenberg asked how to start the disclosure if no action is needed. Ms. Hagan suggested limiting to one line a statement of the purpose of the document. Tazewell Hurst asked how to get people interested in the information in disclosures. Ms. Hagan said to personalize the information and make it relate to social experiences. Sri Reddy asked about benchmarking. Ms. Hagan said the benchmark should cite the source, which should be perceived as neutral and valid. Mr. Reddy asked what approaches to highlighting would she recommend. Ms. Hagan said highlighting material is too complicated for the reader. Mr. Reddy asked about balancing engagement and simplification. Ms. Hagan said engagement is the first priority. Mr. Reddy asked if there are industries that have effective communications that could serve as models. Ms. Hagan cited high tech company examples and suggested using strong icons followed by more detailed disclosure. Colleen Medill asked about universal communications techniques the documents can employ. Ms. Hagan said clean graphics and lots of white space. She added that peer models are important to millennials, but not as much to other age groups. Beth Almeida asked if electronic communications should have a different presentation. Ms. Hagan said millennials would be happy with a pdf of the paper document on a website. Cindy Levering asked about preferences for paper vs. electronic delivery. Ms. Hagan said the survey encompassed both, and some people prefer paper. Mr. Greenfield asked whether the Quick Reference Guide will work. Ms. Hagan said the point of it must be obvious immediately, adding that in the near future bots will find answers to questions for people, using artificial intelligence to lead people through decision trees, based on experiences of other people. Mr. Stein asked how to design a decision tree. Ms. Hagan said the key is to present specific scenarios based on what human resources people find in their data are typical questions and actions. Marjorie Mann asked how to reconcile communications on what similar people would do with legal liability for seemingly offering that as advice. Ms. Hagan said the key is how the information is characterized.

Steve Wendel of Morningstar said the priority of notices should be to state its purpose, then use a behavioral map to start where a typical person would want to start and figure out steps to succeed. He cautioned that people who know the subject well have an informational bias. Mr. Wendel said the notice should anticipate obstacles people face to understanding and action. He advised avoiding terms such as "risk tolerance," and instead discuss appropriate types of investments. Mr. Wendel said too many call-out boxes, such as in the draft proposal by the issue group, lose their effectiveness.

Megan Yost of Benz Communications said employee benefits are meant to foster the relationship between employers and employees, so plan sponsors should do what they can to help employees

appreciate their benefits. Participants need to understand the focus on benefit that plan sponsors are trying to convey, and participants want to know what they are getting from the plan. She provided an illustration of how to provide information effectively. Ms. Yost said to use call-to-action boxes sparingly so as to keep participants focused on the most important actions.

Mr. Greenfield asked if there is a way to use good communication techniques while addressing what different types of information participants need to know. Ms. Yost said orient people first, then put the specific information various participants need. Mr. Wendel said layering should be in the same document, rather than directing participants elsewhere for more information. He suggested simplifying by prioritizing what participants need to read. Mr. Stein asked how to layer the information without getting too complicated or adding a new notice. Ms. Yost said the key is to keep the goal of the disclosure in mind and not to try to include all the information. Mr. Wendel said layering is not about adding a new document, that action is more important than information. Ms. Medill pointed out that for legal protection, it is necessary for disclosures to include information that is extraneous to most people. Mr. Wendel suggested putting such information after more generally useful information. Ms. Medill asked how to address the idea of why bother to read the disclosure if it state it is not the legally binding document. Ms. Yost said the reference to the legally binding document should not diminish the value of the disclosure. Ms. Tully asked for suggestions on fee disclosures. Ms. Yost said participants need to know what they can do with the information they receive. Mr. Wendel said displaying fees as actual dollar amounts would help, but acknowledged that is difficult to do.

Monica Gajdel and Molly Iacovoni of Aon Hewitt testified next. Ms. Iacovoni expressed approval for the proposed Quick Start Guide, but suggested the Guide having everything online or on page 1 with the option for participants to call the employer's HR department and receiving a paper copy upon request. She said the Guide approach gives employees/retirees/participants just enough information that they will know where to find the most current version of the notice when they need to understand a particular right and would not overly burden employers. Ms. Iacovoni indicated multiple employers have told Aon that the participants do not read the SPD or notices, but instead call the HR department when they have questions. For health plans, she particularly singled out the inclusion of provider listings in notices as pointless because the listings continually change.

Ms. Gajdel characterized the Annual Funding Notice (AFN) as one of the most confusing notices participants receive, besides being a burden for plan sponsors. It contains financial information that is not logical or comparable, includes information that does not provide a participant with any context or understanding of what the information means, and contains very few changes from year to year. She said plan information which provides much of the information required in the AFN is available on the DOL eFAST website, so users should be directed to that information. Ms. Gajdel said the statute does not require a statement regarding the investment policy and this information should be eliminated.

Ms. Levering asked if the funding percentage helps participants. Ms. Gajdel said it requires too much information and does not help participants. Ms. Medill asked what specific Q&As would be useful to participants. Ms. Iacovoni said that differs based on the plan size and the participants' backgrounds, so it is important to provide flexibility to plan sponsors. Mr. Greenfield asked what flexibility entails. Ms. Iacovoni said plan sponsors would like a checklist and the ability to add what they think would be useful for their participants, including information available on the Internet. Mr. Stein pointed out that the Council is planning on making its recommendation based on paper disclosures. Ms. Iacovoni said that still works if the result is a safe harbor in place of the SPD.

Karin Feldman of the AFL-CIO said plan sponsors have responsibilities along with flexibility and the right to tell participants what the sponsors are doing for them. She said in drafting proposed disclosures, do not assume that participants have no interest in understanding the details of their benefits. Ms. Feldman said participants are inundated with too many notices. She said the Quick Start Guide should not be a substitute for the SPD. Also, she pointed out the Guide fails to mention claims and appeals procedures.

Mr. Stein asked about plan sponsors supplementing required disclosures with more readable communications. Ms. Feldman said sponsors should be able to tailor different communications after meeting the minimum standard. Ms. Almeida and Mr. Hurst asked about the interplay with collective bargaining. Ms. Feldman said the SPD should cover parameters of benefits, with specifics subject to any collective bargaining agreements (CBA). She added that wrapping disclosures around insurance company documents can cause conflicts with the CBA. Ms. Mann asked how to avoid conflicts. Ms. Feldman said unilateral action is not permitted, that the SPD should state that changes can be made only by the CBA. Pat Haverland asked how to make the fund statement more comprehensive. Ms. Feldman said it should be more than the expense ratio, also including fund withdrawals.

Ms. Tretheway asked for public comments and there were none.

The meeting adjourned at 4:00 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

Frances Perkins Building, Room N3437C
Washington, DC
August 23, 2017

Minutes of Meeting

Council Chair Jennifer Tretheway called the meeting to order at 9:05 a.m. She turned the meeting over to Deborah Tully, chair of the Council issue on Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors and to Jeffrey Stein, chair of the Council issue on Reducing the Burden and Increasing the Effectiveness of Mandated Disclosures with Respect to Employment-Based Health Benefit Plans in the Private Sector.

The first panel to present testimony consisted of Mary Miller of Edison Electric Institute and Jack Towarnicky of the Plan Sponsor Council of America (PSCA). Ms. Miller told the Council members that very few people in her organization's highly educated staff read any disclosures, and the draft proposed changes are a major improvement. She said there needs to be more discussion of risk – there is too little context and description of risk profiles now for the risk numbers sent to participants in disclosures. Ms. Miller said participants need more than raw numbers for fee disclosures as well. Regarding the proposed Quick Reference Guide, she said there should be an explanation of the term "legal claim."

Deb Tully clarified that the annual funding notice (AFN) with risk numbers is intended just for defined benefit plans. Ms. Miller said credit balances are a problem area requiring a modification. She added that plans not at risk might not want to raise issues with participants and beneficiaries and suggesting moving the reference to the PBGC from the AFN to the SPD. Rennie Worsfold asked if a summary risk chart would be useful. Ms. Miller said yes and cited Vanguard's communications as good examples. Mr. Worsfold noted the Council has heard testimony that the fee disclosures are not useful and Ms. Miller said a comparative table would be more useful. Colleen Medill asked about having a checklist for what sponsors include in the Guide. Ms. Miller said that would be better than a template. Beth Almeida asked if she would recommend benchmarks for fees or performance, and whether there are benchmark standards or plan sponsors should be able to determine appropriate benchmarks. Ms. Miller said benchmarks are needed for fees, especially to compare different types of funds, such as lifecycle funds, and the benchmarks should be determined by third party providers, not sponsors. Cindy Levering asked if there is a need for both the Quick Start Guide and the SPD. Ms. Miller said both are needed because they are very different. Doug Greenfield pointed out that the Guide is intended as a safe harbor that could be used as the deliverable version of the SPD.

Mr. Towarnicky suggested the Council include a list of all required disclosures in its reports. He said many of the notices contain complex information that participants do not need. Mr. Towarnicky said plan sponsors write notices defensively, trying to summarize a legal document rather than explaining benefits to participants. He said job churn – people average 12 jobs over their lifetimes – is a problem, because at each employer, people need to re-learn what the benefits plan offers. Mr. Towarnicky said not everyone is comfortable with getting information electronically, but online information is very valuable and timely for those who are comfortable with it. He said disclosures should emphasize what action is required. He did not support the proposed Guide because he said it would amount to two SPDs. Instead, Mr. Towarnicky recommended a "super mini SPD" on one page.

Elizabeth Leight asked if plan sponsors attempt to educate participants so that they can understand the notices. Mr. Towarnicky said sponsors who try to make SPDs understandable wind up with a very long document. Sri Reddy asked if he envisions an annual notice requirement for the "super mini SPD" he is recommending. Mr. Towarnicky said yes, that it would constitute a notice more than an explanation of benefits and could replace the Summary Annual Report (SAR). Marjorie Mann asked if the "super mini SPD" could be included in another notice if the SAR is eliminated. Mr. Towarnicky said yes, any appropriate annual notice. Ms. Medill commented that health plans have more frequent changes and readability is a bigger problem, so that SPDs essentially are the plan. Mr. Towarnicky said there is an inherent conflict in summarizing a legal document.

Carol Bogosian of the Society of Actuaries said notices should target what participants need in retirement. She called for positioning the SPD and other disclosures as a part of financial wellness education that plan sponsors can provide participants. Ms. Bogosian said plan material should emphasize benefits claiming decisions and long term planning.

Brian Perlman of Greenwood Associates testified on financial literacy findings of his firm's various surveys and focus groups. He said most people do not understand (1) the relationship between bonds and equities, (2) alpha vs. beta returns, (3) expected yields for different kinds of bonds, (4) the separation of 401(k) plan assets from their company's assets, (5) how fees work, especially for actively managed vs. indexed funds, (6) the cumulative effect of fees on assets, and (7) the meaning of before tax and after tax investing. He said the Quick Start Guide should include an explanation of the role of the plan sponsor. Mr. Perlman said stringing concepts together in one sentence confuses people.

Ms., Tully asked for suggestions to put in the Guide. Ms. Bogosian suggested information about what retirement entails. Ms. Tully asked if improving notices will help participants. Mr. Perlman said it is a step forward. Jennifer Tretheway asked how people want to receive notices. Mr. Perlman said that differs by individual. Tazewell Hurst asked how to organize the SPD for retirees. Ms. Bogosian suggested visuals to help participants understand what post-retirement life is like. Mr. Reddy asked if participants are not doing what they need to do because of complicated or ineffective disclosures. Mr. Perlman said participants need to know how to

balance competing financial needs and they need an explanation of what they get for the fees they pay. Stacy Scapino asked if different disclosures are need for post retirees. Ms. Bogosian said the documents should differ by generations.

Jeanne Medeiros of the Pension Action Center testified that her organization frequently hears from participants who receive disclosures and are anxious about the meaning. She called for disclosures to be improved, not streamlined, and opposed the idea of removing the requirement to issue the SPD every five years. Ms. Medeiros said the beginning of every SPD should include a statement of ERISA rights and method for filing a claim. She supported the draft proposal for a sample Annual Funding Notice (AFN), as hitting the right balance between simplicity and comprehensiveness. Ms. Medeiros opposed any move toward enabling electronic disclosure, stating that many clients of the Center lack access to a computer and are not computer literate, though she said a Quick reference Guide could be helpful to participants who elect to receive electronic disclosures.

Mr. Greenfield asked what is important about the SPD for retirees. Ms. Medeiros said they want to peruse the SPD when convenient, that they need lots of information to understand plans. Mr. Greenfield asked if she finds her organization's clients do not understand what they have or do not have what they need. Ms. Medeiros said oversimplifying can make notices not useful or even damaging and provided an example of clients who relied on an SPD that was missing important information. Ms. Scapino said the problem is people relying on a summary instead of the plan document. Mr. Stein asked if people who read the SPD understand it. Ms. Medeiros said that varies, that people in unions tend to understand better. Ms. Tully asked if her opinion of the Guide would change if it did not apply to DB plans. Ms. Medeiros said her perspective is DB plans, because nearly all the organization's clients have DB plans.

Deborah Harrison of the Washington Business Group on Health, testifying next, said the Council's draft proposals were steps in the right direction. She cautioned that participants cannot be expected to archive past SPDs. The more notices incorporated into one annual notice, she said, the more likely employers will use a safe harbor. Ms. Harrison said the most important part of the proposed disclosure is the action box telling participants where to go for more information. She said one page for the Quick Reference Guide would be ideal, but it can be longer. Ms. Harrison commented the health plan documents are never completed – they need frequent updating for the formulary drugs and the list of doctors accepting new patients.

Mr. Stein asked what should be on top of the Guide to engage participants. Ms. Harrison said Q&A format works best, with brief explanations and contact information for answers to specific questions. Mr. Stein asked how to get to participants' specific questions directly. Ms. Harrison said plan sponsors will, apart from the Guide, communicate with participants on likely questions. Mr. Greenfield asked if the Guide would be more useful to participants than a big notice. Ms. Harrison said yes, especially with big, bold headings for questions. Ms. Medill asked if plan sponsors want model disclosures. Ms. Harrison said template language is always helpful. Ms. Mann asked what are the traps for the unwary, such as procedural disclosures from the SPD that

make the document longer. Ms. Harrison said the key is to note the issue and refer participants to a document with a full explanation.

Mary Smith of Insurance Management Administrators (IMA) and Tracy Dirks of ACI Worldwide were the next witnesses. Ms. Smith said the consolidation of notices would be a huge help to plan sponsors, particularly if participants could get notices just once a year. She supported the proposed Guide drafted by the issue group. Ms. Dirks agreed with the idea of eliminating the Summary Annual Report (SAR) requirement, because, in its present form, it does little to provide valuable information to participants and only seems to create confusion. She said the significant time and effort expended to prepare and deliver a document that is most likely ignored by plan participants would be better spent on meaningful tasks that would enhance employees' understanding of benefit coverages. Also, Ms. Dirks said consolidation and simplification of annual notices into one document distributed annually would be a positive for both plan participants and benefit administrators. As for the SPD, she proposed a simplified document such as a reference guide or FAQ to include the most commonly asked questions.

Mr. Stein asked for a comparison between the proposed Guide and a 4-page document Ms. Dirks said her firm uses. Ms. Dirks said her document provides essential information for participants about using the health plan. Ms. Medill asked how much participants are willing to read. Ms. Smith said they just want to know the price that the plan sponsor is paying and what amount they will have to pay themselves. If their health condition warrants, they might seek more information. Ms. Dirks agreed that participants might not look at a document until a medical or life change issue arises. Ms. Scapino asked how a disclosure can be simple yet also provide enough information on technical issues to help an advocate. Ms. Smith said participants always want help from a person when facing complicated benefit issues. Mr. Greenfield asked about having guides for participants at different career points, including retirement. Ms. Dirks objected to the idea of requiring sponsors and providers to prepare additional documents. Ms. Leight asked is an annual document with all required disclosures would be helpful. Ms. Smith said more people would be likely to keep that. Ms. Leight asked if flexibility in the notices would help plan sponsors. Ms. Smith said most sponsors use model notices and add to them. Ms. Dirks stated a preference for templates. Ms. Medill asked how much of the drafting of the disclosure documents is done as a litigation shield. Both witnesses said that is a large percentage of the drafting effort.

Cynthia Stamer of Cynthia Marcotte Stamer, P.C. said participants do not read disclosures in any form until something happens so they need to read them. Providers need more information about plans and patients have to rely on them. The Summary Annual Report (SAR), she said, is not needed. Ms. Stamer said communications need to be geared to an as needed basis, driven by events. Having choices makes plans complicated, she said. Mr. Stein asked for specific comments on the Guide. Ms. Stamer said simpler is not always better, because it can lead to lawsuits. For example, she said characterizing each plan's category is not easy or consistently true. She said tailoring communications is easier if the communications are electronic. Participants should be directed to the exact rules that apply to their situation. Also, a flowchart

outline would help. Ms. Leight asked about paper vs. electronic delivery preferences. Ms. Stamer said most plan sponsors have the information in electronic format, which makes it easier for participants to locate and search by keywords, but paper still is needed for people who prefer that medium.

Ms. Tretheway asked for public comments and there were none.

The meeting adjourned at 3:40 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

Frances Perkins Building, Room N3437C
Washington, DC
August 24, 2017
Minutes of Meeting

Council Chair Jennifer Tretheway called the meeting to order at 9:05 a.m. and introduced Tim Hauser, Deputy Assistant Secretary at EBSA for an update on agency activities. Mr. Hauser commented on testimony the Council has received on disclosures, saying the members should show caution in considering statements that participants do not read notices. He said quite a few people use the notices as a resource and those people influence others in the plan.

Mr. Hauser provided an update of recent agency activities. He said EBSA still is looking at possible changes in the fiduciary rules. Also, the regulatory agenda includes possible amendments to the Voluntary Fiduciary Correction Program, to expand and facilitate use of the program. There is work in progress on amendments to the abandoned plan regulation, to enable bankruptcy trustees to wind down benefits and address prohibited transactions problems. EBSA is looking at possible changes in the disability claims regulation and possibly a delay in the effective date. Mr. Hauser discussed enforcement activity, starting with terminated vested participants. He said plans need to keep current on their contact information so the plan can send a notification when they become eligible for benefits. Plans may use statistical samples to send participants letters to confirm addresses. He described this tracking as a significant problem, noting the Philadelphia office alone has recovered $65 million so far this year.

Next, Mr. Hauser commented on the consent decree in the MagnaCare case, involving a third party administrator (TPA) that did not properly disclose management fees of nearly $15 million to the plan or on the Form 5500. In that case, he said lab fees included management fees but characterized them as something else. Mr. Hauser said EBSA investigators suspect that problem exists elsewhere as well. In other enforcement actions, he said EBSA has recovered $20 million this year in ESOP cases, mostly from faulty valuations. Mr. Hauser described another case where the plan failed to reimburse participants for out of network providers in accordance with the terms of the plan. He said there is a chronic problem with plans paying for emergency room expenses using the standard of whether a reasonable person would think it is warranted to go.

Doug Greenfield asked what standards apply for tracking term vested participants, especially for multiemployer plans. Mr. Hauser said the problem mostly concerns single employer plans, which should send letters periodically to test whether they are able to contact the participants. He said some human resources departments take this issue more seriously than others, and that sometimes the problem arises because of company mergers, which begs for someone at the plan

sponsor to focus on this at the time of a merger. Also, he said sponsors could send a note to current participants asking if anyone has missing contact information for term vested participants. Mr. Hauser said EBSA plans to issue guidance based on what it is finding that works. Stacy Scapino commented that her company found that people do not change their mobile phone numbers as frequently as their addresses. Colleen Medill asked if EBSA was coordinating notices with HHS, such as the summary of benefits and coverage. Mr. Hauser pointed out that most health notices are tri-agency (Labor, HHS, Treasury) and there are procedures to coordinate efforts. Ms. Medill asked if there has been an increase in claims from participants that they were misled by plan sponsor communications. Mr. Hauser said he has not seen that.

The Council members discussed what they have heard from witnesses about their topics. Deb Tully said the feedback on the draft of a proposed Quick Reference Guide was mostly favorable. Jeff Stein said there was very little opposition to the idea of consolidating notices and providing a document once a year. Some witnesses, he noted, were critical of the Guide for having too little information and others said there was too much information. He concluded there is no perfect solution, but the Council can recommend improvements, such as a safe harbor approach. Ms. Tully said whatever the Council recommends should be viewed as a work in progress, requiring testing of ideas. Bob Lavenberg cited frequent testimony that participants do not read disclosures until needed.

Ms. Medill said witnesses told the Council that the SPD is not a decision tool but a reference tool when needed and administrative tool after the fact. Pat Haverland said they heard that disclosures have a range of audiences. Tazewell Hurst said a common theme is that for participants in different age groups, trust is critical. Elizabeth Leight said disclosures need to be understandable at the 4th grade level. Mr. Stein said the regulations requirements need to be applied more effectively. Ms. Tully said they were reminded to not forget the purpose of the statute or regulations. Ms. Medill said the flexibility plan sponsors want is partly a delivery method issue. Cindy Levering cited the suggestion to include in the report a list of all agencies' disclosures related to benefit plans. Ms. Tully said instead, the report can reference a GAO report that has such a list.

Sri Reddy said what he heard was that the Council recommendations should focus on usability of notices and consider the need for continuing improvement. He also said consolidating notices would help. Medill said there were repeated recommendations to issue disclosures once a year. Beth Almeida said witnesses emphasized the need to engage participants in the notices. Rennie Worsfold cited the point in the Society of Actuaries testimony that communications should differ between participants in the accumulation phase and those in the decumulation phase. He said the Council heard conflicting testimony on the usefulness of electronic delivery of notices. Ms. Haverland said she heard from witnesses a common theme of including a contact phone number in the notices for further information and suggested using that idea by sending a postcard to participants with a number to call for more information. Mr. Stein noted the emphasis Steve Wendel of Morningstar placed on having a call to action, but argued the Council needs to be

mindful of the role of the disclosures as legal documents. Ms. Medill said testimony suggested DOL should clarify that graphical presentation can be part of meeting mandatory requirements. Bob added clarification is needed for the delivery method. Marjorie Mann commented that the SPD purpose is to describe the plan, not to make the participants understand it. Explanations to help understanding should be additions.

Ms. Tully said her issue group needs direction on fee disclosure. Mr. Worsfold said the group developed the fund fact sheet in response to June testimony critical of the current fee disclosure under 404(a)(5), but then witnesses said the fund fact sheet would be burdensome. Ms. Haverland suggested revisiting the current model notice for fee disclosure and using concepts in the draft of the fund fact sheet. Mr. Worsfold agreed the Council could make recommendations to improve the current notice, especially the comparative chart. Ms. Almeida asked if benchmarking in the notice could be effective. Mr. Worsfold said benchmarking for fees and is not straightforward because types of funds are not easy to categorize and risk is difficult to explain. Ms. Haverland said it is particularly important to help participants understand the fees they are paying for target date funds, because those funds are very popular. Ms. Tully said the issue might be one the current Council cannot address.

