Retirement Income
JOURNAL

Who Runs EBSA? It Matters

By Kerry Pechter *Thu, Mar 24, 2022*

Ali Khawar, the acting head of the DOL's Employee Benefit Security Administration, spoke at an American Academy of Actuaries webinar. To learn about EBSA's initiatives, we tuned in.

Cherry blossoms decorated the nation's capital this week—pink flowers on a white birthday cake. Suppose, while admiring the florescent trees, I ran into a guy who never votes. The major political parties are like the Tweedle brothers, he says. It doesn't matter who wakes up in the West Wing.

That's not necessarily so, I'd say. I would suggest that we walk over to the Francis Perkins Building at 200 Connecticut Avenue NW, where the Department of Labor (DOL) lives.

A model of mid-1960s modernism, the steel-and-limestone Perkins Building has the charm of an IBM punch-card. It is named for the first woman cabinet member—appointed by Franklin Delano Roosevelt as Secretary of Labor in 1933. Perkins helped craft the New Deal.

The building also houses the Employee Benefit Security Administration, or EBSA. EBSA's career attorneys write regulations that follow the laws that Congress passes. But EBSA's chief is a political appointee, so his or her initiatives and rules tend to reflect the political predilections of the incumbent president and Labor Secretary.

That's why any adviser who recommends rollovers to plan participants, or any asset manager that wants its unconventional funds placed as options in 401(k) plans, or any life insurer that favors annuities in defined contribution plans, should care who runs EBSA at any given time.

In the Trump administration, for instance, Labor Secretary Eugene Scalia and EBSA chief Preston Rutledge shelved the Obama Administration's strict "fiduciary rule" and discouraged the use of ESG (Environmental, Social and Governance) funds in 401(k) plans. But they are gone, replaced by Biden's team.

Ali Khawar

What policies is Biden's EBSA likely to favor? It's probably going to resemble Obama's. We don't know for sure, because EBSA is currently led by an *acting* Assistant Labor Secretary, Ali Khawar. (The Senate has not yet confirmed President Biden's EBSA nominee, labor lawyer Lisa M. Gomez.)

Last week, Khawar, a veteran DOL attorney, was the featured speaker in a webinar hosted by the American Academy of Actuaries. To learn about EBSA's current initiatives, we tuned in. Here are some of the themes Khawar touched on, followed by his comments:

Conflicts of interest

EBSA has a "Conflict of Interest" project. As we move from the defined benefit plan universe to a defined contribution and also an IRA universe, it's important that people can trust and rely on the advice they receive. That's even more important in a universe where they are responsible for making their own financial decisions.

Most Americans are not actuaries. They need advice on how much to save, how to invest, and how to take Social Security. We don't have a system that equips individuals well enough to make these decisions on their own.

In spite of a lot of changes and efforts made over the years by DOL and others, it's still the case that you may not be getting advice you can rely on. It depends largely on the product or the firm you're dealing with. It's important that there's a level set of parameters across the board.

As a consumer, you shouldn't have to figure out, 'Which exemption [from a prohibited transaction] is the adviser I'm talking to using. Are they regulated by the NAIC? FINRA? Am

I in a state that has adopted the fiduciary corollary rule?' So we are focused on leveling the regulatory playing-field for the nation. We're trying to bring more trust to the system, and we're trying to address equity issues and get more people to participate. Some communities have lack of trust in financial services industry. That's the Conflict of Interest project.

ESG investing

The issue of "Environmental, Social and Governance" or ESG investments is a long-running DOL focus. On President Biden's first day in office, he asked the DOL to review the Trump administration's actions on ESG. We had heard feedback on ESG from ERISA stakeholders. Their message was that the previous administration's policy statements had a chilling effect, to the point where sponsors felt there was reason to exclude ESG investments.

We proposed an ESG rule last year. The comment period is closed and now we're working on the final rule. We don't think the DOL should say whether defined contribution plan sponsors should or shouldn't take ESG into account when choosing investments. ESG is going to be financially material in some situations but not in others. We think the prior administration's rules, which are still in effect, put a 'thumb on the scale' and took that decision-making power away from the plan sponsors. [That power] is critical to their analysis of risk and return; we expect them to take all of that into account. Our proposed rule is meant to straddle those concepts and to allow ESG investments but not to force them on anyone. That rule is a priority for us. We are currently digesting comments on that and hope to issue a final rule as soon as possible.

Prohibited Transaction Exemptions (PTEs) and Cryptocurrencies

We're also accepting comments on prohibited transaction exemptions. We have proposed a way to look at processing applications for PTEs. We're hoping to introduce some efficiency into the process, and hoping that people can give us more complete PTE applications.

As of March 10, we published **Compliance Assistance Release 2022-01** on cryptocurrencies. We've been thinking about cryptocurrencies for months. We had received reports that certain retirement plan service providers were encouraging plan sponsors to make cryptocurrency investments directly available to their participants, so that they could buy Bitcoin or other cryptocurrencies through their plans. We found that concerning.

There are custodial, valuation, and financial literacy issues around offering cryptocurrencies to participants. What exactly are the messages that participants are getting? Do they see cryptocurrencies with their eyes fully open? Fiduciaries aren't necessarily following these issues. On March 9, the president put out an executive order on cryptocurrencies. It asks a number of federal agencies, including DOL, to think about what a regulator framework for cryptocurrencies might look like. We think that the US must play a leadership role in establishing that framework and setting up a regulatory structure. We need to get the consumer protections right. As we've seen with other asset classes and innovations, they have been harmful for consumers and especially for diverse communities. The Biden administration is concerned about consumer protections in crypto. We believe 401k fiduciaries should be quite skeptical before they allow investments in cryptocurrencies and that they should exercise caution especially regarding direct investments in crypto.

Retirement income

We think it's important to talk about lifetime income as lifetime income. Annuity is just one form of lifetime income. We don't favor securities over insurance. We're focused on making sure that plan participants have the income they need so that they don't rely on public programs. There are a lot of different paths to achieve that goal.

Can we establish a national retirement policy for the whole country? I'm an optimist so I want to say yes. There have been conversations ever since ERISA was passed [in 1974] on how to ensure broader coverage. That conversation thread has never gone away. Today we're having a conversation about Pooled Employer Plans.

In the past we had a similar conversation about SIMPLE IRAs. The question is the same: How do you get more employers into the system and how do you make it easy for them to set up a retirement plan? Everyone is coalescing around these important questions. To make that a reality, we're having meetings like our meeting here today. That's happening across the board. We especially want to pay attention to people who've been left out of the discussion in the past. The situation we're in creates important conditions for needed improvements.

Investor education

Individuals need to make decisions about how much to save and whether they're on track for secure retirement, and they have to know how to make their money last a lifetime. Most people don't have those skills. So the question is, how to educate them about what it means to maximize the employer's matching contribution, or what will be the impact of increasing contributions? How do we convey to young people the importance of saving early, and how to help the near-retiree think about retirement income. Disclosure is helpful to a point.

Then comes decumulation. At retirement, an element of choice paralysis can set in. Many people don’t know what to do with the money that they’ve accumulated. Taking a lump sum or a phased distribution from a defined contribution plan are common solutions. But we need to make other options more broadly available. Take-up of lifetime income solutions is low. The ‘fear element’ is a problem. Health also plays into it. In talking about retirement security, we tend to think in purely financial terms. But the amount of money that you will need in retirement depends in part on your personal health and on your level of health care spending. That makes the lifetime income issue especially interesting and challenging.