Ms. Leight raised the electronic disclosure issue. Ms. Levering said the Council heard that some participants want paper. Stacy Scapino said the report should acknowledge there are challenges to navigating between paper and electronic delivery but not recommend one over the other. Ms. Tully agreed the report can do little more than acknowledge that. Mr. Stein said there was a common theme from witnesses that electronic delivery is one way to make disclosures less burdensome. Ms. Scapino said the Council could recommend that DOL post online some common definitions and notices could reference that. Mr. Lavenberg said that would require extra steps by participants.

Chairwoman Tretheway asked if there any public comments and there were none.

The meeting adjourned at 11:15 a.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5320 Room 6, Frances Perkins Building
Washington, DC

March 22, 2017

Minutes of Meeting

Council Chair Jennifer Tretheway called the meeting to order at 9:00 a.m.

Deputy Assistant Secretary for Program Operations Timothy Hauser welcomed the Council, introduced new members and the leadership, and presented new members with certificates of appointment.

Mr. Hauser provided an update on recent activity by EBSA, starting with enforcement activities. He said the agency recovered nearly $780 million in FY 2016 for participants and beneficiaries, and he expects the number to be larger in FY2017. Mr. Hauser cited the small number of investigators at EBSA relative to the vast number of plans and amounts invested. The agency prioritizes systemic problems. He has asked the agency to focus on cross-regional investigations, because the DOL regional areas do not necessarily correlate with the way businesses are organized. On criminal enforcement, Mr. Hauser said there are large amounts deducted from employee paychecks for retirement plan contributions that are not deposited in the plan. There has been a shift of some resources lately from retirement plans to health plans. Employee Stock Ownership Plans (ESOPs) continue to be an enforcement priority, mostly because of inflated valuations of closely held companies, which result in the ESOPs overpaying for sponsoring employer stock.

Mr. Hauser said EBSA has received 1100 substantive comments on its 60-day delay of the conflict of interest rule's applicability of the definition of the fiduciary role and exemptions. On the Form 5500 changes under consideration, he said the data reported often does not line up with what plans do, so EBSA wants to take make what is now in the "other" category more specific. He added there also is consideration of expanded reporting for health plans.

Jeffrey Stein asked if there is new information from the comments on the conflict of interest. Mr. Hauser said there are new things plans are pointing out, now that they are dealing with implementation of the rule and now that they can comment on the final rule. Rennie Worsfold asked how many fiduciary responsibility seminars EBSA is presenting. Mark Connor, Director of EBSA's Office of Outreach, Education, and Assistance, said there are six seminars by the national office, plus hundreds by the regional offices. Mr. Stein asked about welfare plans' payment abuses. Mr. Hauser said mostly that is due to the plans overpaying for services and getting kickbacks from providers. Ms. Tretheway asked if EBSA will continue its work with other countries on best practices. Mr. Hauser said the research of other countries' practices will continue.

Council Chair Tretheway noted the Council received submissions from members and from the public suggesting issues to study this year. She and the Council vice chair, Beth Almeida, discussed the possible issues with EBSA staff. What emerged from the discussions were two topics – (1)

streamlining disclosures and (2) improving communications for select notices as examples for EBSA. Mr. Hauser explained further that there is overlap between EBSA required disclosures and those required by other regulators. He said there is an opportunity to simplify the array of disclosures, while making sure that participants and beneficiaries are still protected, and to make specific disclosures more readable and more likely to have a positive impact on participants. One question he suggested the Council address is whether there are mandated disclosures that do not fulfill their function. Also, he suggested the Council look for better ways of making disclosures more easily understood with the desired impact on participants' decisions. Mr. Hauser cautioned that if they study fee disclosures and/or electronic disclosures, whatever they do might be overtaken by events.

Ms. Tretheway asked how the Council should separate the topics. Mr. Hauser said one possibility would be a survey of disclosure burdens (the cumulative impact) and a separate focus on specific notices, such as the Summary Plan Description (SPD), Summary Annual Report (SAR), and the Annual Funding Notice (AFN). Colleen Medill asked about including health and welfare plan notices and Mr. Hauser said he would welcome that. She asked whether disclosures can be streamlined if electronic. Mr. Hauser said there could be simplified notices plus links to more information for people who want all the details. Ms. Almeida suggested using past Councils' work on communications as a starting point. Rennie Worsfold suggested following up on the lifetime income issue would be more interesting. Ms. Tretheway said this thread is more timely for EBSA's use. Mr. Worsfold and Deb Tully said the AFN issue would provide sufficient substance for Council action. Mr. Stein pointed out that some disclosure requirements are statutory, which could lead the Council to make recommendations for legislative changes. Mr. Hauser said the Council could note the need for legislative change as well. Joe Canary, Director of EBSA's Office of Regulations and Interpretations, said the Council could propose alternative methods of compliance or work creatively where there is some flexibility. Pat Haverland asked whether the scope can include changes to the frequency and timing of reporting, and Marjorie Mann suggested looking at the timing requirements of the Summary of Material Modifications (SMM) notice. Mr. Canary said there is some flexibility, based on the type of plan, and that the statute has some models for alternatives. Ms. Medill asked whether there are alternative methods of disclosure allowed for health and welfare plans. Mr. Canary said there is some exemption authority.

Ms. Tully suggested the Council could survey the various disclosures and the burdens they cause at the first set of hearings and then focus the next set of hearings on specific disclosures. She noted that if the Council picked certain notices to focus on now, they may box themselves in that way. Ms. Almeida said she was concerned that it would then be difficult for the Council to complete its work this year. Stacy Scapino noted that the two scope documents should not be very different, and Ms. Almeida mentioned maybe there could be only one scope document. Sri Reddy noted there could be one common definition of scope, then two issue groups to do the work. Mr. Hauser said the Council need not recommend changes to all disclosures, but instead could select a few and suggest principles that could be a model for EBSA. Mr. Canary said the Council could start by looking at the SPD broadly, then get more specific based on the first round of testimony, possibly by adding a model for a plain English summary of the SPD. Mr. Reddy suggested the Council focus on a broader engagement of participants. The Council members clarified, after a question by Mr. Greenfield, that the Council will look only at disclosures to participants.

Ms. Mann stated that the problem is that participants don't want to know what the disclosure are until they need to know. She suggested discussing not just the method, but how to categorize the disclosures so that the participants would have them when they needed them. Mr. Canary responded that this was in essence what the SPD was, and that the question is whether the SPD is accomplishing

this goal. Elizabeth Leight thought a lifecycle approach would be valuable. Mr. Stein questioned whether there should be something to help participants get through the SPD. Ms. Leight offered that the Council should look at ways of exempting small employers from requirements. Mr. Canary noted that he was unaware of any disclosure requirements driven by the size of plans. Mr. Reddy suggested the Council be forward-thinking in its work, noting that in the future SPDs may be fed into personal assistant devices.

Ms. Tretheway summarized what she heard as the Council would look at improving disclosures as two separate topics, for retirement plans and for health and welfare plans. Mr. Canary said the health and welfare topic might be too broad, that it might make sense to narrow it to just health and disability plans. Douglas Greenfield noted that there appeared to be a two-step problem, that they needed a survey first to establish a baseline of what value was added by each requirement, and questioned how that would work in the Council's time line for study. Mr. Worsfold noted that procedurally the Council could pick a couple of notices as exemplars and survey the remaining disclosure requirements at the same time, while leaving some topics for future Councils to review.

After a break for lunch, the Council briefly reviewed a 2013 General Accounting Office (GAO) report on improving disclosures under EBSA's jurisdiction. Mr. Canary urged the Council to focus on improving the effectiveness of communications in disclosures, which he said would in turn reduce plan sponsors' burdens. Mr. Stein suggested the Council focus on 1-3 disclosures under each topic, not to develop model disclosures, but to evaluate them and suggest more effective approaches. Mr. Canary agreed the Council could develop principles that could apply to various disclosures. He noted the other government agencies which have disclosures that might be of interest. Bob Lavenberg said one issue group could do a survey of disclosures controlled by DOL and the second could, using the SPD as an example, focus on usability and determine how best to deliver disclosures, whether electronically, via app, or video or other. Ms. Scapino questioned whether some of the new technology bumps up against the minimum standards for maintaining books and records. Mr. Canary acknowledged that as an issue, noting statutory and recordkeeping requirements as well as accessibility issues. He noted that alternative communications such as videos could be problematic if someone requests a written version.

The Council members suggested various aspects of these issues and approaches to take, including:

- Survey of mandated disclosures under DOL's control as to their purpose, audiences, and whether they can be improved, with a goal of enhancing effectiveness of requirements for participants and reducing burden on employers, including small employers
- Make assessments as to whether the disclosures are needed
- Should mandated disclosures be revised or removed?
- Make disclosures less burdensome, more effective
- Determine which disclosures needs a new look
- Will disclosures be read? Understood? Helpful to improve decision making?
- Look at content and method of delivery
- Include what dislcosure improvements would require a regulatory vs. statutory change
- Understand purpose of disclosure, identify audiences for possible changes in statute, regulations, authority of DOL for alternatives or exemptions
- Apply principles of effective communications approach
- Each group could focus on 1-4 notices
- Identify:
  1. What do we want recipients to feel?

   2. What do we want the participants to think?
   3. What do we want them to do?
- Organize by purpose of disclosure – accountability, participant rights (need to identify categories)
- Possible Approaches:
   1. Decision tree
   2. Events based disclosure

The Council members decided their two issues this year would be examining participant disclosures for (1) retirement plans and (2) health and welfare plans. Ms. Tretheway said after the members submit their preferences for which topic they want to work on, she and Ms. Almeida will decide how to split them into two issue groups and who will chair each group. The respective groups will refine their topics along the lines noted above and submit their draft issue scopes for review.

There were no public comments.

The meeting adjourned at 3:20 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

Frances Perkins Building
Washington, DC

September 25, 2017
Minutes of Teleconference Meeting

The meeting was convened at 9:10 a.m. by Council Chair Jennifer Tretheway, who turned the program over to Deb Tully, the issue chair on the day's first topic, Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors.

Ms. Tully read the draft of the Council recommendations:

1. Simplify the Single Employer Model Annual Funding Notice to provide basic introductory information regarding funded status and key metrics, with all other information contained in an appendix to the notice.

2. Eliminate the Summary Annual Report provided to defined contribution plan participants and direct plan sponsors to provide a notification to participants about the availability of the annual Form 5500, including instructions for how to access that filing.

3. Provide plan sponsors with the option to use a "Quick Reference Guide" annually and upon initial eligibility to replace the requirement to distribute other mandatory disclosures, including the Summary Plan Description and the Summary of Material Modifications. The Quick Reference Guide would not eliminate the requirement to update the Summary Plan Description as legally required and participants would still be able to receive an up-to-date copy of the Summary Plan Description upon request.

4. In considering new and revised disclosures, incorporate action language at the beginning of the model notices indicating the purpose of the document, whether the document should be retained and what form of action, if any, is required of the participant, including statements such as "Action Required", "Action Requested", "No Current Action Required", "For Information Purposes Only," etc.

5. The Council recognizes that a significant portion of the burden can be reduced through electronic communications. The Council recommends that the Department of Labor further explore the utility and effectiveness of electronic communications with the objective of both reducing the burden on plan sponsors and improving communication mechanisms for plan participants.

Each of the first four recommendations was discussed in turn, and the Council members made revisions. Discussion of the last recommendation was deferred until the afternoon.

Stacy Scapino commented that the language of the first recommendation was very broad. Ms. Tully said they could insert a sentence clarifying what is in the report appendix. Council vice chair Beth Almeida suggested wording to add.

On the second recommendation, Jeff Stein and Doug Greenfield suggested the use of safe harbor language. Rennie Worsfold said the goal was to eliminate the Summary Annual Report (SAR), not to add an additional requirement, and that this differed from the SAR requirement for health and welfare plans. Ms. Almeida asked if the Council could recommend that plans would satisfy the statutory notice requirement by directing participants to the information. Ms. Tully noted an exchange she had at the June meeting with EBSA Deputy Assistant Secretary Tim Hauser, who said there are alternative possibilities to satisfy statutory notice requirements. Ms. Scapino said a safe harbor might help to make an alternative work, but the SAR still does not make sense for a defined contribution (DC) plan. Ms. Tretheway supported the existing language in the draft. Mr. Stein said the Council could recommend eliminating the report or excluding DC plans from the requirement. Mr. Greenfield suggested language to "replace" the current requirement with a notification. Mr. Stein suggested language to direct plan sponsors to send a notification, or to have a recommendation to exclude DC plans and substitute a postcard notification. Ms. Tully said the type of notification should not be specified, and that replacing the SAR with a simple notification would reduce burdens on plan sponsors. Pat Haverland agreed the SAR currently is burdensome and suggested the Quick Reference Guide could provide the notification. Ms. Tully said that could be added to the Guide.

On recommendation #3, Mr. Greenfield noted the similar recommendation for health and welfare plans requires plans to provide a "complete" SPD to employees when they are hired. Ms. Almeida agreed the "complete" SPD should be provided upon hire. Mr. Stein suggested changing the wording to "satisfy" instead of replace. Colleen Medill said the Guide effectively finesses the statutory requirement to distribute the SPD. Marjorie Mann said the distribution when an employee is hired does not address the problem that participants do not read or understand the SPD. Mr. Greenfield said for the recommendation for a Guide for health and welfare plans specifies that the Guide would constitute the first few pages of a complete SPD, and Ms. Mann liked that idea.

On recommendation #4, Mr. Stein suggested using a model notice as an example for incorporating action language. Ms. Mann expressed concern that the language might be too prescriptive. Mr. Stein said the Council should be mindful of witnesses who asked for no new requirements. Mr. Greenfield said the recommendation for action language, which is not for specific DOL action, could instead be part of the report discussion. Mr. Stein supported that idea. Ms. Medill said it is hard to reconcile this idea with advice from communications experts, so she was not sure it should even be in the report language. Sri Reddy argued that plan sponsors now have the option to use action language, but DOL needs to encourage them to do so. Ms. Tully said the recommendation will be moved to the body of the report and also will note the counter arguments.

Mr. Greenfield noted that the report language appears to focus on DC plans, but it is unclear whether the recommendations and discussion also would apply to defined benefit (DB) plans. Ms. Tully said the Council had not fully explored applicability of its recommendations to DB plans. Mr. Greenfield suggested including in the report that the Council is not suggesting the recommendations are only for DC plans, and Ms. Tully agreed.

As a result of the revisions, this is the new wording for the recommendations for retirement plan disclosures.
The Council recommends that the Department of Labor:

> Simplify the Single Employer Model Annual Funding Notice to provide basic introductory information regarding funded status and key metrics, with all other information contained in a supplement to the notice. The Council has drafted an example of a notice for the Department's consideration, which is included as Appendix A of this report.
>
> Exclude defined contribution plans from the Summary Annual Report requirement and direct plan sponsors to provide a notification to participants about the availability of the annual Form 5500, including instructions for how to access that filing.
>
> Provide plan sponsors with the option to furnish a "Quick Reference Guide" annually to satisfy the requirement to distribute other mandatory disclosures, including the complete Summary Plan Description and the Summary of Material Modifications. The Quick Reference Guide would not eliminate the requirement to update the complete Summary Plan Description as legally required and participants would still be able to receive (1) the complete SPD upon initial eligibility and (2) an up-to-date copy of the Summary Plan Description upon request.

In the afternoon session, Mr. Stein, the chair of the issue group on Reducing the Burden and Increasing the Effectiveness of Mandated Disclosures with Respect to Employment-Based Health Benefit Plans in the Private Sector, asked Mr. Greenfield to review his group's recommendations. They were:

- The Department create a Safe Harbor whereby plan sponsors sending a quick reference guide in coordination with the Summary of Benefits and Coverage ("SBC") annually are not required to distribute the following:
  - An updated SPD every five (5) and ten (10) years
  - An Annual SAR,
  - A Summary of Material Modifications ("SMM") for the year, and
  - Any required annual notice not triggered by an event.

  The Safe Harbor would still require that:
  - The SPD must be formally updated every five years, as required by law.

  - An initial SPD along with applicable quick reference guides must be provided upon hire.
  - Although the SPD may be distributed in paper or electronically, a printed SPD must be available upon request.
  - Plan sponsors continue to comply with the SPD requirements with regard to content, uses or purposes.

  Additionally, the proposed Safe Harbor has no impact on other initial notices that by regulation may be included in the initial SPD, such as COBRA notices. Similarly, any changes to the SPD must be made in accordance with existing law and the changes highlighted in the Safe Harbor's annual quick reference guide. The annual quick reference guides must be archived or otherwise preserved and maintained to document such amendments.

- The Department provide a model quick reference guide, an example of which is in the Appendix to this report.

- Separate and apart from the first recommendation, the Department provide all welfare plans with a safe harbor for the SAR requirements, where the plan sponsor informs participants as to the annual report's availability as part of another plan notice.

- The Department allow the annual notices to be consolidated into one notice to be provided at the date of the earliest required notice or during open enrollment for the group health plan.

- The Council recognizes that the production and distribution of paper disclosures causes a significant portion of the burden. The Council recommends that the Department further explore the utility and effectiveness of electronic communications with the objective of reducing the burden on plan sponsors and improving communication mechanisms for plan participants.

Mr. Worsfold suggested the recommendations stipulate that the Guide should be distributed annually to participants. Mr. Greenfield raised the question of whether to harmonize the safe harbor language with the report on retirement plans. Mr. Stein said his group's proposal is to allow plan sponsors to choose between the safe harbor and continuing with the SAR. Ms. Haverland suggested each report could reference the other's approach. Ms. Mann said the recommendation should note that the safe harbor does not constitute a new requirement. Mr. Greenfield concluded the Council consensus was for each report to keep its approach and acknowledge the other report, and that he will work on wording to clarify that the safe harbor can be met either with a separate notification or as part of another notice.

Ms. Mann asked if the timing of the annual Quick Reference Guide has to be at open enrollment periods, and Mr. Greenfield said that timing makes the most sense. Ms. Tretheway pointed out the Council is asking DOL to allow this approach, so it is not a requirement. In response to a question about applicability of the recommendations to welfare plans, in addition to health plans, Mr. Greenfield said the report will include language that the Council focused on group health

plans. Ms. Haverland suggested adding that the Council does not know of barriers to applying the recommendations to other types of plans.

After some re-wording, the Council decided on the following revised recommendations:

- The Department create a Safe Harbor whereby plan sponsors distributing an annual quick reference guide (along the lines of the model described below) in coordination with the Summary of Benefits and Coverage ("SBC") are not required to distribute the following:
  - An updated SPD to satisfy the five (5) and ten (10) year requirements
  - An Annual SAR,
  - A Summary of Material Modifications ("SMM") for the year, and
  - Any required annual notice not triggered by an event.

  The Safe Harbor would still require that:
  - The SPD must be formally updated every five years, as required by law.
  - An initial, complete SPD along with applicable quick reference guides must be provided upon hire.
  - Although the complete SPD may be distributed in paper or electronically, a printed SPD must be available upon request.
  - Plan sponsors continue to comply with the SPD requirements with regard to content, uses or purposes.

Additionally, the proposed Safe Harbor has no impact on other initial notices that by regulation may be included in the initial SPD, such as COBRA notices. Similarly, any changes to the SPD must be made in accordance with existing law and the changes highlighted in the Safe Harbor's annual quick reference guide. The annual quick reference guides must be archived or otherwise preserved and maintained to document such amendments. The Council recommends the Department provide a model quick reference guide, an example of which is in the Appendix to this report.

- Separate and apart from the first recommendation, the Department provide all welfare plans with a safe harbor for the SAR requirements, in which the plan sponsor informs participants as to the annual report's availability either separately as part of another annual plan notice.

Separate and apart from the first recommendation, the Department allow the annual notices to be consolidated into one notice to be provided at the date of the earliest required notice or during the annual open enrollment period.

Next, the Council members discussed the electronic disclosure recommendation that both reports will include. Ms. Tully suggested the recommendation begin with what the Council is asking the DOL to do. Tazewell Hurst said the issue should be expressed as a reduction of costs, not burden. Mr. Reddy said the focus of the recommendation should be on improving communications, not the plans' burden. Ms. Tully supported that idea. Mr. Stein said he wants the recommendation to capture what the Council learned. Ms. Almeida questioned whether the

Council should include a recommendation on electronic disclosure at all. Mr. Stein and Ms. Scapino said the recommendation is necessary. Ms. Medill said electronic communication is more than the delivery method. Ms. Tretheway suggested that Mr. Reddy and Ms. Haverland, who have been working on this issue, re-word the recommendation and send it to each issue group chair for review ahead of the November meeting when the Council will finalize its reports.

Ms. Tretheway asked for public comments and there were none.

The meeting adjourned at 2:50 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

Washington, DC

November 7-8, 2016
Minutes of Meeting

The meeting was convened on November 7 at 1:05 p.m. by Council Chair Jennifer Tretheway, who turned the program over to Jeff Stein, the issue chair on the day's first topic, Reducing the Burden and Increasing the Effectiveness of Mandated Disclosures with respect to Employment-Based Health Benefit Plans in the Private Sector.

Mr. Stein read the draft of the Council recommendations:

1. The Department create a **safe harbor** whereby employee welfare benefit plan administrators distributing an **annual quick reference guide** (along the lines of the model described below) in coordination with the Summary of Benefits and Coverage ("SBC") are **not** required to **distribute automatically** any of the following:

- An updated complete SPD every five (5) or ten (10) years (as applicable).
- An annual SAR.
- A Summary of Material Modifications ("SMM") for the year.
- Any annual notice not triggered by an event required under part 1of title I of ERISA.

Note: the safe harbor would have no impact on other initial notices that by regulation may be included in the initial complete SPD, such as COBRA notices. Similarly, any changes to the complete SPD must be made in accordance with existing law, and those changes must be highlighted in the safe harbor's annual quick reference guide. Annual quick reference guides must be archived or otherwise preserved and maintained to document all modifications over time. Thus, the safe harbor would not change the following current disclosure requirements:

- The complete SPD must be updated formally every five years or ten years as applicable.
- An initial, complete SPD must be provided upon hire along with applicable quick reference guides since the complete SPD was last updated. This approach is currently required for SMMs. A printed SPD must be available upon request.
- Plan administrators must continue to comply with the SPD requirements with regard to content, uses, or purposes.

2. As referenced in the first recommendation, the Department develop and publish a model quick reference guide, an example of which is in the appendix to this report.

3. Separate and apart from the first recommendation, the Department establish an alternative method of compliance with the SAR requirements applicable to all employee welfare benefit plans, in which the plan sponsor satisfies the SAR requirement by informing participants of the annual report's availability either in a separate notice or incorporated in another annual plan notice required to be distributed under part 1of title I of ERISA

4. Separate and apart from the first recommendation, the Department permit the annual required notices to be consolidated into one notice that must be furnished either at the date of the earliest required notice or at the outset of any applicable annual open enrollment period for such employee welfare benefit plan.

Bob Lavenberg and Deb Tully asked whether the report recommendations apply to non-health welfare plans. There was discussion as to whether the term "welfare plans" includes "health "plans." Mr. Stein said the focus of the study was on health plans. He looked at references to "welfare plans" throughout the report. Marjorie Mann pointed out the use of "welfare plans" in the first recommendation. Mr. Stein agreed to change that and other "welfare plan" references to "health benefit plan." Also, the Council decided to add a footnote to the report's first mention of "welfare plan," in the Abstract, to explain the focus of the study was on health plans.

Cindy Levering suggested changing "upon hire," in the second bullet point of the first recommendation, to "upon initial eligibility" and that change was accepted.

Ms. Mann and Ms. Tully said the phrase "Separate and apart from" in the third and fourth recommendations was confusing. After some discussion, Mr. Stein suggesting substituting "In addition to" and that was accepted.

The Council next discussed recommendations on Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors. Issue Chair Deb Tully read the recommendations, which were:

1. Provide plan sponsors with the option to furnish a "Quick Reference Guide" annually to satisfy the requirement to distribute other mandatory disclosures, including the complete Summary Plan Description and the Summary of Material Modifications. The Quick Reference Guide would not eliminate the requirement to update the complete Summary Plan Description as legally required and participants would still be able to receive (1) the complete SPD upon initial eligibility and (2) an up-to-date copy of the Summary Plan Description upon request.

2. Simplify the Single Employer Model Annual Funding Notice to provide basic introductory information regarding funded status and key metrics, with all other information contained in an appendix to the notice.

3. Create an alternative means for compliance with the current requirement to distribute a Summary Annual Report to defined contribution plan participants by allowing plan administrators to notify participants about the availability of the annual Form 5500,

including instructions for how to access that filing. The alternative disclosure could be provided as a stand-alone notification, or be included as a part of other mandatory disclosure(s), including the proposed Quick Reference Guide, which is a part of the Summary Plan Description.

The Council discussed alternative wording for recommendation #1 as submitted by Mr. Stein and Doug Greenfield. After extended discussion, the Council changed the wording to partly reflect the submitted suggestions.

Both reports contained a similar recommendation regarding electronic disclosure, asking that the Department further explore the utility and effectiveness of electronic delivery mechanisms. The Council discussed whether the treatment of electronic disclosure should be in a section of the report or in the appendix. The members decided to follow the draft reports in that manner, even though it differs in each report.

The meeting resumed on November 8 at 9:10 a.m.

The Council decided to change the wording in several places in the slide presentation, including some corrections to conform to the language in the statute or regulations.

The Council members unanimously approved the recommendations from both reports. Also, the Council unanimously approved a motion allowing the Chair and Vice Chair to make clerical changes in the reports that do not affect the substance of the recommendations.

Ms. Tretheway asked if there were any comments from the public and there was one comment about the wording of one of the slides.

In the afternoon session, Deputy Assistant Secretary Timothy Hauser opened up to questions about EBSA developments and Mr. Stein asked about the status of the conflict of interest reexamination. Mr. Hauser said EBSA has sent to the Office of Management and Budget for final approval a proposal to extend the general applicability date of the rules previously promulgated. He noted some rules remain in effect, such as the impartial conduct standards, and stressed the need for plan sponsors to make good faith efforts to comply with those standards. Mr. Hauser said EBSA is reviewing submissions about the substance of the rule, such as alternatives to exemption conditions, and might act on those.

Ms. Tretheway provided background information that led to the Council's recommendations, including comments by witnesses. Mr. Hauser asked about the witnesses' request for flexibility. Ms. Tretheway said the flexibility they want is mostly about timing and delivery. Mr. Stein and Ms. Tully led the presentations of their respective issue group recommendations and background. Mr. Hauser asked several questions about whether participants would have sufficient information from the proposed quick reference guide, information that would be helpful in calling HR or a call center, given that sometimes the call center provides inaccurate information. Mr. Stein replied that the proposals are not intended to address faulty information from call centers. Mr. Greenfield added that at least with the guide, participants would know where to get information about their rights and plan protections. Mr. Hauser asked about the first part of the guide, which

has what he characterized as technical jargon. Mr. Stein and Mr. Greenfield explained that some witnesses said it was important to define terms at the outset. Mr. Canary asked whether any witnesses asked for at least a brief summary statement to replace the Summary Annual Report and the response was no. Mr. Canary asked whether the Council had considered that participants would not have all their SPDs as a reference if there was no longer a regular distribution requirement. Mr. Stein said the report includes a requirement for plan sponsors to maintain an archive of past SPDs which the participants can request. Mr. Hauser asked if the issue of fee disclosures arose. Ms. Tully and Mr. Worsfold explained there were some witnesses who mentioned it, but they had conflicting views and that came too late in the process for the Council to investigate the issue properly.

Labor Secretary R. Alexander Acosta thanked the outgoing members for their service and presented them with Certificates of Appreciation.

Ms. Tretheway asked if there were any comments from the public and there were none.

The meeting adjourned at 3:50 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5521 Room 4, Frances Perkins Building
Washington, DC
June 6, 2017

Minutes of Meeting

Council Chair Jennifer Tretheway called the meeting to order at 9:01 a.m. She turned the meeting over to Jeffrey Stein, chair of the Council issue on Reducing the Burden and Increasing the Effectiveness of Mandated Disclosures with Respect to Employment-Based Health Benefit Plans in the Private Sector.

The first witness was Professor Peter Wiedenbeck of Washington University School of Law, who has written extensively on ERISA disclosure issues. Professor Wiedenbeck urged the Council to keep four parameters in mind when evaluating the current state of mandatory disclosures. The first was the function of disclosure rules within ERISA's broad regulatory system. Specifically, he referenced several functions: to establish transparency to promote compliance with and enforcement of statutory obligations; to allow participants to get the most benefit from their plans by better planning their affairs; and to promote the exchange of ideas between participants and employers. The second parameter was the importance of making disclosures both understandable and reliable, with the SPD seeking to find a middle ground of optimal disclosure. The third parameter was the need for incentives for all parties – for the plan administrator an incentive to have a balanced drafting technique (not just a liability shield), perhaps through DOL guidance or participation in litigation – and employee incentives to encourage them to use and rely on information in an SPD. The fourth parameter was encouragement to learn from experience, particularly as related to electronic disclosure. Professor Wiedenbeck identified new opportunities as well as challenges related to electronic and digital disclosure. He said it is not viable for courts or DOL to review all disclosures, so DOL policy should encourage optimum disclosure, balancing legal protection and understandability.

Mr. Stein said full disclosure is impossible – plan sponsors cannot put everything in the SPD -- so why not emphasize the need for the SPD to be usable. Professor Wiedenbeck said that can be done through nested disclosure. Deb Tully asked how to create an incentive for plan sponsors to balance legal protection and understandability of disclosures. Professor Widenbeck suggested DOL could issue an Interpretative Bulletin or take a position in court arguments that overly lengthy SPDs aren't fulfilling the requirement to summarize. Mr. Stein asked if that would necessitate liberalizing the regulations, regarding plan sponsors having to identify plan provisions for each assertion, and Professor Widenbeck said yes. Doug Greenfield asked how to apply that framework, and whether nesting disclosure can be done in the paper realm. Professor Wiedenbeck answered that the document could be structured to emphasize the most relevant information in a simple way, followed by lengthier explanations, even on paper.

The first panel to present testimony consisted of Terry Dailey from Mercer, Brennan McCarthy of Willis Towers Watson, and Anthony Sorrentino from SilverStone Group. Mr. Dailey noted that employers are administratively burdened by disclosure requirements and that participants do not read or value the required disclosures. He recommended eliminating the Summary Annual Report (SAR) requirement for health plans that are currently required to file it, or requiring only those plans with contributions held in trust to file a SAR with revised requirements. He noted that consolidation and streamlining of notices would be an improvement, and encouraged the use of model notice language. Regarding the SPD, he testified that permissive use of an executive summary/quick reference guide with links to more detailed information would be more effective and easier for plan sponsors to maintain.

Brennan McCarthy testified that to get the most value from communications, you need to reach employees where they are, both in terms of content and delivery. He noted that most Americans can receive information online, and prefer to receive information as a hierarchy of highlights and more detailed information accessible as needed. Mr. McCarthy noted that the various timing requirements of current disclosures are burdensome, and that employers currently ignore the safe harbor electronic disclosure rules and go outside the box. He recommended that notices be consolidated and timing aligned; that the e-disclosure safe harbor rules be broadened; that a SPD-at-a-glance document be required; passive consent be allowed for electronic receipt of documents; plan sponsors be empowered to use technology to make disclosures more accessible; and that any shift in approach be tested through focus groups or surveys before implementation.

Addressing the proposal to eliminate the SAR, Anthony Sorrentino testified that the information currently included is largely misunderstood, and could be incorporated into other documents where relevant. He noted that various disclosures could be consolidated for ease of administration and reduction of cost, and would be more likely to be read and understood by participants. Mr. Sorrentino further said that SPDs are not readable, and that they are not summaries, but rather legal shields. He also discussed the results of his polling of six of his firm's mid-to-large sized plan sponsors regarding disclosure issues.

Mr. Stein asked the panel whether the current electronic disclosure rule was helpful. Mr. McCarthy responded that to better communicate with participants you would need more electronic disclosure and improved content. Elizabeth Leight asked if they would rather have an SPD or the summary SPD that has been discussed. Mr. Sorrentino and Mr. McCarthy both would prefer an SPD summary with links to more detail. Mr. Dailey agreed that plan sponsors would still need to provide all the information, but could eliminate the distribution requirements on the full SPD and provide detail using links. Mr. McCarthy proposed centering the disclosures around life events, and if paper disclosure was necessary to provide a two to four page summary with references to locations to get more info. He felt that there is value to a paper SPD as long as it is made more user-friendly and acts as a roadmap. Colleen Medill asked about plan sponsors' experience with communicating with participants by smartphone. Mr. McCarthy said some sponsors ask participants if they want to opt in to text messages, which can have links to microsites for more information. In response to a question about revisions to SARs from Doug Greenfield, Mr. Dailey said it would be helpful if the SAR told participants whether or not the plan had sufficient funds to pay claims. Bob Lavenberg asked whether they tailor disclosures to the particular client plan's participants or to a universe of participants. Mr. McCarthy said they do customize disclosures, and offered as an example a client that had

requested information be conveyed at a 5th grade level as opposed to the 7th or 8th grade level that is more commonly used. Mr. Lavenberg asked when using customized disclosures, what topics do the panelists typically focus on. Mr. McCarthy noted consumer directed health care. Mr. Dailey agreed and mentioned high deductible health plans and health savings accounts, which are less expensive for the employers, and Mr. Sorrentino mentioned pharmacy benefits.

Next, the Council heard testimony from Mark Buckberg of Bond Beebe, an employee benefit plan audit firm. Mr. Buckberg's firm supports the proposal to eliminate the SAR for health plans that are not already exempt from the filing requirement. He stated that the SAR is not useful to the average participant because it is outdated by the time participants receive it, and because the content is not provided in language that the average participant would find easy to use. He also noted that the financial information in the SAR can be found in the plan's Form 5500, which is available online, and suggested that perhaps it would be better to educate participants on where to find this information if they would like it. The financial information that really matters to participants is whether their company can pay claims, or information on the insurance company's financial health. Mr. Buckberg added that his comments that the SAR is not helpful also apply to retirement plan SARs. In addition, he stated that the investment fee disclosures are similarly not useful to participants. Regarding the SPD, Mr. Buckberg stated that it is useful from an audit perspective, but not as a timely document.

Mr. Greenfield asked whether the SAR tells participants that the plan is being administered as intended. Mr. Buckberg indicated that a plan's financial statement is audited, but that there is not a requirement for auditors to provide information about the audit to participants. In response to Mr. Greenfield's follow up question on making a more robust SAR, Mr. Buckberg said that there is more useful information (such as net reserves) that is more relevant, and restated that getting information into participants' hands sooner would be more helpful. Rennie Worsfold asked for recommendations for more useful fee disclosure. Mr. Buckberg recommended giving information on net return. Colleen Medill asked how quickly information can be gathered realistically. Mr. Buckberg replied that it varies from plan to plan, but that he does think it can be done sooner. He thinks most plans can get a SAR out now in 3 months, but that it would be based on unaudited information. When asked about employee engagement by Sri Reddy, Mr. Buckberg noted that engagement comes when people need information. In response to a question from Jeff Stein, Mr. Buckberg said that participants need to know if the plan is going under, or if their premiums are going up. He also suggested that participants be surveyed to find out what they need and want to know.

The next panel to testify included Linda Duvall of Associated Administrators, Elizabeth Queen of Central Data Services, Kevin Schlotman of Benovation, and Sanford Walters of Kelly & Associates Insurance Group. Mr. Schlotman testified first. His firm acts as a healthcare third party administrator (TPA) for single employer plan clients. He noted that most people don't read what they receive, but rather contact the plan administrator when they need information. He believes the SAR is not useful, and that the SPD, while intended to be short and helpful, is now filled with legalese due to litigation and regulatory requirements. He indicated that consolidation of notices would simplify matters for participants and improve efficiencies for plan sponsors. He also testified that the electronic safe harbor should be simplified; SBCs do not achieve their purpose; and that the proposed Schedule J update is onerous and confusing.

Elizabeth Queen, whose TPA firm serves Taft Hartley plans and retiree VEBAs, said VEBAs typically have a finite amount of funding, so the cost burden of regulatory compliance and mandated communications falls on participants, because these funds are not available to pay benefits. Ms. Queen supports the elimination of the SAR, but believes that participants should have access to the full financial report if interested. She suggested this could be accomplished with a post card that references its availability. She believes the consolidation of notices would be helpful, and urged the DOL to create a single document/website to convey the required information to ERISA plan participants. Ms. Queen also suggested that certain notices be sent only when relevant, i.e. a WHCRA notice after a diagnosis of breast cancer or Newborns' Act notice upon pregnancy. She believes a searchable SPD would be more helpful, and advocates the mailing of postcards listing available resources, rather than the costly current disclosures.

Linda Duvall, representing a TPA firm serving multiemployer Taft Hartley plans, agreed with her fellow panelists' testimony, noting that it is a waste of money to produce notices that participants throw away, only to call her firm when they need information. She supports the elimination of the SAR and the synchronizing of compliance dates so that participants could be sent a single annual notice in the form of a postcard or newsletter which would tell them where to access more information if they should wish. On the SPD, she believes digital format would be less costly to produce and easier to update; and it would be more user-friendly because it would be searchable, and could be enhanced with informational pop-ups and links to other websites, information, and forms.

Sanford Walters of Kelly & Associates testified next. His clients are primarily fully insured self-funded health plans. He noted that the electronic disclosure safe harbor should be updated to allow a good faith compliance distribution level. He believes that use of postcards to advise participants of certain information is a great idea, as it helps to direct them to what they need. He noted that all of the required information is important, but that it is important only when participants need it. With regard to the SAR, Mr. Walters believes that for fully insured plans, it has no benefit. For the proposed Schedule J, he noted that small employers won't be able to answer the questions, and the added burden of the Schedule J will give employers a reason to question why they even have a plan. He also noted that only plan insurance carriers will have the required information for the Schedule J, and that plans have difficulty getting required information from insurers. He also testified that when counting participants to determine required reporting for wrap plans, plan sponsors should look at the individual benefits offered, rather than the entire number of people receiving some benefit under the plan. For example, a wrap plan with a combination life insurance and medical might have 100 participants covered by the life policy, but only 30 receiving medical benefits. He argued that plan sponsors should not have to comply with the larger plan requirements just because of the wrap.

Mr. Stein asked Ms. Duvall about the contents of the quarterly newsletter her company creates for plans. Ms. Duvall noted that their Board of Trustee clients decide if they want to use that format, and if so, they include required notices and other things participants want or need to read (health articles, logistical information). In response to a follow up question from Mr. Stein, she also said that participants call mainly about eligibility questions, adding dependents to coverage, and finding out what is covered. Mr. Stein asked the panelists what website information they find most effective. Mr. Schlotman noted benefits and cost-sharing information, and Mr. Walters added links to networks, formularies, and PBM information. Ms. Leight asked whether electronic postcards sent to smartphones would be useful. Mr. Walters

noted that the current distribution rules would not allow this; Ms. Duvall mentioned that the purpose of the postcard is to get participants' attention, not replace required information; and Mr. Schlotman added that it should be used to alert participants to something they need to know. When asked by Ms. Medill about the most effective way to get participants' attention, Mr. Walters said during open enrollment his firm uses emails and texts frequently, and Mr. Schlotman similarly noted that electronic enrollment and communication is easier to track and more effective for follow up. Mr. Greenfield asked whether there is usefulness in the SAR in the VEBA world, and Ms. Queen responded that if you could replace the information with some measure of the plan's survivability, and provide context for the information, it could be. When asked by Ms. Leight about "nesting" in online documents, Mr. Walters noted that his firm uses nesting and it allows them to track to see who is opening documents; Ms. Duvall advocated for SPDs that are searchable with hyperlinks; and Mr. Schlotman noted that easing of regulatory requirements would make nesting more prevalent.

The final witnesses of the day were Mary Ellen Signorille and Michele Varnhagen, representing AARP. Ms. Signorille began by noting that one of the purposes of required disclosures is to allow participants to help police their plans. She testified that disclosures should be short, meaningful, and easy to understand, with terms that are defined and resources for more information listed. Using tools such as bold, underlines, charts, etc., as well as how text is laid out, is helpful in conveying information. Testing is crucial to determine if you are successful in conveying information. With regard to the SAR, she noted that AARP agrees it is not useful, but that the discussion should be how to make it useful rather than whether to eliminate it. She believes consolidating notices would be appealing, but that you would need a table of contents with a short description directing participants to notices relevant to them, as well as prominent language advising them to keep the disclosures for future reference. Ms. Signorille was troubled by the SPD at-a-glance idea because its addition would mean there were 4 plan or summary documents, further exacerbating the problem of inconsistencies among them.

Ms. Varnhagen noted that when something goes wrong, the SPD is crucial to the plan, participants, and the employer, but retirement plan participants do not get SPDs very often. She said people do need to know the vesting and eligibility criteria for the plan, and encourages the DOL to produce more models and summaries for plans to use. Ms. Varnhagen does not think the SAR gives much information, but she does note that it is the main document that advises participants about the Form 5500. If the SAR is eliminated, she believes that requirement should be added to another disclosure. With regard to electronic disclosure, AARP believes the current rules work, and noted that their surveys still indicate that people want paper disclosures.

Mr. Stein asked how to improve the quality of communications to get people what they want and need when they need it. Ms. Signorille said the answer depends on the plan's employee demographics, i.e. that what works best for larger employers won't work as well for smaller employers. Ms. Medill asked how to resolve the tension between making disclosures readable and the concern over litigation risk for information that is not precisely written. Ms. Signorille responded that employers will continue to be sued and that there really is no way of avoiding that. Ms. Tully asked if there would be value to having a quick start guide at the front of an SPD possibly noting life events. Ms. Signorille thinks it could be helpful since it would be the first thing participants see. Ms. Levering asked about the various numbers contained in annual funding notices generated by using competing interest rates. Ms. Varnhagen noted that she is sure the information is confusing to participants, and said her belief is that participants choose to

believe the better numbers. Mr. Greenfield asked how to improve the SAR. Ms. Signorille responded that including an indication of whether salary deductions are being used to pay premiums would be helpful.

Ms. Tretheway asked for public comments and there were none.

The meeting adjourned at 4:35 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5521 Room 4, Frances Perkins Building
Washington, DC
June 7, 2017
Minutes of Meeting

Council Chair Jennifer Tretheway called the meeting to order at 9:01 a.m. She turned the meeting over to Deborah Tully, chair of the Council issue on Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors.

The first panel to present testimony consisted of Michael Hadley, Davis & Harman, and Scarlett Ungurean, ABA Retirement Funds, who was accompanied by Rebecca Chandler, Voya, on behalf of ABA Retirement Funds Program. Michael Hadley said current law imposes significant barriers to making electronic delivery the default method of disclosure. Any one of four different IRS or DOL standards can apply. For much information, plans must sign up each participant individually for electronic delivery and obtain affirmative consent. He recommended eliminating the Summary Annual Report (SAR) for defined contribution plans, saying it does not provide useful information and participants now receive much more useful information in the quarterly benefit statement. Mr. Hadley said DOL has flexibility to eliminate or streamline the SAR without the need for legislation. Section 104(b)(3) of ERISA gives the Department flexibility to require only the information that is actually "necessary" in light of the additional disclosures participants receive. He said DOL should amend the SAR regulation to provide that the SAR obligation in a defined contribution plan can be satisfied by informing a participant of the his or her right to receive a copy of the full annual report. Mr. Hadley suggested consolidating all notices provided at enrollment and annually into a single "Quick Start" notice and explained what that should contain. He pointed out that the vast majority of disclosures provided by the federal government's Thrift Savings Plan are now electronic by default.

Scarlett Ungurean said plan sponsors adhere to safe harbor formats regardless of usefulness of layout or information for participants. She said periodic (annual) communications do not mean that the communications are more useful to participants, and it is more likely that a participant will read a shorter disclosure. Also, she said the Summary Annual Report (SAR) for a defined contribution (DC) plan is confusing and does not provide any valuable information for a participant, and the same information, included in the plan's Form 5500, is publicly available through the DOL website. Ms. Ungurean recommended (1) authorizing one government agency to manage all participant-related disclosures; (2) reconsidering the frequency of the QDIA notice; (3) sending a SMM only if plan changes have financial implications for participants; (4) issuing disclosures in "just-in-time" fashion; (5) issuing the SPD to coincide with a participant's life stage or other key event; and (6) eliminating the SAR requirement for DC plans.

Ms. Tully asked about the call center's experience with participants' reactions to disclosures. Ms. Chandler said it helps to offer a course of action so participants know what to do with a

disclosure. Council Chair Jennifer Tretheway asked about the mix of paper and electronic disclosures, and Council member Bob Lavenberg asked about the cost of paper disclosures. Ms. Chandler said the mailing costs alone can be $50,0000/ year, and that participants usually pay for the SAR, which they find useless. Stacy Scapino asked if they thought a quick start guide would be useful. Ms. Ungurean said sponsors do not want to have to produce and mail another document. Mr. Hadley said he is suggesting a quick start guide in place of existing notices, not as an added notice. Mr. Lavenberg asked if sponsors are growing frustrated with the administrative burden of plans and switching to IRAs. Ms. Chandler said she sees that with small businesses. Douglas Greenfield noted the SAR is intended to help participants police their plans. Mr. Hadley said for defined contribution (DC) plans, there are other mechanisms for that and SARs do not provide an accurate financial picture of the plan. Ms. Chandler said the expenses shown in the SAR are not inclusive, that the Form 5500 filings are better for that. Ms. Scapino said the Council heard the day before that there are delays in getting access to the 5500 filings. Ms. Chandler disputed that. Beth Almeida noted testimony the Council heard last year that it is not always easy to identify the particular 5500 filing participants should search. Ms. Chandler said most participants are not interested in looking for a 5500 filing, those who are can find more useful information elsewhere, and the plans could notify participants how to identify their 5500.

Ms. Scapino asked if electronic delivery is through emails only or also smart phones. Mr. Hadley said there are fast moving developments to create smart phone access to the information. Mr. Lavenberg asked if plans make changes because of the SAR, and Ms. Chandler said no. Jeffrey Stein asked if electronic delivery would solve the problem of having to send the SAR annually. Mr. Hadley said the notice still is not useful to justify burdening plan sponsors and inundating participants. Rennie Worsfold asked how to make fee disclosure useful to participants. Ms. Ungurean said it should be a snapshot in time, provided at least annually.

Next, David Godofsky of Alston & Bird and Alison Salka of LIMRA testified. Mr. Godofsky said it is harmful to provide too many notices to participants, because they become trained to think of mandated disclosures as “junk mail.” Very few employees read the disclosures, and those who do read them do not understand them. He said disclosures would be more effective if an employee could receive a single package each year, and electronic disclosures are more useful because they are searchable. Mr. Godofsky suggested for defined benefit plans, allow all notices to be given at a single date in the year, elected by the plan sponsor. For defined contribution plans, he would still require quarterly statements and otherwise impose reasonable restrictions. Mr. Godofsky suggested disclosures that are duplicative, such as the AFN, fee disclosure, QDIA notice, safe harbor notice, and QACA notice should instead refer participants to the SPD. He said the AFN contains information that is not only confusing and misleading, but often directly wrong. Mr. Godofsky recommended a number of relief measures, including: (1) allow the end of year funding estimate to be calculated on the same basis as the beginning of year liability number, (2) allow the plan sponsor to use any reasonable basis to compute the liability, (3) do not require disclosure of investment policy, (4) allow a plan sponsor to shorten the notice by eliminating any information that is provided in the SPD or a different disclosure (other than the funding percentage), (5) emphasize the funding percentage by showing it only as a percentage, and (6) clarify that share class changes and any other changes that merely reduce fees do not require advance notice.

Dr. Salka said the LIMRA Secure Retirement Institute has conducted research that provides information on participant understanding relative to DC plan fee disclosure. The research found that one in five DC plan participants rarely or never read retirement plan disclosures. Of those who claimed to read these disclosures all or some of the time, half said they spent only two to five minutes doing so. Few participants reported taking action based on disclosures. Only 12 percent of DC participants were able to estimate their fees. The study recommended shifting focus from the amount of information created (outputs) to the amount of information participants are likely to retain (outcomes).

Ms. Tully asked Mr. Godofsky if the AFN changes he recommended required a statutory change and he said no, because the statute does not stipulate a method of delivery, allowing plan sponsors to deliver the information in the AFN in other disclosures or links. Cindy Levering noted that some AFNs provide information on lump sum options. Mr. Godofsky said plan sponsors would have to disclose any material changes. Mr. Worsfold asked what actions participants might take based on information in the AFN. Mr. Godofsky said he expected they would take action only in rare events of substantial drops in the funding percent for a plan. Ms. Almeida asked if there should be forward looking notices to help participants anticipate problems. Mr. Godofsky said multiemployer plans have unions, whose staff knows where to get information, and that forward looking calculations would not be applicable for single employer plans. Sri Reddy asked for an explanation of why young workers are more likely to read disclosures, according to Dr. Salka's testimony. She said they're newer to the work force and more interested in learning. Mr. Reddy asked what the main target should be for information in disclosures. Mr. Godofsky said not the very few who want very detailed disclosures, because they can find ways to obtain the information and details overwhelm most participants. Mr. Reddy asked how to create a comprehensive disclosure for average participants. Mr. Godofsky said one way is to lead with a Q&A section, as many plans do. Mr. Greenfield asked for a burden analysis. Mr. Godofsky said his proposal for the AFN would reduce burdens and still provide participants with necessary information, that the current AFN is too confusing and not useful.

Bill Rubidge of Mercer, plus Brigen Winters and David Levine of the Groom Law Group, presented next. Mr. Rubidge said disclosures burden sponsors, which can discourage small employers from providing benefits. He said DOL should provide models for structure, content, and safe harbor language, and consider allowing the annual funding notice and the annual personal benefits statement as one required notice. Disclosures that announce plan changes should provide participants sufficient advanced notice to take appropriate actions. He made specific recommendations for writing style, structure, navigation, content, and delivery of disclosures.

Brigen Winters & David Levine, Groom said the AFN requirements and model notice should be substantially shortened and tightened up to provide plan participants only with relevant, understandable information. The current model notice includes asset values and funding percentages that are based on the actuarial value of assets. The notices should simply contain the current market value of assets. They said the asset allocation chart in the model notice should be simplified and the discussion of plan terminations and the PBGC in the AFN should be greatly scaled back, by at least 50 percent, to a shorter summary of the termination rules and a much shorter summary of the PBGC guarantee rules. As currently structured, they said the SAR is not valuable to participants and the disclosures contained therein are not material to a

participant's understanding of the plan. They recommended (1) DOL allow the integration of annual notices into a single combined SPD-notice document that would address default investments, plan fees, and the various SPD requirements, provided once a year; (2) DOL allow plan administrators to rely on the IRS rules governing electronic disclosure; (3) a progressive access regime, under which participants are first furnished with simple, fundamental information via email communications plus instructions on how the participant can access additional plan information; and (4) DOL use its regulatory flexibility to change the timing of notices.

Ms. Tully asked how summary plan descriptions (SPDs) can be more effective in light of plan sponsors' liability concerns. Mr. Rubidge suggested DOL provide models, even though that might stifle innovation and there is difficulty in agreeing on an ideal model. He said electronic disclosures help by allowing participants to search for what they want. Mr. Levine suggested DOL take court positions that plan documents control, not the SPD. Mr. Greenfield expressed his concern that a quick start guide would add to sponsors' burden and complicate the controlling document debate. Mr. Levine said DOL itself sometimes provides guidance with further information on demand, and that sponsors can reduce liability with clear wording on where participants can obtain more information. Mr. Greenfield asked how to make the SAR more useful. Mr. Winters said the SAR does not have much useful information. Mr. Levine added that the SAR could be transformed into a quick start guide.

Ms. Scapino asked how the timing of disclosures affects the SAR. Mr. Rubidge said what is needed is a Summary of Material Modifications (SMM) available online for search. Mr. Stein asked if many plans already use electronic communications outside the requirements for disclosures and suggested DOL could (1) change its audit procedure to look at the entirety of communications and (2) ease stringent rules for claims procedures. Mr. Rubidge said his firm prepares clients for audits by analyzing whether they are meeting standards and goals. He suggested audits of plans should focus more on goals. Mr. Levine said he liked the idea of a comprehensive approach instead of a check-the-box approach, but DOL would have to provide guidelines and examples to investigators. He added that reducing liability risk is difficult. Mr. Lavenberg asked is sponsors base decisions on the timing of disclosures. Mr. Levine acknowledged that the timing of notices have unintended consequences. Colleen Medill asked if participants tend to ignore disclosures if they receive too much information. Mr. Rubidge said the solution is to organize the information better.

The Council heard from James Gelfand and Will Hansen of the ERISA Industry Committee (ERIC) on the health and welfare and retirement disclosures, respectively. Mr. Gelfand said health benefit plans should no longer be required to furnish SARs to beneficiaries. He said there are many other disclosures and forms that employees receive that can help them understand their benefits, and if they need data about their employers' or their plans' finances, there are appropriate avenues for those to be obtained as well. At the least, he said DOL should suspend the SAR requirement for health benefit plans, which he characterized as a waste of time and resources, and see if any complications arise as a result. Mr. Gelfand recommended that DOL conduct a comprehensive review of all DOL's exclusive as well as multi-agency beneficiary disclosure requirements and ask questions such as (1) would this information be useful to most beneficiaries, (2) what are the pros and cons of providing this information, (3) is this the only requirement that asks for this information, or is the same information required to be furnished

multiple times, and (4) how likely is this information to confuse beneficiaries. If the SPD was to be reimagined as a reference tool that guided plan participants to appropriate "source materials," it would be critical that these reference materials were relied upon by the courts to explain the scope of benefits and requirements under a plan. He said participants do not use the Summary of Benefit Changes (SBC).

Mr. Hansen said DOL should review the cost impact to the plan sponsor of any proposed changes to current disclosures, and that the totality of disclosures is burdensome. He said the SAR does not provide needed information and the information could be provided elsewhere. Mr. Hansen said the SPD is a key document that could accept information from other required disclosures. The creation of a Summary or Quick Guide, he said, would be effective only if it was not deemed by the courts as a controlling document –it should be in place of the SPD. Plan sponsors are fearful of making any alterations or additions to the SPD outside of recognized case law and the regulations that control SPDs. Mr. Hansen said DOL should eliminate the AFN or provide guidance to make it less confusing and the SMM represents a document that could easily be incorporated into other communication materials, resulting in more effective communications at lower cost. He said the participant fee disclosure is not typically presented in a manner that assists a participant in selecting the right investments. He said distribution rules that favor electronic dissemination would provide a plan sponsor with the flexibility to enhance the disclosures to include interactive features that could help participants understand the materials.

Mr. Stein asked about the quick start guide. Mr. Hansen said it would necessitate a new document, and the SPD was intended as a summary. Mr. Greenfield asked about having a quick start guide and using the SPD only as a reference, with no requirement to distribute it. Mr. Hansen said that still carries the burden of preparing an additional document. Marjorie Mann asked about the timing of SMMs and whether they are needed. Mr. Hansen said most large plan sponsors notify participants quickly about any changes and SMMs could be eliminated only if the information they provide goes into SPDs. Elizabeth Leight asked about a postcard mailed to participants with links to information. Mr. Hansen said he would support that idea, especially if participants can opt out of receiving the postcard and state a preference for e-mail. Ms. Tully asked whether fee disclosures are driving fund choices, such as a reluctance to change funds if that requires sending more notices. Mr. Hansen said there might be some hesitancy in plan committees, but sponsors probably are more concerned with possible lawsuits.

Jane Smith of the Pension Rights Center (PRC) suggested DOL draft introductory information for all required disclosures that would answer the following questions: (1) what is this, (2) why am I receiving it, (3) what do I do with it, if anything, (4) will this affect my current or future benefits, and (5) whom do I contact at the plan or EBSA with a question. Also, she recommended DOL make available to plan sponsors introductory paragraphs for each required notice in language understandable to the average participant. To do this, she suggested EBSA contract with communication experts to write plain language introductory paragraphs and model notices. For SPDs, the introductions should emphasize the need to keep the SPD with permanent records and advise participants to notify the plan administrators of any changes of address or family status. Furthermore, circumstances that could cause a participant or beneficiary to lose benefits should be presented at the beginning of the SPD. Ms. Smith endorsed the idea of a Summary/ Quick Start Guide. Also, she recommended that EBSA write a fact sheet for the "Compliance Assistance" section of the website that would summarize the

requirements for SPDs and post a complete list of required disclosures from all agencies, DOL, IRS and PBGC, in one place on the EBSA website. Annual notices should be delivered at the same time every year. She said since required disclosures impart important plan information, they must be delivered in a manner that guarantees receipt. Internet porting of disclosures can be helpful to some participants, but that should not be a substitute method of delivery. She said SPDs and benefit statements should be delivered only by first class mail unless a recipient opts-in to electronic disclosure. Ms. Smith noted that some participants complain that SPDs do not have all the details they need.

Ms. Tully asked if participants complain about the complexity of just one or two notices. Ms. Smith said no, but recently the big complaint has been about funding notices, because participants find them upsetting and confusing. Ms. Levering asked if she supports the elimination of the SAR, and Ms. Smith said no because it is the only way participants can keep up with plan finances. Ms. Levering pointed out that the SAR is not relevant to the individual accounts of DC plan participants, and Ms. Smith said she would follow up with a response. Ms. Almeida asked whether the PRC's pension counseling project tracks calls in a way that would show what participants are calling about, and Tazewell Hurst asked if PRC has information on people who receive electronic disclosures but prefer paper. Ms. Smith said she would provide follow up information on those questions as well.

Ms. Tretheway asked for public comments and there were none.

The meeting adjourned at 4:15 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5521 Room 4, Frances Perkins Building
Washington, DC
June 8, 2017
Minutes of Meeting

Council Chair Jennifer Tretheway called the meeting to order at 9:00 a.m. She welcomed Deputy Assistant Secretary for Program Operations Timothy Hauser, who noted that DOL soon will publish a notice seeking nominations for five Council positions that are open in 2018. He said EBSA welcomes input on nominations from Council members.

Mr. Hauser presented an update on EBSA actions since the March meeting, starting with the status of the conflict of interest (COI) rule. He summarized provisions of the rule which were about to take effect. He said DOL will welcome input on the industry's experience in applying the rule. The EBSA focus will be on helping firms get into compliance with the new rule. Mr. Hauser said DOL received several thousand comments in response to the recent notice triggered by the White House memorandum directing DOL to re-examine the rule. He said he expects DOL to issue a request for information (RFI) soon to ask about alternative approaches to meet certain requirements, especially contract requirements.

Mr. Hauser also commented on state initiatives to establish automatic savings arrangements, noting that DOL's rule last year sought to remove the ERISA preemption barrier to those initiatives. He said DOL will publish a notice repealing the guidelines, following congressional action that nullified the rule.

Council member Cindy Levering asked for reaction to proposed legislation on lifetime income disclosures. Joe Canary, Director of the Office of Regulations and Interpretations, said EBSA is working on a proposal on lifetime income based on comments received in response to its RFI on the issue. Jeff Stein asked about the status of EBSA work on electronic disclosures for benefit plans. Mr. Hauser said EBSA is awaiting the appointment of an Assistant Secretary to lead on the issue, but he thinks there is a likelihood EBSA will work on that. He said it is up to the Council whether it wants to make recommendations about electronic disclosure. Mr. Canary said to the extent the Council does so, it would be useful to explore how the technology used for disclosures in the financial services sector might relate to benefits disclosures. Rennie Worsfold said the Council is looking for ways that DOL can rein in overly detailed SPDs and witness testimony at the Council's meeting suggested DOL file amicus briefs on Summary Plan Description (SPD) cases to clarify the need for making the SPD understandable. Mr. Hauser said the amicus program ensures EBSA is a participant in relevant cases, but is not a good way of setting policy. He added that technology could offer a workable solution to the conflict between making SPDs complete, legal statements of the plan provisions and the need for simple explanations for participants. Also, Mr. Hauser said there is fairly broad regulatory authority on SPDs and EBSA is open to suggestions.

Mr. Stein cited testimony from witnesses that plan sponsors are using add-on communications to participants outside of the disclosure requirements and would prefer that DOL not impose rules for those communications. Mr. Hauser said if mandated disclosures are not easily understood and effective, that is a problem that should be addressed, irrespective of other communications.

Beth Almeida asked about any interplay between the Summary Annual Report (SAR) and form 5500 filings. Mr. Canary said the question is whether summarizing the 5500 information is the correct approach for the SAR. Deb Tully noted concern with statutory constraints on changing the Annual Funding Notice (AFN), among other notices which the Council is considering. Mr. Canary suggested the Council look for ways of providing information to participants that will meet the AFN requirements. Bob Lavenberg asked if there is statutory flexibility on specific deadlines for notices where the Council is considering consolidation of notices to simplify the stream of notices for plan sponsors and participants. Mr. Canary said EBSA is open to ideas on timing of notices.

Next, the Council members discussed what they have heard from witnesses so far and what other testimony they need for their reports.

On the health and welfare disclosure, Issue Chair Jeffrey Stein commented that the Council cannot avoid the issue of electronic disclosure completely, and proposed the Council use an overlap team from both issue groups to propose guidelines on electronic disclosure ~~that~~, possibly to be passed along to a future Council for consideration.

The members summarized solutions and best practices for SPDs, SARs, and miscellaneous disclosures. They discussed testimony that SPDs no longer are summaries. As for SARs, with the exception of testimony from AARP and the Pension Rights Center, almost nobody found them useful, at least in their current form. For other notices, the testimony suggested sponsors need simple model language for a comprehensive notice.

Stacy Scapino proposed four criteria for the Council to evaluate the issues being studied – (1) Timing, (2) Relevance to participant (i.e. whether the disclosure is generic in form or participant focused); (3) Level of clarity for audiences; and (4) Delivery mechanisms. Doug Greenfield agreed that this was a good framework for addressing the three proposals that the witnesses were asked to comment on.

Members commented that event based notices are difficult to address, suggesting a focus on other notices. The Council could recommend notification annually of availability of disclosures, with links and directions on how to obtain the notices. There was a comment on the need to examine each disclosure to ensure that any consolidation or switch to reference only does not conflict with statute. On the SPD, if recommending the indexing approach as the plan deliverable, there is a question of how to satisfy the standard of being both more beneficial to participants and a lower burden to sponsors. The members decided to look to other agencies for models/processes -- for example, the proxy streamlining process -- as they develop August witnesses, possibly including the SEC. On the desirability of targeting of notices, there was an

acknowledgement that the approach would have benefits but it raises HIPAA and other privacy concerns.

On retirement plan disclosures, issue chair Deborah Tully said the main issues could differ according to the type of plan (defined benefit, defined contribution, multiemployer plans), but essentially are (1) Fee disclosure – participants might not be using the disclosure correctly, and there is a need to balance the plan sponsor burden with usefulness; (2) Modifications of AFN – the Council could offer an example; (3) SAR, focusing on the value to participants; (4) SPDs, which retirement plans do not need to update as often as health and welfare plan SPDs; and (5) Timing of disclosures.

There was interest in (1) the idea of targeted participant disclosures, keeping in mind specific audiences, including the policing goal; (2) consolidation of other disclosures, e.g. SMMs; (3) approaches such as a quick start guide, though it should be consistent in both reports, or explain why not; (4) considering the impact of shifting the onus for obtaining information to participants, and any potential pitfalls; (5) suggesting best practices and letting DOL decide what to do with them; and (6) defaults that allow participants to access information how they want.

The Council members discussed the need for testimony on multiemployer plans and from communications/ behavioral witnesses, who could comment on how participants digest information, including generational differences, and how to provide flexibility for plan sponsors to provide disclosures in an appropriate manner for their participants. Also, the members concluded they should establish a fact base for recommendations, rather than rely on anecdotal information.

There was one public comment, by Jan Jacobson of the American Benefits Council. She noted that witness Michael Hadley had testified on behalf of SPARK, and that SPARK had conducted a survey on the usefulness of paper versus electronic disclosures. She said the Council might want to request the survey information.

The meeting adjourned at 11:35 a.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5521 Room 4, Frances Perkins Building
Washington, DC
August 14, 2018
Minutes of Meeting

Council Chair Cynthia Levering called the meeting to order at 1:10p.m. Ms. Levering turned the meeting over to Bob Lavenberg, chair of the Council issue on Evaluating the Department's Regulations and Guidance on ERISA Bonding Requirements and Exploring Reform Considerations. Mr. Lavenberg noted that anecdotal information received by the issue group thus far indicates that there really is not much of a problem with the fidelity bond statute and regulation. To the extent that there are issues, they seem to be centered on compliance, particularly in the small-plan arena.

Doug Greenfield, vice chair of the fidelity bonds issue group, also noted that the group was unable to find evidence of a problem within the marketplace. They found that bonds do not seem to be a focus of sponsors of small plans, so there is likely a significant number of small plans that don't comply. He then summarized specific findings made by the issue group.

- The Council did not receive evidence that bonds were not covering what the statute required, i.e. losses due to acts of fraud and dishonesty that were committed by plan officials who handle money or other property of the fund. He noted two barriers to getting underwriting data on this point – the proprietary concerns of insurance companies issuing bonds and the lack of a national data bank. There was also no testimony on the record indicating that policies failed to cover what was required. He stated that recent DOL investigations resulted in changes to specimen fidelity bonds. Although DOL never indicated to the Council that it was satisfied with the settlement, the issue group could not determine whether anything else was necessary, nor find losses that were not covered.

- The Council did not receive evidence to suggest that plan officials failed to cover every entity required to be covered by the fidelity bond. They did see evidence that some plans did not have bonds at all and thus were not covering anyone. Mr. Greenfield noted that since bonds seem to be completely available and relatively cheap, the Council is led to infer that the only reason for lack of coverage is lack of awareness. Mr. Lavenberg added that the DOL data from Form 5500s indicated that the plans that did not have a bond or that appeared to have an inadequate bond were the smaller plans. Informal discussions with brokers also indicated that those advising small plans may themselves not understand the rules.

- The Council did not receive evidence that plans were sustaining losses due to fraud and dishonesty by plan officials who handle plan money or other property that exceeded the mandatory minimum amounts of coverage. Although over 40 years has passed since the limits were established, no evidence was presented to suggest that higher limits are needed.

Many bond purchasers buy their fidelity bond within a crime policy bundle where the coverages being purchased exceed the statutory requirements. The Council was unable to ascertain whether requiring insurance to cover losses due to the failure of employers to deposit to the plan on a timely basis participant contributions would result in greater protection to plan participants or could be practically administered. Mr. Greenfield noted that the timely deposit of participant contributions has been a target of the DOL's enforcement action for many years, but for bonding purposes, there is an issue of when assets are covered by a fidelity bond. It is unclear how adding this as an insurable event would be done, or whether it would make plans more protected.

- The Council received some anecdotal and informal statistical evidence that small plans have failed to secure fidelity bonds, a significant number of small plan sponsors are unaware of their obligations to secure a fidelity bond and they are confused by the distinctions between mandated fidelity bond coverage and other insurance coverage.

Mr. Greenfield then outlined the issue group's draft recommendations.

1. The Department should publish an Interpretive Bulletin, incorporating much of the content of its 2008 Field Assistance Bulletin 2008-04. He said issuance of an Interpretive Bulletin would (1) give the information heightened deference and publicity and (2) allow the language of the field assistance bulletin to be modernized to be more helpful and understandable.

2. The Department should publish in sub-regulatory guidance a checklist of the requirements for the contents of a fidelity bond. The issue group has prepared a preliminary draft model. The rationale for the checklist is that it would make clear to plan officials and carriers precisely what must be in a fidelity bond and what is prohibited. This should be done with input from the carriers so that they will readily modify any specimen bond that is not fully compliant with the checklist.

3. The Department should emphasize bonding requirements in its educational outreach programs to plan sponsors, fiduciaries, and service providers.

Council members then discussed the draft findings and recommendations without making changes.

David Blanchett asked whether plans are suffering losses in ways not covered by the bonds. Mr. Greenfield noted the existence of cybercrime as a burgeoning problem. Some coverage for these crimes may be included in a bundle of insurance bought by an employer. The ERISA fidelity bond is treated separately within those bundles because it cannot have any exclusions or deductibles that may apply to the broader coverage.

In response to a question from Sri Reddy about information from EBSA's field offices, Mr. Lavenberg indicated that the issue group spoke with the New York Regional Office concerning bond language, but not specifically about enforcement results. Mr. Reddy asked whether plans are required to report claims made on a fidelity bond. Mr. Lavenberg noted the testimony indicated that fidelity bond claims may not be separately recorded by insurers, but rather may be

encompassed by a larger claim amount made on a bundled crime policy. Mr. Greenfield added that there was some speculation that plan officials make a conscious decision to not collect insurance so as to avoid publicizing that there was a problem.

In response to a question from Pat Haverland, Mr. Greenfield stated that the Interpretive Bulletin could have a section to describe other non-required coverages that might be helpful. The distinction between fiduciary insurance and Fidelity bonds would be important, as well as distinguishing between inside jobs and outside jobs, and the purpose of cyber insurance.

Jason Bortz raised the question of whether ERISA section 412 added value to the system. Mr. Greenfield indicated that without the statutory requirements of 412, coverage to protect against "inside" jobs would be sold, but without deductibles and exclusions. Mr. Lavenberg indicated that there was testimony that the required coverage, although maybe not perfect, at least forces most plans, to have something to cover some level of loss.

David Kritz asked whether there was any value to adding questions on bonding to the Form 5500. Mr. Greenfield noted that it would add to the Paperwork Reduction Act burden of the form, but it was unclear whether it would add any protection or increase compliance. Mr. Lavenberg noted that there was no testimony in this regard.

Ms. Levering asked for public comments and there were none.

The meeting adjourned at 2:25 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5521 Room 4, Frances Perkins Building
Washington, DC
August 15, 2018
Minutes of Meeting

Council Chair Cynthia Levering called the meeting to order at 9:10 a.m. Ms. Levering turned the meeting over to Patricia Haverland, chair of the Council issue on Lifetime Income Solutions as a Qualified Default Investment Alternative (QDIA) – Focus on Decumulation and Rollovers.

The first witnesses were Fred Reish of the Drinker Biddle & Reath law firm and David Certner of AARP. Mr. Reish said the safe harbor regulation for annuity selection has not worked and cannot work. He called for objective and obvious guidance for plan sponsors, such as a checklist. Mr. Reish said there is a need for independent and expert fiduciaries that plans can hire. He pointed out there are no perfect solutions for participants. Mr. Reish said the 401(k) plan is not an appropriate retirement income vehicle. He said participants need help in deciding among retirement plans and services. They typically have just 30-90 days before retirement to make decisions about income for the rest of their lives, and they are ill-prepared to make those decisions. Mr. Reish said it should be appropriate for plan sponsors to provide guidance on retirement income products.

David Certner cited a 2018 survey showing that 44 percent of retirees rolled over their assets to an IRA, half are not confident they know how much they will need in retirement, and 80 percent are interested in a lifetime income option, either in-plan or out-of-plan. He suggested combining periodic payments with a QLAC to protect for longevity. He noted employers increasingly are pulling out of their role in selecting retirement plan investments, shifting responsibility to participants. Mr. Certner said annuities – and especially variable annuities -- are complex, not transparent, and have higher fees than other investments. Yet brokers are paid more by insurers for selling variable annuities. He noted EBSA already has outlined what fiduciaries must consider, including demographics, in selecting investment vehicles that are best for participants. Fiduciaries, he said, must determine for participants whether an annuity is prudent for participants. He recommended encouraging plan sponsors to offer a full range of options.

In response to a question from Bridget O'Connor about what additional guidance is needed for offering lifetime income in the QDIA, Mr. Reish replied (1) clarification that all forms of QDIA can include an insurance component and (2) allowing a gap before annuities fully take effect. Ms. Haverland asked what is the legal construct for plan sponsor options to satisfy the diverse needs of a large percentage of participants. Mr. Reish said target date funds (TDFs) offer guarantees with minimum withdrawals, and allowing participants to opt out of a default should give comfort to sponsors. Mr. Certner said it is critical to allow partial withdrawals or guaranteed income. Mr. Reish added the GMWD (guaranteed minimum withdrawal benefit) provides for continued sustained income for retirees who withdraw at a reasonable pace and retirees effectively pay a 100 basis points charge to pool risk. Doug Greenfield asked about a

proposal for early retirees to tap retirement accounts until age 70 as a bridge to maximize Social Security benefits. Mr. Certner said that assumes a rational decision maker, but most people are not able to make that analysis, partly because they fear they will lose if they die early. Mr. Reish predicted recordkeepers will move toward providing financial wellness education to retirees. Mr. Certner added that having an independent fiduciary platform could be helpful, but participants might not use it if they have to pay.

David Kritz asked about concerns with portability and cost of LTI products. Mr. Reish said it's reasonable to compare the cost of LTI products in the plan and at retail, and the portability concern is with change of recordkeeper, but technology can solve that. Mr. Certner cited the fiduciary's responsibility to look at those factors. Linda Kershner asked about the prospect that a liquidity drain could dramatically change the provider's financial rating in a short period of time. Mr. Reish said the sponsor needs to follow a prudent process and through monitoring the selection can change providers at least for future commitments. Sri Reddy asked about market solutions to these problems. Mr. Certner said he expects the market to develop solutions, possibly including LTI products that are more cost effective and appropriate than annuities. Stacy Scapino, noting that an independent fiduciary function could solve the portability problem, asked if that idea is a prerequisite to making the GMWB option affordable. Mr. Reish said the idea is that exercising the fiduciary role is too complex and therefore expensive for small plan sponsors.

The next panel consisted of Michael Finke of The American College of Financial Services and Sarah Holden and Shannon Salinas of the Investment Company Institute (ICI). Mr. Finke stated that the QDIA is a powerful tool for accumulation in 401(k) plans, but what is needed is a guaranteed income approach through a default distribution option. He cited a survey that showed 92 percent of Americans would like to put at least some assets in a guaranteed income vehicle, and they prefer a fixed to variable income choice. He said there needs to be a system in which employers are not fiduciaries – they lack the ability to assess the health of insurers -- and a transition to independent fiduciaries for guaranteed income. Ms. Holden said the Council's presumption in its issue scope that people need more access to annuities is not supported by research. She countered arguments that participants make poor decisions in not choosing LTI products, saying they want flexibility and liquidity. She suggested re-thinking the three-legged stool approach to retirement savings with a savings pyramid with Social Security at the top and attention paid to what people get from all layers. She said people should use their retirement savings to delay claiming Social Security before they annuitize. Ms. Salinas said modifying the annuity selection safe harbor could do more harm than good. She said an exception from the safe harbor for a QDIA would weaken the guidelines for one particular product – annuities – that participants have shown they do not want and would restrict participants' choices. Locking participants into annuities for a period of time would go against the QDIA concept of allowing participants to opt out of defaults. Ms. Salinas said the QDIA already allows annuities subject to current rules.

David Blanchett asked the witnesses to react to each others' conflicting statements. Mr. Finke said it is important to look at the goal of the large tax subsidy for retirement plans and devise a strategy for people to make good decisions. Ms. Holden disagreed with his point that QDIAs already are highly prescriptive, saying the key to the default working is the ability of participants

to escape it, and suggested the need to look at the overall household financial situation to determine what makes sense for retirement income choices. Ms. Haverland asked if other than a default, does an annuity option have a place in 401(k) plans. Ms. Holden said yes, but plans must allow choice. Mr. Kritz asked how sponsors should weigh the fact that participants prefer immediate income in deciding whether to offer and promote an annuity option. Mr. Finke said deferred annuitization is better for highly paid participants, but acknowledged that most participants want immediate income when they retire. Ms. Levering pointed out that surveys say participants want an annuity option. Ms. Holden said people say they want the option but rarely select it. Beth Almeida asked how to help guide retirees in knowing how much to spend. Mr. Finke said spending is not a problem if the retirees know they have guaranteed income for basic costs.

The next panel consisted of two actuaries, Ted Goldman of the American Academy of Actuaries and Steve Vernon. Mr. Vernon, testifying remotely, said the defined benefit to defined contribution transition will not be complete until participants can check a box to get lifetime income. He said there are no perfect solutions, but there are very good solutions that plan sponsors should be able to offer, such as a Qualified Default Retirement Income Annuity (QDRIA), as part of a menu that would not carry fiduciary risk for plan sponsors. The options could include installment payments without a guarantee, a lifetime income annuity, and Social Security bridge payments. He suggested allowing participants to roll over a portion of their assets to an annuity selection platform. Mr. Vernon recommended a statutory or regulatory safe harbor to allow plan sponsors to offer the options. Mr. Greenfield asked about the statement by AARP that it would be difficult to get participants to opt for a Social Security bridge. Mr. Vernon said participants with low account balances will not select the bridge, nor would other ideas work, other than working longer. Mr. Kritz asked if there should be a default for LTI or just a safe harbor. Mr. Vernon prefers a menu so sponsors can select a default that works best for their participants. Ms. Scapino asked if that could work with the independent fiduciary idea and Mr. Vernon said that is one possible solution. Ms. Haverland asked if there are many independent fiduciaries who are qualified. Mr. Vernon said the challenge is finding non-biased and qualified people, with a key being whether they are paid by basis points, in which case they are not independent. Mr. Kritz asked if the menu would be an improvement over the current situation without a default. Mr. Vernon suggested using the required minimum distribution as the default.

Mr. Goldman said the American Academy of Actuaries favors helping people figure out lifetime income within their plans. He said DB plans made lifetime income easy, with pricing efficiencies by pooling risk, ease of transition, and product due diligence. That, he said, needs to be replicated for DC plans. As for the annuity safe harbor, Mr. Goldman said it is important to get it right. He said QLACs have some appeal, but low demand means insurance companies do not make a big effort to market them and sponsors worry about fiduciary risk. Mr. Goldman said QLACs could be more attractive with improvements in the safe harbor. Also, he said Open Retiree MEPs (multiple employer plans) could facilitate retirement income approaches where plan sponsors transfer participants to the Open Retiree MEPs for administration and vetting decisions.

Mr. Kritz asked if QLACs make sense above a certain income level. Mr. Goldman said no, it hinges more on the amount of other savings people have. Mr. Greenberg asked what groups could create Open Retiree MEPs and what would the funding and fee levels be. Mr. Goldman said the fees depend on the scale, and the Open Retiree MEPs could be created by TIAA, AARP, the retirement Clearing House, and others. As for funding, Tonya Manning, who accompanied Mr. Goldman, said that sponsors now are paying for those services directly or through a third party administrator. Jason Bortz asked (1) what should the Council recommend for Open Retiree MEPs and (2) whether there should be multiple defaults for plan sponsors to offer participants with differing individual circumstances. Mr. Goldman suggested the Council draw attention to Open Retiree MEPs and that sponsors have the information to map participants to specific defaults. Ms. Haverland asked if O Retiree MEPs could be a default and Mr. Goldman said yes. Ms. Levering asked if the idea for Open Retiree MEPs would include IRA money or just qualified plan money. Mr. Goldman said they could include IRA money.

The next panel of witnesses included Alison Borland at Alight Solutions, Tim Rouse of the SPARK Institute, and John Croke of Vanguard. Mr. Rouse stated that SPARK supports the expansion of the fiduciary safe harbor in the Retirement Enhancement and Savings Act of 2018 (RESA). He also listed some of the challenges for recordkeepers when addressing lifetime income solutions. Portability is an issue because of variations of systems and product designs, the rehiring of participants who are already receiving annuities, tracking QDRO payments, loans, and the lack of standardized data formats. Mr. Rouse said communication with participants is a challenge because of the products' complexity. There also is the added cost associated with recordkeeping lifetime income products. He added that regulatory issues created by the QJSA and Roth IRA rules present additional recordkeeping hurdles.

Mr. Croke testified that there is no one-size-fits-all income need in retirement, so any income solution has to meet the divergent needs, circumstances, and objectives of retiree households. About 20 percent of plans at Vanguard offer an annuitization distribution option. In these plans, he said less than one percent of participants elect annuity distribution options. Even with plans that specify an annuity as the default form of distribution, there is very low voluntary uptake of annuities. Vanguard believes that annuities generally are an underutilized retirement tool but that only certain retiree households have that right mix of financial structure, healthcare, homeownership, and other factors to benefit from an annuity purchase. Mr. Croke stated that when annuitization is an appropriate and prudent strategy, it is a decision that requires an affirmative choice.

Ms. Borland testified that lifetime income options encompass any tool, product, solution, or service that facilitates decumulation. She noted that plan sponsors recognize the need for more distribution options and education about the draw-down of retirement funds, but that the availability of insurance-based guarantees and longevity protection continues to lag. Barriers include fiduciary concerns, operational or administrative concerns, a sense of waiting to see what evolves, and concerns about participant utilization. She recommended that the DOL modify the QDIA regulations to encourage lifetime income features defined broadly within investment alternatives, improve the safe harbor for selecting an annuity provider (as contained in RESA), and revise Interpretive Bulletin 96-1 to promote lifetime income utilization through education.

Ms. Scapino asked about the recordkeeping challenges of moving lifetime income products from provider to provider. Mr. Rouse indicated that it is the features and limitations on the products -- surrender charges, for example -- that are a challenge, as the new recordkeeper would have to incorporate the features of each new product into their system. His suggestion is to create a box around guaranteed products to preserve its features as it is transferred. Ms. Borland added that any of the complexities in recordkeeping can be addressed; it is really just a question of having the scale necessary to make the investment in a new system.

In response to a question from Linda Kerschner, Mr. Rouse said that he did not know of any backstops that guard against an insurance company default on the national level. On the state level, insurance products are regulated, with great variability among the 50 states. Mr. Croke agreed and added that there could be a national insurance backstop like the PBGC, but that the added cost of it may serve to push sponsors further away from offering annuities. Ms. Borland stated that some plan sponsors use multiple insurers to protect against this risk.

Mr. Blanchett asked whether recordkeepers could make a more customized view of the decision to annuitize, considering they have information not only on potential retirement date, but also on compensation, balance, savings rate, gender, and whether there's a pension plan. Mr. Croke responded that although this seems like a lot of information, there is still much to know about a person that providers don't have yet. He added there is potential in the future to tease out additional information that could be used to make a more dynamic decision about whether a participant would benefit from a lifetime income product as a QDIA.

Mr. Reddy asked why a plan offering a partial withdrawal option would be a challenge. Ms. Borland said it is not a challenge and that most of her clients do it. Mr. Croke said about 70-80 percent of Vanguard's plans allow for withdrawals, but some plans prefer the decumulation phase of retirement to be served by the retail environment rather than by the plan. Mr. Greenfield asked Mr. Croke whether more tailored annuity decisions created by additional information about participants would create a problem of adverse selection. Mr. Croke agreed but said that it was not an insurmountable obstacle.

The next panel consisted of Jack VanDerhei of the Employee Benefit Research Institute (EBRI) and Brigitte Madrian of the Harvard Kennedy School. Dr. Madrian, a behavioral economist, testified about why the take-up of annuities or lifetime income options is so low. She noted that although an annuity is an insurance product, its nature is completely different from other insurance products. With an annuity, people are insuring against a good thing – old age – as opposed to a bad thing – loss of home, etc. She said behavioral biases, such as present bias and loss aversion, make annuities psychologically seem like a bad deal. Other issues, including underestimating the likelihood of living to a very old age, or the desire to be in control, are further challenges. Choice architecture factors (use of defaults, a preference checklist, changes in framing questions, or sequential decision making) can help to overcome some behavioral biases. Dr. Madrian said annuity design approaches (guarantee elements, payout stream options) can also overcome some biases.

Dr. Vanderhei discussed the optimal level of deferred income annuity purchases for those trying to maximize retirement income adequacy. Using EBRI's retirement security projection model, EBRI projects that almost 43 percent of the households are simulated to run short of money in retirement. He noted that when determining the right percentage of a QLAC or a DIA, people

have to balance the improvements in longevity risk with the probability that they won't have enough liquid assets to get through a catastrophic long-term care event.

In response to a question from Mr. Blanchett, Dr. Madrian noted that there is a range of changes that could be made to improve take up of annuities, but there is not great data on impacts. Mr. Kritz asked how a plan sponsor would decide whether to include an annuity in the plan, when looking at EBRI statistics that showed some employees better off, and others worse off, with annuities. Dr. Vanderhei said that a generic recommendation of a QLAC default of up to 20% would be net positive for all employees, but lower wage earners on average would have a negative experience.

Mr. Bortz asked how choice architecture works with a heterogeneous population. Dr. Madrian stated that with any policy, there are going to be winners and losers. Further, there seem to be some areas where a differentiated default (target date funds) is accepted and others where it is not. She said annuitization as a default can be a starting point to help people make a decision. It reduces the possibility that they're going to not make a choice today out of fear of regret and it gets them over the status quo hurdle. Mr. Reddy asked Dr. Madrian what might prevent further adoption of other product designs, such as guaranteed minimum withdrawal benefits. She indicated that these other products solve some problems, like control issues, but pose other problems, like complexity and opaque pricing structures.

The next panel was composed of Eileen Leahy of Siemens and Lynn Dudley of the American Benefits Council (ABC). Ms. Leahy testified that if there isn't a safe harbor, most plan sponsors will not engage in an activity. Only a very small fraction of plans offer a retirement income solution in their defined contribution plans. Based on her data collection, there is not one product that would serve all of Siemens' participants. She thinks one of the biggest issues is that she does not know how to explain half of the products to participants or her company's investment committee. She said she has to love a product, and it has to make sense for the majority of Siemens' participants to consider putting it into the plan. Mobility and portability are additional deterrents because of workforce turnover. Ms. Leahy said allowing multiple distributions is helpful, as is marketing retirement balances in terms of monthly income, and auto-enrollment contributions that are high enough to get a full company match.

Ms. Dudley discussed an informal survey that the American Benefits Council (ABC) took of its members. The survey showed that lifetime income options are not popular. However, two-thirds of the plan sponsors that don't already offer lifetime income are thinking about offering it if the rules are made clearer. She said ABC members want to see flexible and innovative products that are portable, affordable, and understandable. They also want clear guidance, a straight-forward safe harbor that allows for different kinds of products, and for sponsors to be able to rely on expertise of state insurance commissioners when selecting an annuity provider. Ms. Dudley emphasized the need for education for employees that focuses on distribution options, longevity risk, the role of Social Security, and healthcare costs.

Mr. Kritz asked whether it would be possible to implement a default for only select groups of participants. Ms. Leahy responded that as a fiduciary, she is responsible for all of the plan's members, so if there was a default for only certain groups, she would need another option for the other members. She could not offer something to just one segment. Ms. Dudley added that this

was the problem with target date funds initially, and it was resolved by offering different funds for different groups.

Ms. Haverland raised the issue of fiduciary liability around selecting an annuity provider and asked how plan sponsors view the approach of relying on state insurance entities to evaluate insurers. Ms. Dudley indicated that ABC members would do some due diligence beyond what was required by RESA to satisfy their broader fiduciary responsibilities. Ms. Leahy agreed and thought her company would hire an independent fiduciary to examine the insurance companies before they would rely on the state insurance commission.

Ms. Scapino asked Ms. Leahy if her focus as a plan sponsor has been more on closing the savings gap than on lifetime income, and was this because it was easier to communicate. Ms. Leahy agreed that accumulation has been the focus, but that going forward there will be a shift because participants will reach retirement with funds that they don't know what to do with and will have to manage the payout stream. Mr. Kritz asked how to get sponsors to weigh the benefits of lifetime income products that come with higher fees. Ms. Leahy agreed that there is going to be a higher fee with lifetime income products, but the fee has to make sense in relation to what people are getting for it. There is not necessarily a reasonableness number, but there should be some justification for paying higher fees. Ms. Dudley added that cost was the third highest concern noted by sponsors in the ABC survey, after fiduciary liability.

Mr. Kritz also asked about why a proposal to annuitize 401(k) balances within a sponsor's DB plan hasn't been more popular. Ms. Leahy indicated it was because sponsors are working to get pensioners off their books. Adding more balances would add complexity because those people would be on the books for another 30 years. If a plan sponsor doesn't want to keep its DB plan, it wouldn't want to do this. Ms. Dudley said that a lot of sponsors have indicated that they do want to downsize their DB plans. But, even when this is an option, it's not very popular because participants don't understand the value of what they're getting instead.

Ms. Haverland asked whether participants who elected a target date fund would be dissatisfied if the fund were to be changed to embed an annuity and the cost of the fund was raised as a result. Ms. Dudley said that they would first survey employees to see if there was a need to do this, and if so, would likely set up a separate set of funds with an annuity rather than automatically changing the product. Ms. Leahy stated that there would be a concern over liability if this were done.

Ms. Levering asked for public comments and there were none.

The meeting adjourned at 4:55 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5521 Room 4, Frances Perkins Building
Washington, DC
August 16, 2018

Minutes of Meeting

Council Chair Cynthia Levering called the meeting to order at 9:05 a.m. EBSA Senior Policy Advisor Mark Dundee provided an update on recent EBSA activities. He described the follow up on the recently published association health plan (AHP) rule. The rule allows small employers to band together by geography or by industry to save on health plan costs. He said EBSA is focused on educating consumers, employers, and service providers about the rule, providing technical assistance on it, and coordinating with state regulators. EBSA also is considering requests for formal guidance and preparing its enforcement program to ensure that AHPs live up to their promises.

Mr. Dundee then discussed EBSA's participation in a joint healthcare fraud enforcement effort with the Department of Justice and other agencies. The effort resulted in charges against 601 individuals responsible for over $2 billion in fraud losses. The targets were billing Medicare, Medicaid, Tricare, and private insurance companies for medically unnecessary prescription drugs and medications.

He then highlighted the nominations period for the ERISA Advisory Council, open until September 17th, and the nominations period for the PBGC advisory committee, open until September 24th.

The Council heard from one witness on the Council issue of Evaluating the Department's Regulations and Guidance on ERISA Bonding Requirements and Exploring Reform Considerations. That witness was Kevin Guillet of Marsh, who told the Council that insurers are far more focused on external threats, such as social engineering, and those threats carry much larger costs than do the threats covered by fidelity bonds. Doug Greenfield asked what changes were made in fidelity bond policies as a result of EBSA investigations. Mr. Guillet said the changes incorporated statutory language in endorsements and dropped exclusions. Mr. Greenfield asked what happens in the case of investments that are not plan assets. Mr. Guillet explained the fidelity bond policy is purchased by providing underwriters information on the plan and investments and the policy covers each plan. If an investment has its own fidelity bond, coverage applies only to employees. Independent contractors are not covered and must obtain a bond, but those who are individuals cannot obtain coverage. Plans need to ask to add such individuals as employees. Jason Bortz asked about coverage when an outside investment manager has control but not custody over assets. Mr. Guillet referred to the 2008 FAB, which states that handling funds or property doesn't mean physical custody, but rather the ability to control.. He also noted that premiums are low because few people have custody of assets and therefore the opportunity to steal.

Mr. Greenfield asked whether raising coverage limits would increase premiums. Mr. Guillet replied somewhat, but most plans buy coverage for the amount of losses they could incur, not just for the required amount. Mr. Greenfield asked whether small plans can insure the risk of the employer using 401(k) contributions temporarily to pay bills. Mr. Guillet said yes, but some underwriters would hesitate to insure that risk. Mr. Bortz asked whether bonds are differentially priced by underwriters. Mr. Guillet said they are essentially universally priced at $1,000 per million of assets and then factors such as head count of covered individuals, locations covered, and controls are considered. Some underwriters use a grid to determine price.

The Council next turned to a discussion of its issues. On fidelity bonds, Mr. Greenfield said the new perspective from the last witness concerned coverage of participants' contributions. He said mandating such coverage could require a statutory change. Council members discussed whether they could recommend EBSA interpret the statutory language of "money and other property" to include participants' contributions.

Next, the Council discussed the lifetime income/ QDIA issue, led by issue chair Pat Haverland. She outlined witness recommendations, which included:

1. Include LTI features in QDIA – regulatory challenges

2. Include LTI in DC plans in general – what challenges

3. Plan design features that sponsors could be encouraged to use – partial withdrawals, Social Security bridge, brokerage account option

4. QRIA for decumulation phase

5. Communications to participants in context of 96-1

6. Open retiree MEPs

7. Clearer safe harbor for annuity selection (RESA provision)

Sri Reddy added to the list the suggestion to modify the QDIA language to clarify it applies to retirement income, not just savings. Ms. Levering added the suggestion of a Social Security claiming strategy that would have retirees delay buying LTI products until they reach the maximum Social Security payment age. Linda Kerschner said the lack of financial education is another issue, pointing out that TDFs were not understood at first and now are dominant, and the same could be true for re-branding LTI and educating advisers. But other members said there had not been enough study of that aspect by the Council this year for the Council to make a recommendation. Mr. Bortz said fiduciaries are concerned with their risk if they provide financial education in connection with presenting participants with retirement income choices that include LTI. Mr. Kritz observed that witnesses agreed more on the need for the annuity safe harbor clarification than on QDIA solutions. He said plan sponsors want the option to offer LTI through a safe harbor, but are reluctant to make that a QDIA. Mr. Reddy said the safe harbor was not defined to cover lifetime income, so new language is needed on valuations and changes

in spenddown solutions. Ms. Haverland concluded that the issue group will discuss whether to recommend changes in annuity selection rules.

Ms. Levering asked for public comments and there were none.

The meeting adjourned at 12:50 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5515 Room 2, Frances Perkins Building
Washington, DC

March 27, 2018

Minutes of Meeting

Designated Federal Officer Larry Good called the meeting to order at 9:01 a.m. From EBSA, Deputy Assistant Secretary Jeanne Wilson, Deputy Assistant Secretary for Program Operations Timothy Hauser, Senior Policy Advisor Mark Dundee, and Joe Canary, Director of EBSA's Office of Regulations and Interpretations, attended.

Deputy Assistant Secretary Wilson welcomed the Council, then provided an update on recent activity by EBSA, starting with enforcement activities. She said the agency recovered over $1.1 billion on behalf of plans and participants, $682 million from enforcement investigations, and another $418 million resulting from the informal complaint resolution that EBSA's benefits advisors undertake. Two voluntary compliance programs, the Abandoned Plan Program and the Voluntary Fiduciary Correction Program, resulted in $37.9 million in recoveries. Also, criminal investigations resulted in 113 individuals being indicted and in 79 cases being closed with either a guilty plea or a conviction. She reported that EBSA's education and outreach efforts in 2017 included over 1,800 events and the distribution of over 300,000 publications. Of the 174,603 calls that the benefits advisors took last year, many had an education component, for a participant, beneficiary, plan sponsor or service provider.

Ms. Wilson noted that on January 5, 2018, EBSA published a proposed rule that would allow employers to join together to sponsor a single group health plan that could self-insure or purchase insurance in the large group market. The proposed rule, which applies only to employer-sponsored health insurance, would allow employers to join together as a single group to purchase insurance in the large group market. It would allow businesses to form an AHP on the basis of common geography or industry. She said the comment period closed March 6 and EBSA is reading through the comments. Ms. Wilson described the proposed rule published on February 21 by HHS, Treasury, and DOL that would amend the definition of short-term, limited-duration health insurance. Specifically, the short-term insurance proposed rule would increase the maximum period of such short-term, limited-duration insurance from three months to 12 months.

Council members did not have any questions for Ms. Wilson.

Next, Ms. Wilson told the members of the Council that EBSA had in mind three topics on which the Council's input would be useful this year and suggested the members pick two of those. First, she suggested the Council could study fidelity bonds. She said ERISA section 412 generally requires that ERISA plans be protected against loss by reason of fraud or dishonesty by any fiduciary or other person who handles plan assets. EBSA issued a "temporary" regulation in 1975 to deal with this provision. In the last few years, EBSA had an investigative focus on fidelity bond issues and found a number of compliance issues. Ms. Wilson asked the Council to look at whether the regulation needs to

be updated, whether it serves its intended purpose of protecting plans and participants from loss, and whether particular issues need to be revisited or is a wholesale change in approach needed.

Second, Ms. Wilson she suggested a study of plan to plan rollovers, following up on recent work by the Council by helping to create a standardized rollover form for plans to use. Thirdly, she suggested looking at how to promote lifetime income, specifically studying the QDIA rule with an eye toward decumulation issues.

The Council members discussed various aspects of these issues and approaches to take, including:
Lifetime income/ QDIA

- Looking at product and how disclosed
  - What managed income streams available?
- Looking at marketplace, innovations
- Lifetime income illustration
- Annuity selection safe harbor
- Modifying QDIA rules to promote lifetime income
- Look at info letters to Treasury and TIAA
- Usage to this point? Hurdles?
- Resistance to buying annuities; what percentage is appropriate?
  - People are reluctant to cede control
- Plan-to-Plan transfers need to facilitate moving lifetime income products

Fidelity Bonds

- Examine carve-outs and exclusions – statutory and regulatory
  - What risks are being covered?
- What should be covered by these policies?
  - Model language? Some pubs available
- 5500 data and how plans respond to Qs
- Do bonds cover right kind of risk?
  - Cybersecurity risk – what kind should be covered?
- Look at in context of outsourcing
- Including other fiduciary liability insurance
- Wholesale change?
- 2008 FAB
- Who is acceptable surety of fidelity bonds on Treasury list?
  - Relates to federal contracts; might not apply
- Tool for plan sponsors, e.g. for selecting auditors

The Council members decided their two issues this year would be (1) Evaluating the Department's Regulations and Guidance with Respect to the Bonding Requirements under ERISA and Exploring Reform Considerations, and (2) Lifetime Income Solutions as a Qualified Default Investment Alternative (QDIA) – Focus on Decumulation and Rollovers. The respective groups will refine their topics along the lines noted above and submit their draft issue scopes for review.

There were no public comments.

The meeting adjourned at 11:30 a.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

Frances Perkins Building
Washington, DC

September 25, 2018
Minutes of Teleconference Meeting

The meeting was convened at 10:05 a.m. by Council Chair Cynthia Levering, who turned the program over to Bob Lavenberg, chair of the Council issue group on Evaluating the Department's Regulations and Guidance on ERISA Bonding Requirements and Exploring Reform Considerations.

Mr. Lavenberg read the draft of the Council recommendations:

1. The Department of Labor should publish a new Interpretive Bulletin, incorporating much of the content of its 2008 Field Assistance Bulletin 2008-04, but directed at plan officials who are responsible for compliance with the fidelity bond requirements set out in section 412 of ERISA.

2. The Department of Labor should publish a summary of the requirements for securing a fidelity bond that complies with the Department's guidance, directed at plan sponsors and plan service providers. The Council has drafted a sample summary, which is included in the appendix to the report.

Mr. Lavenberg asked for comments from Council members on the recommendations. Hearing none, he turned the discussion over to Doug Greenfield, vice chair of the fidelity bonds issue group. Mr. Greenfield discussed how the issue group approached their review of the five questions noted in the topic's issue statement.

Issue group member Linda Kerschner then summarized some of the witness testimony. She noted that the anecdotal testimony presented indicated that small plans (that don't have the staff or advisors that large plans do) are more likely to misunderstand ERISA's bonding requirements. The testimony indicated that bonds generally cover a natural person associated with a plan, but that outside third parties often require their own bonds. Ms. Kerschner noted that witness testimony failed to provide statistics regarding losses reimbursed by fidelity bonds. She also discussed statistical information provided to the Council by the Employee Benefits Security Administration (EBSA) concerning its bonding enforcement projects. Regarding the question of bonding coverage for participant contributions, Ms. Kerschner noted that while some witnesses testified that contributions could be covered, other witnesses noted that this was not reasonable or urged caution on the subject. She also noted that the witnesses did agree that the bonding requirements were not well understood and that education would be beneficial.

Council member Tazewell Hurst asked about cyber security issues. Mr. Lavenberg said the issue group decided that was a separate issue which the Council did not study. Stacy Scapino asked if cyber security is not a fiduciary issue, does it need to be addressed. Mr. Lavenberg said the Council did not look at fiduciary liability or other insurance, but only at whether cyber risks are covered under ERISA section 412 and decided the answer was no.

Mr. Greenfield stated that the issue group did not find sufficient information to indicate that the bonding regulations and guidance were inadequate. They also could not conclude that the insurance market was operating ineffectively, in large part because the Council could not obtain underwriting data. In terms of the questions asked in the issue statement, Mr. Greenfield said that the issue group observed:

- The insurance markets were operating efficiently;
- The mismatch in language might be a factor in confusion;
- There was no evidence that the bonding dollar limits had impacted losses;
- There was no consensus on the participant contribution issue and more work is needed to analyze the costs and benefits of mandating additional coverage for this type of event; and
- The informal survey data was helpful as it jibed with testimony heard by the Council that the small market had incurred larger than expected losses.

Issue group member Beth Almeida suggested an explanation in the report of why the Council is not recommending a revision of the existing regulation. In response to a question from Chair Levering, Mr. Greenfield stated that no data was provided by The Surety & Fidelity Association of America (SFAA). With regard to whether the Council should recommend revisions to the bonding regulations, Mr. Greenfield stated that recommendation for the DOL to issue an Interpretive Bulletin would be speedier because it would not need a full Administrative Procedures Act process and would accomplish similar goals, since it would be published in the Federal Register and given some deference by courts. Chair Levering asked whether the issuance of an Interpretive Bulletin would create an inconsistency with the existing temporary bonding regulation. Mr. Greenfield noted that they would not be inconsistent.

Mr. Greenfield noted that the Council has drafted a summary of requirements for a fidelity bond (checklist) for the Department's consideration, which is included as an appendix to the draft report. Ms. Almeida stated that before drafting the checklist, the issue group reviewed EBSA's bonding Field Assistance Bulletin and related publication to determine whether those pieces of guidance were adequately addressing the issues that are tripping up people. The issue group then wrote its checklist to focus on particular areas of confusion, including coverage of multiple plans on one bond, listing the plan as the named insured on bonds, the form of the bond, and exclusion/deductible issues. Mr. Lavenberg added that the issue group decided to exclude some details of the regulation because the intent of the document was to create a general awareness. Chair Levering asked whether the issue group had asked some insurance carriers to review the draft checklist. Mr. Lavenberg said that both the Insurance Services Office (ISO) and SFAA had reviewed and made comments on the checklist.

All members participating in the meeting (Council member David Kritz was absent at this time) voted to approve the recommendations of the bonding issue group.

Chair Levering convened the afternoon session. Patricia Haverland, chair of the Council issue group on Lifetime Income Solutions as a Qualified Default Investment Alternative (QDIA) – Focus on Decumulation and Rollovers, described some of the general observations and conclusions of the issue group. She said that:

- no solution heard by the Council will fit all;
- the topic is complex, with lots of solutions;
- the market is working on additional solutions;
- challenges to lifetime income (LTI) remain;
- the QDIA regulations are ambiguous regarding LTI;
- there is a need for education; and
- the use of LTI can be hindered by platform inconsistencies.

Ms. Haverland said that the group concluded that DOL's amendment of the QDIA regulation would incentivize plans to use LTI, a change in the annuity safe harbor wouldn't address the concerns, and that plans should be able to delegate the fiduciary responsibility for selection of an annuity provider to a 3rd party. The Council then discussed each of the draft recommendations.

1. Amend the QDIA regulations to address using LTI in a QDIA. The QDIA regulations tangentially address LTI and the Department's guidance has generally been informal. Amending QDIA regulations to specifically address LTI could incent plan sponsors to adopt innovative QDIAs, including QDIAs with LTI options. Such guidance should address:

    a. The permissibility of including fixed annuities, living benefits and other LTI approaches in a QDIA;

    b. The importance of tailoring the default to affected participants. Specifically, the Department should clarify in the regulations that different defaults may be used based on participant demographics because plan populations may not be sufficiently homogeneous for a single default to be appropriate.

    c. Similar to rules applicable to QDIA balanced funds, and given the participant population diversity and needs, the regulations should require a plan fiduciary selecting a QDIA with a LTI option to determine that the default is appropriate for the affected participants as a whole; and

    d. Clarify how QDIA transferability and liquidity requirements in the regulations apply to living benefits. [Text will reject commentator requests to relax the existing transferability and liquidity requirements to permit illiquid fixed annuities to be utilized in a QDIA.]

Chair Levering asked for an explanation of the yellow highlighted area in the draft recommendation. Issue Group member Jason Bortz said that there was testimony that liquidity requirements were inconsistent with insurance and that some witnesses wanted a relaxation of rules in this regard, but that the issue group decided not to suggest this. Mr. Lavenberg indicated that the report should specifically say that the Council is not asking DOL to clarify rules on living benefits. Mr. Bortz said that the report should affirmatively say what is not recommended. Issue Group member Bridget O'Connor agreed and indicated that the group would edit bullet d. to reflect the discussion. Ms. Haverland proposed that the Council vote on recommendation 1, with edits incorporated as discussed, and all members present voted in favor of the recommendation.

2. The Department should publish guidance confirming that a plan may hire a 3(38) investment manager to select annuity providers for distributions from a DC plan. The Council believes that plan sponsors would benefit from the use of independent fiduciary experts and that the fiduciary responsibility scheme of section 3(38) – in which the plan fiduciary only has responsibility for the prudent selection and monitoring of the independent expert – would go a long way in addressing plan sponsor concerns about fiduciary liability. The Council further notes that the creation of annuity purchase platforms within the framework of ERISA (as opposed to IRA annuity purchase platforms) could be facilitated by such guidance.

Mr. Lavenberg questioned the language suggesting that allowing plans to hire an independent fiduciary would address sponsor concerns. Mr. Greenfield thought the safe harbor would impact co-fiduciary liability under ERISA Section 405. Mr. Bortz said that 405 liability was extraneous to the Section 3(38) construct. He indicated that the question that first must be asked is whether 3(38) applies, and if so, is it broad enough to encompass everyone who might do the type of work needed. The discussion continued concerning 3(38) with Mr. Greenfield asking how the recommendation would liberate plan sponsors since it looks like the issue group is just applying current law. Mr. Bortz said that the 3(38) regime insulated one fiduciary and Mr. Greenfield noted that Sec. 405 can be used in the same way. Mr. Kritz added that employers want to use 3(38) because of comfort and that 3(38) would have to be redefined to include this type of selection. Mr. Kritz thinks it is important to say that this would be part of 3(38) rather than similar to 3(38). Council member Colleen Medill noted that 3(38) requires the delegation be made to a registered investment advisor and that people who would make a selection of an annuity provider would not necessarily fit this designation. Ms. Haverland stated that the Council could ask DOL to develop something along the line of 3(38) but that would fit the situation under discussion. Mr. Greenfield noted that a new expert with 3(38) status would be trying to get relief from the Sec. 405 standards.

Ms. Medill noted that the recommendation should be changed to reference a "named plan fiduciary" rather than a "plan." She also noted that due to the Tibble case, she doesn't think the DOL can create a new way to get around Sec. 405(c). Mr. Bortz asked whether Ms. Medill agrees with the goal of the plan sponsor being able to hire an expert to get out of making the solvency call. Ms. Medill indicated she agreed and then discussed how to reach this goal with the existing statutory language. Ms. Scapino advocated that the report include a broader discussion of the recommendation on this issue and let the DOL figure out how to implement it.

Ms. O'Connor said that she was in favor of the original language with some edits, rather than giving the DOL an open-ended recommendation to create a new 3(38) without the protections that go along with it. Mr. Bortz asked if the Council would agree to go back to the original recommendation language, provided some wordsmithing was done to address concerns raised by the Council. Ms. Haverland asked for any thoughts on Mr. Bortz's proposal. Hearing none, she asked for the Council to vote on recommendation 2, with edits to come as discussed. All members of the Council agreed.

3. The Department should encourage plan sponsors to adopt plan design features that facilitate LTI, including: allowing participants to take ad hoc distributions, enabling installment payments, providing social security bridge options and establishing payments that track required minimum distributions. These design features are settlor decisions and readily available on most recordkeeping platforms at modest cost, yet the Council understands that many plans continue to offer only single sum distributions.

Vice Chair Reddy raised a question about the wording of the recommendation, as to whether plan designs should allow distributions that track required minimum distributions (RMDs). Ms. Haverland said DOL should encourage plan sponsors to consider that. Vice Chair Reddy cited testimony to the Council stating that most plans now allow partial distributions, contrary to the point implicitly made in the recommendation. Ms. Haverland replied that information related to large plans and cited a GAO report which said two-thirds of plans did not offer withdrawal options.

With minor modifications, the Council members approved this recommendation unanimously.

Chair Levering asked for public comments and there were none.

The meeting adjourned at 3:20 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5521 Room 4, Frances Perkins Building
Washington, DC
June 19, 2018
Minutes of Meeting

Council Chair Cynthia Levering called the meeting to order at 9:10 a.m. EBSA Senior Policy Advisor Mark Dundee announced and welcomed the new Council members (David Blanchett, Jason Bortz, Bridget O'Connor, Linda Kerschner, and David Kritz) and leadership (chair Cynthia Levering and vice chair Srinivas Dharam Reddy). Ms. Levering turned the meeting over to Patricia Haverland, chair of the Council issue on Lifetime Income Solutions as a Qualified Default Investment Alternative (QDIA) – Focus on Decumulation and Rollovers.

The first witnesses were Michael Hadley of the Davis & Harman law firm and Jonathan Forman, a law professor from the University of Oklahoma College of Law, testifying on his own behalf. Mr. Hadley said retirement plans which default participants into guaranteed income streams find participants are generally happy about that. He recommended (1) DOL should amend the QDIA regulation so that reasonable liquidity and transferability conditions consistent with income guarantees do not disqualify an investment from being a QDIA; (2) DOL should amend the QDIA regulation to make clear that an investment does not fail to qualify as a QDIA simply because the investment allocates a percentage to an annuity, guaranteed income benefit, or similar feature; and (3) DOL should issue guidance confirming that a fiduciary is not in violation of section 404(a)(1) of ERISA solely because the fiduciary makes available an investment, including as a QDIA, that is limited to participants and beneficiaries meeting a specified age or service condition (or combination of age and service conditions).

Jon Forman said EBSA should craft a specific safe harbor for annuities and similar life-contingent income streams that relaxes the periodic transfer condition. He noted that the QDIA rules that require participants to have the ability to move from one investment to another, do not work well with annuities. Furthermore, he said (1) any new QDIA safe harbor for life-contingent products should permit at least some of those products to be nontransferable and nonrefundable, (2) DOL should encourage plan sponsors to allow for more flexible distribution options, (3) plan sponsors should be encouraged to offer periodic payments rather than just lump sum distributions to allow participants to try out annuity-like income streams, and (4) DOL should provide guidance to enhance the portability of annuity contracts, and that guidance also should cover variable annuities.

In response to a question from Ms. Haverland, Professor Forman explained that defined contribution (DC) plan sponsors originally thought that their plans were supplemental to their workers' traditional pensions, but ultimately pensions went away and DC plans became the primary source of retirement income. He said that people are generally happy with annuities once they have them, but it is difficult to get them to invest in annuities initially. He believes

that there are various ways to approach the problem, including an annuities safe harbor or a "404(c)" type protection for fiduciaries who select a number of annuities as investment choices.

Mr. Greenfield asked Mr. Hadley how the relief that he had proposed would handle fee differentials. Mr. Hadley noted that there is no requirement for reasonable fees in the QDIA, but that the issue of reasonable fees would still be part of fiduciary oversight. Professor Forman agreed that the fee issue is just one of the investment selection issues to be evaluated by the fiduciary. Ms. Scapino noted once the safe harbor is available, then plans need a default to work against the inertia to invest in an annuity, then they have potential litigation issues. Mr. Hadley replied that the litigation issue did not disappear with the QDIA and it wouldn't go away. Instead, he suggested to focus on removing barriers for employers. Professor Forman noted that the power of the employer to set a default is huge, and that annuity use would certainly rise if it was available as a default.

In response to a question from Mr. Reddy, Professor Forman said that annuitization isn't the only solution, but that increasing the availability of periodic payments would be great. He also stated that a safe harbor for employers to educate participants about longevity and retirement savings would be helpful. Mr. Hadley noted the different options available for using annuities in a QDIA, saying that employers could select the option that is best for them. Professor Forman added that the discussion shouldn't be limited to insurance options only, and that there is an opportunity for others to have managed payout options.

Ms. Haverland questioned Mr. Hadley about how liquidity requirements could be handled in a QDIA with an annuity. Mr. Hadley noted that for the initial 90 day period, liquidity was not a significant issue. However, when investing for the long term, there would be a tradeoff for liquidity – to get maximum return, you need to lock people in to the investment. In response to a question from Ms. Haverland about the impact of investing for the short term on other investors, Mr. Hadley said that the overall investment return would be lowered by keeping a portion liquid, which would impact other investors. Marjorie Mann asked whether employers were hesitant to use a system of periodic payouts because of the issue of missing participants. Professor Forman agreed that missing participants is an important issue and that many employers would prefer to pay out a participant once and be done with them. Ms. Haverland asked Mr. Hadley how his client employers could get over the hurdles of offering an annuity in a target date fund (TDF). Mr. Hadley said that plans do not want to offer annuities unless they qualify as a QDIA, and it would help to start with the biggest employers, and then offering this type of product would trickle down to smaller employers.

Chair Levering then introduced the next panel, consisting of Mr. Kevin Hanney of United Technologies Corporation (UTC) and Jack Towarnicky of the Plan Sponsor Council of America (PSCA). Mr. Hanney stated that in 2010, UTC closed its defined benefit plans to new participants, and in 2012 launched its Lifetime Income Strategy (Strategy). The Strategy's default features mean that people typically save 16-19% of pay between the employee default and employer contributions. By age 60, a participant's balance is allocated to a variable annuity. Participants are free to transfer out of the Strategy at any time, and this ability is important to the plan design. His written testimony shows how the Strategy addresses the QDIA regulation and

explain his recommendation that DOL adopt a qualified retirement income alternative, or QRIA, for a safe harbor.

Mr. Towarnicky stated that despite surveys where workers say they want lifetime guaranteed income, take-up rates remain modest. PSCA recommends DOL: 1) clarify the retirement income safe harbor and provide relief for sponsors who add retirement income solutions, including a choice of payout options; 2) not put service providers who don't provide retirement income products at a disadvantage; 3) focus on a default form of payout to coordinate with a deferral of social security to age 70; 4) focus on aggregation, consolidation, reducing leakage through rollovers, deemed IRAs, electronic \banking; and 5) clarify TDF as QDIA re: glide path.

Chair Levering asked Mr. Hanney how plan-to-plan transfers work with the annuity at UTC. Mr. Hanney said that the lifetime income strategy at UTC does offer portability - each insurance carrier that backs the variable annuities provides an IRA for people to transfer into. They can do a plan-to-plan transfer if there is another recordkeeper who used same standards for the insurance component. He noted that most former participants stay in the plan and UTC accepts roll-ins from former employees, as long as they have a balance in the plan. Mr. Towarnicky added that electronic features minimize leakage – people can continue to make loan payments or initiate a loan post-separation. In response to a question from Mr. Reddy about the plan sponsor's on-going relationship with separated employees, Mr. Hanney said that there is a strong business case to be made that every dollar in the plan is also good for the company. In response to a question from Ms. Haverland, Mr. Hanney said that ¾ of the people who are in the lifetime income option were defaulted in and there is about an 80/20 ratio between the people who are defaulted in and stay versus the people who were defaulted in and then leave. Mr. Hurst asked Mr. Hanney whether the Strategy was available to collectively bargained employees as well. Mr. Hanney said that employees covered by a collective bargaining agreement are not defaulted into the plan, but have access to the Strategy.

Mr. Reddy then introduced the next panel, consisting of Marc Pester, managing director with Prudential Retirement; Mark Foley, managing director and head of Retirement Plan Default Solutions at TIAA-CREF; and Elizabeth MacGowan, Vice President of Strategy and Business Development for National Life Group. Mr. Pester began by highlighting the emerging risks faced and described three income solutions designed to address those risks. First, non-guaranteed income solutions (for example, TDF or managed funds with systematic withdrawal programs) address conversion risk, but don't eliminate sequence risk or longevity risk. Second, fixed annuities address longevity risk but give up the most in terms of flexibility and liquidity. Third is the guaranteed minimum withdrawal benefit (a variable annuity with a guaranteed minimum withdrawal benefit rider), which is generally set up in conjunction with a target date fund or managed account. The guaranteed benefit is designed to address that sequencing and longevity risk without giving up flexibility and control of the market value and liquidity. Prudential's experience with guaranteed minimum withdrawal benefit (GMWB) is that participants with them have much better savings behaviors and outcomes. His recommendations call for DOL to clarify whether the selection safe harbor applies to solutions like GMWB, and to amend the safe harbor consistent with the approach in current legislation.

Mr. Foley testified that the current regulatory environment discourages the inclusion and use of annuities in defined contribution plans. A key characteristic of TIAA plans is the ability for participants to convert some portion of their accumulated savings into a guaranteed annuity. TIAA supports amending the selection safe harbor to provide more certainty. Fiduciaries should be able to rely on the oversight of state insurance bodies that have the foundation to evaluate the solvency of insurers. Second, TIAA thinks DOL should amend the liquidity requirements of the QDIA regulation. The 2016 DOL information letter to TIAA confirmed that it is possible for sponsors to prudently default participants into vehicles that include annuities with the 90-day liquidity feature.

Ms. MacGowan testified that the QDIA rules currently prevent many annuities, including fixed indexed annuities, from being available as a QDIA. The primary feature of a fixed indexed annuity is protection from market losses because the insurance company is responsible for any market downturn. Participants can either elect to get a fixed rate declared in advance, or elect one of the index options, which provides a return using a formula tied to (but not invested in) a market index. She stressed the importance of a certain amount of protection so that the insurance company can invest for a long period. Ms. MacGowan stated that if you give a lot of liquidity and people actually exercise it, the people who stay in are subsidizing those who leave early. Fixed annuities provide lifetime income and annuitization options within the products and she said the QDIA rule should be modified to clarify that this type of product is available.

Mr. Reddy asked the panel how, considering that insurance solutions are complex, they would go about educating participants. Mr. Pester said that income solutions are very simple if you focus on what they do, i.e., what does an account value translate into in terms of an income stream? Participants don't need to understand how the solution works. Mr. Foley said that the lifetime income component is part of, but not the entire QDIA and TIAA explains how the investment works in fact sheets and other resources. Ms. MacGowan agreed that it can be simple if you focus on what the investment will provide to participants at certain ages. Mr. Greenfield asked the panel if there were issues, other than the legal issues, that explain why sponsors do not use annuities more often, and whether there is a difference in uptake between ERISA and non-ERISA markets. Mr. Foley noted that TIAA was founded pre-ERISA with annuities as the foundation, and when a plan is positioned as a source of lifetime income as opposed to accumulation, there are higher annuitization rates. Getting people to adopt these solutions is one challenge, but there are others, like portability and communication. Mr. Pester said that the majority of his company's government plans not subject to ERISA use guaranteed income solutions, so he thinks the fiduciary aspect does play a role in the lower take up rates for ERISA plans. Mr. Greenfield asked Mr. Foley about the sufficiency of state regulators as a safeguard, and whether anything has changed in this respect since Pacific Life. Mr. Foley noted that it has been 20 years since the last major insurance failure, and that there is nothing to indicate deficiencies in regulation. He noted there are differences between insurance companies, and that regulatory authorities have the ability to evaluate those institutions.

Mr. Reddy asked whether the solution used by United Technologies to use multiple insurers is a better way of spreading the risk. Mr. Pester said that it's a facts and circumstances determination depending on the plan and its size. Having multiple insurers made sense to UTC, but there are trade-offs because it adds complexity. Ms. Haverland asked whether the limit on state guarantee

associations to a certain dollar amount would be a reason for having multiple insurers. Mr. Pester said that could be one reason to do it and the structure of how the insurance is set up is important. In response to a follow up question from Ms. Haverland about the financial examination, Mr. Foley said that it is typical to have the examination every five years. Ms. Scapino noted how the contracts described by Ms. MacGowan are extremely complex and asked how to explain that to the broader market. Ms. MacGowan said that in an institutional setting, fees and surrender charges could be reduced, and there are other ways to simplify and illustrate the product.

In the afternoon session, the first panel consisted of David Ireland, State Street Global Advisors Mark Fortier, NISA Investment Advisors, and Christopher Jones, Financial Engines. Mr. Ireland suggested DOL revise its QDIA regulation to allow a TDF that includes an annuity component pre- or post-retirement to qualify as a QDIA. He said the Administration should support the annuity provider selection safe harbor contained in the Retirement Enhancement and Savings Act of 2018 (RESA) or, if not enacted by June of 2019, the DOL should revise the annuity selection safe harbor regulation to mirror the provision in RESA. He also recommended that DOL should issue guidance reaffirming that a plan sponsor's decision to offer a guaranteed income option is a settlor function and that guaranteed income may be a fiduciary consideration when implementing a plan. Mr. Ireland asked for formalizing existing DOL guidance, in a 2014 exchange of letters, allowing an investment manager to assume fiduciary responsibility for selecting an annuity provider. He called for the DOL to issue guidance regarding the appropriate amount of advance notification to precede the automatic purchase of the annuity. Mr. Ireland commented that incorporating QLACs into DC plans would allow participants to insure against the tail risk of a very long life and correspondingly spend down their remaining assets at a faster rate.

Mr. Fortier asked DOL to clarify the existing QDIA rule's use of fixed income investments designed to provide stable and sustainable retirement income over life expectancy. He also called for guidance to assure plan fiduciaries that it does not violate their fiduciary duties in the selection of a QDIA designed to provide varying degrees of long-term appreciation, capital preservation, and income stabilization through a mix of equity and fixed income exposures based on the participant's age, target retirement date and the expected time horizon after retirement. Mr. Fortier suggested a change to the basis under which the equity and fixed income exposures are determined from "or life expectancy" to "and expected time horizon after retirement."

Mr. Jones stated that the QLAC structure is a more efficient approach to ensure that retirees do not outlive their assets. He said any QDIA regulation should include a variety of products and services that may be suitable for a given household and must not deem annuities as having preferential treatment. Mr. Jones said decisions by plan sponsors to default a participant into a Lifetime Income QDIA must be based on evidence that such a default is in the best interests of the participant, which varies on the facts and circumstances of the individual or household. He added that for most participants, it is not economically advantageous to purchase annuity income prior to reaching their early 70's, making any default of younger participants into annuity products a dubious proposition from an economic perspective. Participants who pay annuity costs at a young age and then do not annuitize at retirement have significant losses in available

assets, he said. Mr. Jones pointed out the challenges for annuity-based Lifetime Income products that are impossible or difficult to roll over to a new employer's plan.

Council vice chair Sri Reddy asked how managed accounts work with defaults. Mr. Jones replied that defaults are based on having a complete financial picture for participants, and a majority of clients choose not to annuitize. Mr. Reddy asked about blending in the QLAC. Mr. Ireland said the key is separating the accumulation and decumulation phases, with a QLAC purchased when the participants are in their sixties. With a QLAC, they need to focus on making their assets last 15 years, not their entire lives. Mr. Reddy asked how to figure the maximum spenddown possible. Mr. Fortier said the idea is to help participants transition by framing the issue. Ms. Levering asked how to get employers to buy into the idea of looking at the whole retirement picture, including Social Security. Mr. Jones said it is harder getting people to commit when they are in their 60's then when they are 70.

The next panel was Kelli Hueler, Hueler Companies and Neil Lloyd, Mercer, for Defined Contribution Institutional Investment Association (DCIIA). Ms. Hueler said the fact that many people buy annuities individually shows that there is a market for them. She recommended making available a broad range of both guaranteed and non-guaranteed lifetime income alternatives to help participants personalize their desired income streams. She said one of the biggest obstacles to getting plan sponsors to include lifetime income benefits is their concern with providing education and communications to participants about the alternatives. She recommended revising IB 96-1 on education and advice to participants to apply to lifetime income options in the decumulation phase, whether or not in the plan. She suggested allowing plan sponsors to offer a choice that includes QDIA with an income component, as well as a qualified plan distributed annuity and an IRA rollover. Also, Ms. Hueler recommended allowing partial distributions to provide participants greater flexibility to match their income needs at various stages of retirement.

Mr. Lloyd cited DCIIA surveys showing that plan sponsors overwhelmingly want a fiduciary safe harbor before they offer lifetime income (LTI) solutions in their plans. Plans also are concerned with plan-to-plan transfers with LTI. He cautioned that the value of LTI solutions might be severely limited in a Plan's qualified default investment alternative (QDIA) if a Plan does not allow for partial withdrawals. Mr. Lloyd advised, before putting LTI solutions in the QDIA, to ask how many participants will be in the QDIA at retirement. He said participants near retirement may need a more tailored solution, beyond the lifetime income solution envisaged within a QDIA.

Stacy Scapino asked what could make annuities markets work. Mr. Lloyd said an open MEP environment would help. Ms. Scapino asked about tailoring products to appeal to participants. Ms. Hueler said that and greater transparency would help. Ms. Scapino asked if the annuities platform could adopt to a QDIA option. Ms. Hueler said the key is flexible technology, along with portability and new types of communications. Ms. Haverland asked what should be benchmarked. Mr. Lloyd said that depends on the product. Ms. Levering asked why most participants do not want annuities. Ms. Hueler said they are not buying from the plan, and the retail market is more difficult and costly. Ms. Haverland asked how many recordkeepers are not accommodating these type of products. Mr. Lloyd said recordkeepers are more likely to make changes if they're hearing a consistent message. Ms. Hueler said some recordkeepers are supportive but others are not. Ms. Scapino asked about a default like path. Ms. Hueler said it is

guiding people in a seamless way that dovetails investment alternatives in the plan, such as with target date funds.

The last panel consisted of Teresa Ghilarducci and Tony Webb of The New School and Mark Iwry. Dr. Ghilarducci and Dr. Webb advocated for a temporary annuity in a QDIA to help bridge the gap to claiming the full Social Security benefit. Mr. Iwry noted the letter from EBSA stating that the QDIA may contain lifetime income options. He suggested tailoring protection against outlying assets through the QLAC, though that depends on different needs of people. Mr. Iwry said plans are concerned with fiduciary responsibilities in the selection of annuities. He suggested expanding 96-1 to provide fiduciary relief for the selection of annuities or other forms of lifetime income. Mr. Iwry said one option is to use part of the 401(k) assets to buy an annuity from an existing defined benefit plan, even if the plan is frozen. Also, he suggested plan sponsors could decide all or part of the employer match could be in the form of an annuity, or to make the match amount untouchable until retirement. Mr. Iwry also suggested a trial annuity, so that participants would receive installments for two years after they retire, and then the account balance would convert to an annuity unless the person opts out. He also recommended eliminating the required minimum distribution for those with assets under $250,000.

Mr. Greenfield asked how to annuitize for people in their seventies, given the requirements of the distribution rules. Mr. Iwry said the idea is to start with a regular drawdown, then convert to annuities. Mr. Hurst asked how to bridge until full retirement claiming under Social Security for a fifty year-old retiree. Mr. Iwry suggested a partial annuity for those situations.

Ms. Levering asked for public comments and there were none.

The meeting adjourned at 4:45 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5521 Room 4, Frances Perkins Building
Washington, DC
June 20, 2018

Minutes of Meeting

Council Chair Cynthia Levering called the meeting to order at 9:10 a.m. Ms. Levering turned the meeting over to Bob Lavenberg, chair of the Council issue on Evaluating the Department's Regulations and Guidance on ERISA Bonding Requirements and Exploring Reform Considerations.

The first witness was Marc Mayerson of The Mayerson Firm. He said that ERISA fidelity coverage is not a problem area. He noted that there are losses and disputes, but that the coverage is reasonably available at reasonable price points. He testified that the loss under review by the Council is loss occasioned by the fraud or dishonesty of those with access to plan funds. He discussed a decision from the Ninth Circuit in the Aqua Star case, where the Court held that a fidelity bond which did not cover social engineering losses caused by employee actions was because social engineering losses are caused by employee negligence and not by employee dishonesty or fraud. Mr. Mayerson noted that there are ways of insuring against computer-caused losses, but that plans could instead invest in training employees better. He said including computer fraud coverage would broaden the standard coverage offered. He noted that the cyber insurance market is still relatively young so coverage and pricing is not standardized.

Mr. Mayerson said if fidelity bonds covered money due to be remitted to the plan, the fidelity insurer would pay the plan immediately and then would have the right to chase the delinquent contributor. He noted that plans already can sell on the commercial market the right to collect a contribution. This would force insurers to pay claims where the plan or a commercial factor would not find it economically rational to do so. He stated that it does not seem reasonable to require insurers to pay for receivables where the dishonesty of the contributor is at issue.

Ms. Scapino asked when something becomes a plan asset, Mr. Greenfield stated that until the plan actually receives them, funds are not a plan asset, but the right of action to collect them is a plan asset. Mr. Greenfield asked whether fraud and dishonesty are the greatest risks today and whether the Council should encourage DOL to broaden the coverage requirements. Mr. Mayerson said that the commercial crime policy does conform to the ERISA bond requirement in that it is a standard form endorsement for the purpose of complying with DOL regulations. He believes that this is not a problem area because he is not seeing fidelity bond cases. To the extent that there are cases, they are either self-dealing in small plans or opportunistic claims brought following a Ponzi scheme (which have all been unsuccessful). In searching case law on this topic, Mr. Mayerson noted that the cases he found were 20 to 30 years old, and not particularly interesting in his opinion. To the broader question of what should be covered, he said that there are two thoughts – either mandate coverage or leave it to the judgment of the fiduciaries. He would not mandate coverage if there was no problem.

Mr. Greenfield asked if the market is working effectively, what makes fraud and dishonesty so special that coverage is required, and whether the requirement is outdated. Mr. Mayerson noted that he ran through the process of attempting to buy a bond on an insurance company website and found he could purchase one for $700. His view is that if the premium is only $700, this isn't the most valuable coverage. Mr. Greenfield asked whether there are situations where the mandated coverage amounts were inadequate. Mr. Mayerson is unaware of a source for this information. Mr. Lavenberg asked whether the language used – since it is pre-ERISA commercial language – should be updated. Mr. Mayerson stated that there is a healthy gap between the regulatory requirements and the contract requirements. Ms. Mann asked whether there had been a change in the environment, for example, were premiums more expensive in previous years when issues were more prevalent, and is it harder to be fraudulent now in light of advances like electronic banking? Mr. Mayerson does believe that the changes in system tend to reduce risk, but doesn't believe there is a relationship between losses and the price of policies. Rather, he believes supply and demand and standardized policies are the main reason for the decreased price.

Ms. Scapino asked whether he was correlating the lack of an interesting case history to the lack of losses occurring. Mr. Mayerson said he didn't know about claims paid or claims dropped, but only about cases reported and sometimes not reported. Ms. Scapino asked whether it is a legitimate requirement to have employers with adequate controls subsidize those who don't. Mr. Mayerson does not believe insurance markets work that way. There is a relationship between loss and cost, but it is a small one. Ms. Scapino questioned whether there should be an opt-out mechanism for those who can demonstrate that they don't need the bond. Mr. Mayerson would instead remove the requirement and let the onus be on fiduciaries to purchase insurance if they think it is necessary.

In response to a question from Mr. Lavenberg on his thoughts about instances where employers make the plan whole after a fraud because they don't want to publicly report it, Mr. Mayerson said the question is whether reporting to law enforcement should be mandatory. If a bad actor was kept in employ, the plan would automatically lose coverage. If the employer fired the person and the money made good, life would be back to normal. He is not aware that this is a major reporting problem and stated that one remedy is to use underwriting processes to police this type of activity, where underwriters ask whether the plan has had any thefts, made any claims, or reported anything to police in the last year. Mr. Greenfield asked if underwriting was not driving the price of coverage, what was? And if it's not underwriting, is there any incentive for insurers to ask questions about losses? Mr. Mayerson said the incentive was to lay a perjury trap to avoid paying on the coverage later on. As to what drives the price of bonds, Mr. Mayerson said it is principally supply and demand, and the investment return matters more than underwriting profit. In a rising interest rate environment, he would expect prices on most insurance to end up going down.

The next witness was Robert Duke of The Surety & Fidelity Association of America (SFAA). He said ERISA Section 412 does not dictate the form of bond that must be provided, does not explicitly mandate a fidelity bond, and does not require a single bond cover all handlers. However, the statute and regulations suggest that blanket fidelity bonds are acceptable. The fiduciary must ensure that all plan officials and service providers handling funds or property are bonded in some way. Insurance policies typically have definitions and conditions - to delineate

the risk. In 2015, SFAA learned that EBSA Regional Offices objected to standard fidelity bond language, particularly the language in the employee dishonesty insuring agreement. SFAA amended the coverage with respect to welfare benefit plans so that the insuring agreement covers loss caused by "fraud or dishonesty" and the revised language includes an exclusion for negligence. Regarding coverage minimums, Mr. Duke said his association did not know of instances in which an otherwise covered loss was not covered because the policy limits were not sufficient. He stated that the applicability of the regulation to funds of the plan apparently does not apply to money withheld from employees before it is transferred or segregated. In instances of theft of such funds, the employer's insurance policies might apply. Mr. Duke recommended that any regulatory action recommended by the Council should involve the requirement of the right coverage for the right exposure. Mr. Duke said the fidelity bond has a tremendous public policy benefit.

Mr. Greenfield asked Mr. Duke whether the Council should recommend a change in the amount of mandated coverage, and if that were to occur, what the impact would be on the insurance markets. Mr. Duke replied that the first step would be to conduct an exposure analysis. As an example, he cited the SFAA's ongoing dialog with EBSA's New York Regional Office, where EBSA wanted the standard bond language to more closely track the fraud or dishonesty language in the regulation. EBSA gave scenarios of dishonest behavior, posing whether they were covered. Mr. Duke's response was that many of the scenarios were more appropriately covered by fiduciary liability coverage, and that perhaps that should be required as well as the bond. Mr. Greenfield asked about the distinction between the bond and fiduciary liability insurance, which protects the fiduciaries, and whether a fiduciary having coverage would be a way to cover the plan's claim against the fiduciary. Mr. Duke recalled that some coverage scenarios posed by EBSA involved the standard of care of the fiduciary regarding investment decisions. That is closer to fiduciary liability coverage than a fidelity bond loss.

Mr. Lavenberg asked whether the language of the fidelity bonding requirements should be updated to cover other things. Mr. Duke indicated that in the past, the "manifest intent" language of bonds was sufficient under the bonding rules to cover dishonesty; however, in the past few years, EBSA's view has changed such that the words fraud or dishonesty had to be in the form. What is needed is a precise definition of what is included in fraud or dishonesty, not a "we know it when we see it" view. Mr. Lavenberg asked whether there needs to be more clarity, or use of ERISA language, also in the terminology of embezzlement or theft. Mr. Duke said that the SFAA forms do not use the terms plan assets or funds, but rather "money, securities or other property", and that the DOL was satisfied with the form containing this language.

In response to a question from Mr. Lavenberg about whether the $500,000/10% bonding requirements should be revised, Mr. Duke said that the SFAA doesn't have data on whether claimed losses exceed policy coverage. It is conceivable, he said, that there are instances where there was not sufficient coverage. SFAA would have statistics to say whether losses were paid out at the policy limit, but, since most ERISA coverage is an endorsement to a larger policy, it would be difficult to tell how much was attributable to ERISA losses.

Mr. Greenfield asked whether the Council should recommend that DOL work with the insurers and SFAA to create model language for a safe harbor. Mr. Duke indicated that SFAA, Insurance

Services Office (ISO), and individual insurers had already revised language in response to DOL's concerns, so this wasn't necessary at this time. If the DOL's views changed, Mr. Duke thinks the DOL should make any further changes by regulation, not via regulation by enforcement. With the regulatory process there is the opportunity for public comment and certainty once a change is implemented. Mr. Duke agreed with a question from Mr. Greenfield that the antiquated and differing language in the forms and regulations does cause confusion for consumers. Ms. Mann asked Mr. Duke to elaborate on his written testimony that any change in the regulations would require a lengthy process to obtain approval from state regulators. Mr. Duke stated that the recent process of changing their standard policy, from negotiating with DOL to being able to use the policies in all states, took probably a year. SFAA or ISO members can use standard industry forms once they are approved by the state involved. Insurers who develop their own forms have to get them adopted by the states too. There are filing fees for each state, and there is a cost to developing the forms and manuals. It's an involved process that takes a great deal of time and there is a cost involved, but Mr. Duke couldn't pinpoint the total cost.

Mr. Greenfield asked whether a crime policy covering all crimes, whether inside or outside jobs and including social engineering thefts, should be mandated. Mr. Duke acknowledged that he doesn't know enough about burglary and theft exposure, but that cyber coverage would address a real risk that plans face. To determine what the exposures are, you need to ask about losses. In response to Mr. Greenfield's question about coverage for participant contributions, Mr. Duke noted that all states require an ownership condition, so if the plan doesn't yet own the contributions, it wouldn't yet be a loss to the plan.

Ms. Scapino noted that all plans are required to have a bond, and asked whether sophisticated sponsors or fiduciaries should be treated the same as smaller fiduciaries, who likely have a larger probability of loss. Mr. Duke doesn't think the DOL views the fidelity bond requirement as an enforcement mechanism. Ms. Almeida asked whether there was data that shows whether these risks are stable, declining, or rising over time. Mr. Duke said that the SFAA does have data over the years, but all losses are coded to the general business. Mr. Hurst asked whether cyber insurance should be mandated. Mr. Duke said that when SFAA's advisory committees discuss claim trends for businesses in general, they are typically cyber related. For example, social engineering – taking advantage of technology – is an area in which SFAA members have been getting claims. If happening in businesses it stands to reason that it is happening at plans too. Training is helpful regarding social engineering, but the market response they've gotten is that training isn't a perfect solution. Chair Levering asked whether losses are being incurred that weren't anticipated by the coverage. Mr. Duke said yes, and that social engineering is the latest example of this.

Mr. Lavenberg then asked if anyone in the audience wished to address the Council. Mr. Robert Olausen, a principal with the Insurance Services Office (ISO), asked to participate. Mr. Olausen heads up Fidelity and Financial Institution Product Development and has experience developing cyber programs, directors and officers, and fiduciary liability coverage. He noted that the term cyber means a lot of different things, and with regard to insurance, it really means the release of confidential information, not computer-type fraud coverage. This is important if the term is used in a recommendation.

Like SFAA, ISO forms are used extensively in the commercial marketplace. ISO gathers data on pension plans and fidelity coverage in the same manner as the Surety Association does. Mr. Greenfield asked whether Mr. Olausen had a view on whether the Council should recommend broadening the bonding mandate. Mr. Olausen said that burglary or robbery may be more insignificant type perils but social engineering coverage may be more of an issue. But once mandated, the market could change and carriers could decide not to offer that type of coverage, leaving people out of compliance. Whatever is done, his recommendation is that it is done through regulation, so that the entire industry can participate in the process.

Mr. Mayerson then rejoined the discussion, noting that the Secretary's authority is limited by the McCarran-Ferguson Act, which governs the ability of the Federal Government to mandate insurance terms. He also stated that the discussion about the tracking of words in the policy versus words in the regulation is really not an issue. The two issues that are the subject of litigation are whether the bad person acted with manifest intent and whether the action produced loss that is in the form of money within the meaning of the fidelity coverage. Mr. Duke agreed that prior to the SFAA's contact with EBSA in 2015, what was in the regulation and what was in the policy was really not an issue. But that changed when EBSA made it an issue.

Next, the Council heard from Diane McNally, Segal Select Insurance. She stated that insurers are revising fidelity bond language regarding third party perils per the request of EBSA. Plan sponsors, she said, are responsible to make sure the list of coverages is updated. Ms, McNally noted the personal or confidential information exclusion and stated other insurance applies. She said the ERISA fidelity bond insurance market now provides coverage for an expanding area of fraud commonly known as social engineering or fraudulent impersonation of an employee, customer, vendor or a plan participant, causing an employee who relied on fraudulent instructions to voluntarily part with money or securities and/or other property based on fraudulent instructions. Carriers' sublimits of coverage and higher policy retentions and coverage vary by carrier, so there could be a potential gap in coverage for plan sponsors. Also, she said the definition of "plan official" varies by carrier and policy form. McNally said the fact that carrier bond forms are not uniform as to who is a plan official makes it difficult for plan sponsors to assure that all plan officials are properly insured. She suggested there could be guidance to clarify who must be bonded, by reviewing the requirements under the DOL Field Assistance Bulletin (FAB) 2008-04 to determine if additional changes are needed regrading who is responsible for how funds are handled. Ms. McNally also suggested evaluating types of losses and average paid claims involving plan officials and whether the change in inflation rate over time would support a change in the bond limit requirements. Also, Ms. McNally said broad coverage bonds have the advantage of covering a wide variety of potential problems.

Mr. Lavenberg asked if bonds cover recordkeepers. Ms. McNally suggested revising guidance to require coverage of any natural person with access to plan information or assets. Mr. Greenfield asked if she has seen any losses in excess of the bonds' coverage amount and if DOL should mandate a coverage amount to meet the excesses. Ms. McNally said she has seen losses involving service providers as high as $40 million, but excess losses involving employees have not been that large. Because she has only anecdotal information about losses and no hard data, she was reluctant to recommend large increases in mandated coverage. Ms. Mann asked if higher coverage amounts are needed for third party losses. Ms. McNally pointed out that the

large losses she has seen from third parties involved multiple plans and policies. Mr. Greenfield asked about increasing the current coverage minimums to reflect inflation since the rules were established. Ms. McNally said the market already has adjusted accordingly to make those amounts available. Plans that do not have the higher amounts could face increased premiums, partly depending on state rating changes. David Kritz asked about related funds buying one bond. Matt Jackson, who accompanied Ms. McNally, said related funds buying together have higher coverage amounts. Ms. McNally added there is a question of when contributions become plan assets in the case of a plan using a pass-through company for allocating contributions among funds. Mr. Greenfield asked about covering money contributed but not yet deposited that sits in a corporate treasury account. Ms. McNally said that could lead to underwriting changes that increase prices of policies. Mr. Greenfield asked about building in subrogation rights and Ms. McNally said there also is the issue of a bankrupt sponsor. She said there is a high cost to underwrite new coverages because of uncertainty of risk. Ms. Levering asked about coverage of lost PII. Ms. McNally said there is a conversion of policies covering related risks, including PII and personal health information, but that cyber liability policies cover those issues, unless there is fraud or dishonest acts. Mr. Jackson added that fidelity bonds cover only losses to plans.

The final witness of the day was Professor Norm Stein (participating by phone), who said he could not find academic literature on issues related to fidelity bonds and there has been very little case law. He pointed out that fidelity bond provisions date back to a 1962 statute, before ERISA added the fiduciary concept. He summarized employee benefit law changes that make Section 412 less relevant. Among other issues, he suggested the Council should address whether (1) the net benefit of fidelity bonds justify their cost, (2) payroll deductions for contributions to 401(k) plans (and other employee contributions) should be covered by fidelity bonds before they become plan assets, (3) an increase is appropriate for the maximum bond amounts established in 1962 --$500,000 for most plans (increased to $1,000,000 for plans that carry employer stock in 2006) but no more than 10% of a plan's assets, (4) employees are paying the cost of fidelity bonds as plan expenses, (5) clarity is needed for what constitutes handling plan assets in the case of plans holding substantial amounts of employer securities, and (6) it is appropriate to rely on the fiduciary rules to govern whether a plan should purchase a fidelity-type bond, and if so, the amount of the bond and the scope of the risks covered by the bond. Mr. Stein suggested there could be a change in the regulation to allow plans to self-insure if they meet certain credit and solvency criteria.

Mr. Lavenberg asked whether it would help to update the regulation to clarify the applicability of the bond requirement to plan assets vs. plan funds and other property. Mr. Stein said the regulation should be amended to make the language more relevant to current practices, if the statute allows. Mr. Greenfield asked whether crimes policies should be added to fidelity bonds requirements. Mr. Stein said other crimes policies deal with bigger problems. Mr. Lavenberg asked about revising the coverage amounts in the regulation. Mr. Stein said 40 years ago, many plans had $500,000 in assets or less, which suggests the amount should be raised. While the 10 percent requirement is reasonable for large plans, he said it is inadequate for small plans.

The meeting adjourned at 3:25 p.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE
AND PENSION BENEFIT PLANS
Employee Benefits and Security Administration
U.S. Department of Labor

C5521 Room 4, Frances Perkins Building
Washington, DC
June 21, 2018
Minutes of Meeting

Council Chair Cynthia Levering called the meeting to order at 9:02 a.m. EBSA Senior Policy Advisor Mark Dundee provided an update on recent EBSA activities. He described the association health plan (AHP) rule that was just published as beneficial for small employers. The rule allows them to band together by geography or by industry to save on health plan costs. The rule applies to sole proprietors as well as larger companies. He said the Congressional Budget Office estimates 4 million people switch to AHP coverage by 2023 as a result of the rule. Safeguards include the role of state insurance commissioners, he added. Commenting on enforcement efforts, Mr. Dundee noted the agreement with MetLife and Brighthouse for help in winding down plans under DOL's abandoned plan program, including confirmation that plans are abandoned. Those companies will serve as termination administrators and use an agent, Ascensus Trust Company. He expects $116 million to be disbursed to 20,000 participants in 400 plans with small levels of assets.

Ms. Levering asked about the differences between the new AHPs and the existing AHPs. Deputy Assistant Secretary for Program Operations Tim Hauser said the new AHPs (1) allow affiliation to be by geography and (2) apply to self-employed individuals. Marjorie Mann asked if EBSA considered concerns that by allowing AHPs an exception to including the essential health benefits now required by law, it might undermine health care for people. Mr. Hauser responded that EBSA looked at that, but concluded this approach gives employers flexibility to tailor benefits to the needs of participants and at a lower cost. Plans will still be subject to ACA large plan rules other than coverage. David Kritz asked whether the form of the recent proposed soft guidance on mental health parity represents a trend. Mr. Hauser answered that the format was context specific. That EBSA wanted comments before proceeding.

The Council next turned to a discussion of its issues. Council Executive Secretary Larry Good emphasized the need for the new members of the Council especially to have an opportunity to look at the issue scopes and suggest changes. Bob Lavenberg, chair of the fidelity bonds issue group, stated that his group is mostly satisfied with testimony and insights the Council received on the five main questions raised in the issue scope. However, the group wants to get more detail on certain aspects, one being what do these ERISA riders to insurance policies really look like. He said the group hopes to get some sample language and try to understand the underwriting process. Other outstanding queries include:

- Handling of money in the electronic age – any changes from when statute was enacted
- Get input from state insurance commissioners to discuss relationship between federal mandates and state insurance rules

- Look at existing sub-regulatory guidance to determine if any of it can and should be incorporated in regulatory scheme
- Look for data on current issues with bonds, including losses and claims
- Regarding the 2006 statutory changes with a higher cap for plans with employer stocks – look at the legislative history to determine whether Congress looked at bonds more broadly then
- Does the benefit of the fidelity bond relate to cost?
- Should contributions be covered before they are considered plan assets?
- Are changes in regulations needed? Cost-benefit? Coverage minimums update?
- Guidelines for plan sponsors
- Look at DOL pub on Fidelity Bonds to possibly recommend revisions
- Consequences of ending mandate?
- Should there be a penalty for not having a bond?

David Kritz raised the questions of (1) whether the fidelity bonds need to name the specific plan officials covered and (2) whether there should be a penalty for not having a bond. Mr. Lavenberg agreed those are points the Council needs to clarify. Council vice chair Sri Reddy asked whether the group will look at an issue witnesses raised about the need for further DOL clarification of the rules rather than regulation by enforcement. Issue group vice chair Doug Greenfield summarized the pros and cons of recommending a change in the regulation vs. other measures. Stacy Scapino asked whether the Council should consider the relevance of the fidelity bond requirement in the current context. Mr. Greenfield said the problem is trying to draw a distinction between the mandate for fidelity bond coverage and other insurance coverage that might be more relevant. Ms. Levering asked about the suggestion to allow large plans to self-insure. Mr. Greenfield said that relates to the question of whether the fidelity bond mandate should remain in place. Mr. Reddy asked what might happen if there was no mandate for fidelity bonds. Mr. Greenfield said because of fiduciary responsibility, bond purchases might persist.

Next, the Council discussed the lifetime income/ QDIA issue, led by issue chair Pat Haverland. Bridget O'Connor wanted the issue scope to include consideration of the impact of what the Council is considering on Social Security claiming decisions, specifically, whether default annuitization would harm Social Security claiming delays. Ms. Haverland noted that the scope's statement about seeking innovative solutions covers that aspect. Stacy Scapino said several witnesses talked about in-plan vs. out-of-plan decisions, and out-of-plan could incorporate Social Security claiming strategies. Mr. Reddy discussed the need for a multi-solution approach, to allow variability and flexibility (e.g., in-plan withdrawals at a certain age, mortality risk variations). Ms. Almeida mentioned that mortality risk might differ widely across demographic groups and occupational groups. Ms. Levering brought up the point by several witnesses that lifetime income benefits constitute benefits, rights, and features that favor higher paid employees. Mr. Greenfield stated that is an IRS issue.

One idea was to look at regulation vs. guidance through letters, and whether regulatory changes are needed to make policies more comprehensive. Ms. Levering noted there was witness support for lifetime income provisions in the Retirement Enhancement and Savings Act (RESA), and Ms. Haverland said her group will look at the legislation. Ms. Scapino said RESA's provisions for assessing insurers' health might not be sufficient. Mr. Reddy expressed a desire for more

information about how fiduciaries can assess the health of insurers for a long-term annuity purchase.

Ms. Scapino wanted more information on how the employer match could be used for partial annuitization. Ms. Haverland said witnesses at the next meeting hopefully will address that question and other plan design issues. She also noted the need for further information on seeking (1) transparency, in terms of sponsors' communications about product fees, and (2) portability, which would require a determination of the annuity value and ways to make sure the valuation is correct.

Ideas for additional witnesses included another plan sponsor, Blackrock, and ACLI. For plan sponsors, the Council members want to ask about any obstacles for them to implement partial annuitization for participants. Mr. Greenfield cited testimony by some witnesses that retirees' hoarding because of fear of running out of money seems to be the problem, but noted they lack data on people running out of money. He said the Council needs balance on presenting the case for encouraging LTI solutions. Ms. Haverland said she hopes witnesses at the next meeting will clarify whether including LTI in the QDIA constitutes a settlor or fiduciary decision.

After some discussion of whether to revise the issue scope, the Council decided to amend the scope to encourage plan sponsors as well as participants to use LTI products.

Ms. Levering asked for public comments and Jan Jacobson from the American Benefits Council offered her organization's help in identifying a plan sponsor to testify in August.

The meeting adjourned at 11 a.m.

ADVISORY COUNCIL ON EMPLOYEE WELFARE

AND PENSION BENEFIT PLANS

Employee Benefits and Security Administration

U.S. Department of Labor

Washington, DC

November 5-6, 2018

Minutes of Meeting

The meeting was convened on November 5 at 1:10 p.m. by Council Chair Cynthia Levering, who turned the program over to Pat Haverland, the issue chair on the day's first topic for discussion, Lifetime Income Solutions as a Qualified Default Investment Alternative (QDIA) – Focus on Decumulation and Rollovers. Ms. Haverland explained that since the September 25 Council meeting, the issue group decided to remove some of the verbiage in the recommendations and put it into the findings of the report. She also pointed out wordsmithing changes made by the issue group.

The Council discussed the wording in the recommendation to "Require a plan fiduciary selecting a QDIA with an LTI option to determine whether the default is appropriate for participants as a whole, similar to rules applicable to QDIA balanced funds, considering the participant population characteristics." Mr. Lavenberg thought the phrase "participants as a whole" could lead to confusion. After some discussion, the members decided to change the wording to "clarify that sponsors may default participants into different options based on participant demographics because plan populations may not be sufficiently similar for a single default to be universally appropriate."

Ms. Haverland explained changes the issue group decided to make regarding the recommendation about the potential role for 3(38) investment managers. The change read "The 3(38) investment manager can either execute this responsibility directly or outsource certain responsibilities to third-party experts." After some discussion, the members decided to remove the sentence as unnecessary and possibly confusing.

Also, the Council had an extensive discussion on language in the recommendations related to liquidity and costs, specifically for surrender charges for annuities in a QDIA. Instead of wording that included "excessive" charges, the members decided on saying "Address the extent to which charges may be imposed if they limit liquidity and/or transferability."

The Council discussed whether to note that pending legislation, other than the Retirement Enhancement and Savings Act (RESA), could supersede one or more recommendations. The members authorized Ms. Haverland to add a reference to other legislation.

After additional wordsmithing, the Council decided on the following language for its recommendations:

The Council recommends the Department:

1. Amend the QDIA regulations to address using LTI in a QDIA. Such changes should:
   a. Address the permissibility of including fixed annuities, living benefits and other LTI approaches in a QDIA;
   b. Address the importance of tailoring QDIA options to affected participants, similar to rules applicable to QDIA balanced funds. Specifically, we recommend the Department clarify that sponsors may default participants into different options based on participant demographics because plan populations may not be sufficiently similar for a single default to be universally appropriate;
   c. Maintain the current transferability and liquidity requirements, but clarify whether living benefits satisfy these requirements;
   d. Address the extent to which charges may be imposed if they limit liquidity and / or transferability.
2. The Department should publish guidance confirming that a named plan fiduciary may appoint a 3(38) investment manager to select and monitor annuity and other LTI providers for DC plan decumulation, as well as accumulation.
3. The Department should encourage plan sponsors to adopt plan design features that facilitate LTI, including, but not limited to: allowing participants to take ad hoc distributions, enabling installment payments, providing social security bridge options and allowing for payment of required minimum distributions.

Issue chair Bob Lavenberg then led a discussion on the second topic under consideration by the Council, Evaluating the Department's Regulations and Guidance on ERISA Bonding Requirements and Exploring Reform Considerations. The issue group suggested two changes since the Council met on September 25. Mr. Lavenberg described the changes as follows:

1. "in Recommendation 1, it said, 'directed at plan officials,' and then, in Recommendation 2, we said, 'directed at sponsors and plan service providers.' In discussions, we believed that there was no reason to specify, so we took those references out and moved them to the top, to the introductory."
2. Change "fidelity bond checklist" to "fidelity bond summary."

The Council agreed with both the changes, with the resulting recommendations:

Based on the testimony and research received and for the reasons stated, the Council recommends that the Department publish the following new guidance directed to plan officials, plan sponsors, and plan service providers:

1. A new Interpretive Bulletin, incorporating much of the content of its 2008 Field Assistance Bulletin 2008-04.

2. A summary of the requirements for securing a fidelity bond that complies with the Department's guidance. The Council has drafted a sample summary, which is included in the Appendix to this report.

Next, the Council began to review the draft slide presentation based on the reports. The members suggested revisions for consistency of capitalization, punctuation, and format. They also cut back some of the explanations and agreed to wordsmithing changes.

Chairwoman Levering asked for public comment and there was none.

The meeting adjourned for the day at 4:50 pm.

The meeting resumed on November 6 at 10:00 a.m.

The Council made some final wordsmithing and format changes to its slide presentation, then voted unanimously to approve the reports and slides. It also approved a motion by Beth Almeida to authorize the chair and the vice chair, in consultation with the drafters of the reports, to make perfecting revisions and additions to the reports, provided that there are no substantive changes to the findings and recommendations in the reports.

After a recess, the meeting resumed at 1:05 p.m. Chairwoman Levering welcomed everyone and turned the meeting over to Assistant Secretary Preston Rutledge, who provided an update on EBSA activities since the August meeting. He summarized pending regulation projects, noting that EBSA's priorities are driven by the President's Executive Orders and the theme that too many Americans do not have access to workplace benefit plans. On the Association Health Plan project, he stated EBSA is engaged in outreach and education efforts in advance of the January 1 implementation date. Mr. Rutledge said on October 29, the DOL together with the Departments of the Treasury and of Health and Human Services proposed a rule that would remove the current prohibition on the use of Health Reimbursement Accounts (HRAs) by employers to reimburse their employees for the cost of health coverage they've purchased for themselves in the individual market so long as certain conditions are met. He said these and the Administration's other initiatives in the health area would increase consumer and employer choice, expand access, and help push down costs.

With regard to retirement, Mr. Rutledge noted the August 31 Executive Order (EO) directing DOL to (1) clarify circumstances in which small employers can adopt multiple employer plans (MEPs) and (2) review actions that could make the required ERISA disclosures more understandable and useful to participants and also find ways to reduce the costs and the burdens for plan sponsors. The same Executive Order, he said, directed Treasury to update the life expectancy and distribution tables for required minimum distributions and to work on a fix for

the "one bad apple" rule, which would contaminate a MEP if one contributing plan sponsor violates the rules. In response to the EO, Mr. Rutledge said DOL issued a proposed rule on October 23 that would allow small businesses to band together in an association retirement plan, which would assume administrative and fiduciary responsibilities. The rule sets forth a number of conditions and safe harbors that would apply to the plans. He noted the proposal does not address open MEPs but does request comments on these. Regarding disclosures, Mr. Rutledge discussed looking at ways to make the disclosures more effective and lowering costs for plan sponsors and participants. He suggested one way to lower costs might be incorporating more electronic delivery of disclosures.

Mr. Rutledge also summarized EBSA's enforcement efforts and the work of benefit advisors in helping participants to understand their plans and, in some cases, to recover benefits they are entitled to receive. He said last year, EBSA recovered $1.5 billion for plan participants, of which $1.15 billion came from enforcement and another $443 million as a result of actions by the benefit advisors. In addition, last year EBSA's staff attended more than 1,800 outreach and educational events.

The Advisory Council members then presented their findings and recommendations using the slide presentation finalized by the Council earlier in the meeting. Following the presentation on the bonding topic, Assistant Secretary Rutledge asked about the typical mistakes made by plans concerning fidelity bond coverage. Issue chair Lavenberg and Issue vice chair Doug Greenfield indicated that a variety of mistakes are made, including not purchasing a bond, or not purchasing the correct coverage because of confusion over the coverage requirements. EBSA Deputy Assistant Secretary Tim Hauser asked about the Council's consideration of changes surrounding bonding coverage of participant contributions. Mr. Lavenberg noted some concern voiced in testimony that a plan sponsor might be incentivized to not timely pay contributions to a plan if they had bonding coverage. Mr. Hauser indicated that he was not sure how that was different than the risk of misappropriating contributions. Mr. Greenfield noted testimony surrounding the underwriting complications of a bond insuring against a claim when the participant contributions are not yet in the plan's custody. EBSA Director of Regulations Joe Canary expressed interest in learning more about the complexity of insuring third-party risks, particularly in light of the current requirements to insure service providers who handle plan funds.

Following the lifetime income presentation by the Council, Assistant Secretary Rutledge asked whether the Council heard testimony about deferred annuities. Issue chair Haverland noted that there was research and statistics about how deferred annuities might facilitate retirement readiness. Assistant Secretary Rutledge noted his understanding that there are not a lot of participants electing this type of annuity. Ms. Haverland noted that testimony concurred with this statement. Issue vice chair Stacy Scapino added that the testimony supported the need for flexibility and multiple solutions because one solution would not work for everybody at retirement.

When Labor Secretary R. Alexander Acosta arrived, the Council provided him a summary of their recommendations. After discussing the report recommendations with the Council,

Secretary Acosta thanked the outgoing members for their service and presented them with Certificates of Appreciation.

Chairwoman Levering asked if there were any comments from the public and there were none.

The meeting adjourned at 3:00 p.m.