

**Questions for the Record from**  
**REPRESENTATIVE ROBERT C. “BOBBY” SCOTT**

**Committee on Education and Workforce**

**HELP Subcommittee hearing titled: “Restoring Trust: Enhancing Transparency and Oversight at EBSA”**

**Tuesday, July 22, 2025**

**10:15 A.M.**

**Representative Robert C. “Bobby” Scott (D-VA)**

**Questions for Mr. Ali Khawar**

1. In the No Surprises Act, Congress provided the Departments of Labor, Health and Human Services, and the Treasury with a combined \$500 million in supplemental funding. What was the impact of this additional funding on EBSA’s capacity and how will the refusal of the Trump Administration to extend this funding affect the agency moving forward?

EBSA’s base budget has remained essentially flat for years, even as fixed costs like salaries and rent have risen. That left the agency with no choice but to reduce staffing. The supplemental funding provided under the No Surprises Act (NSA) was therefore critical in reversing staffing declines and sustaining EBSA’s capacity to achieve its mission.

With this support, EBSA was able to (1) dramatically strengthen and expand its mental health parity enforcement efforts, which showed widespread industry noncompliance, addressed both individual and systemic barriers such as blanket exclusions for eating disorder treatment, and informed the changes EBSA made to its MHPAEA rules in coordination with HHS and Treasury; (2) alongside HHS and Treasury, effectively implement the NSA by issuing guidance and rules on arbitration and other provisions, and ensuring workers, providers, and plans received timely answers;<sup>1</sup> (3) devote resources to NSA implementation and mental health parity enforcement without having to divert resources away from other important enforcement and participant assistance work.

The consequences of losing this funding are severe. In 2024, EBSA estimated that without the approximately \$33 million in annual supplemental support it was receiving from the NSA funding, it would need to cut about 120 full-time employees—roughly the equivalent

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<sup>1</sup> In 2024, EBSA Benefits Advisors handled more than half of all NSA provider help desk complaints nationwide.

of three of its 13 field offices.<sup>2</sup> That reduction would significantly diminish the agency's ability to enforce mental health parity, carry out the NSA, and respond to participant inquiries. It will also result in the diversion of enforcement resources away from other important issues, like EBSA's efforts to prevent fraud in health plans and protect retirement plan participants from fiduciary breaches.

2. During his confirmation hearing in June, the Trump Administration's nominee for Assistant Secretary for EBSA told the Senate HELP Committee that he would "end the war on ESOPs." Could you respond to this? Do you believe that the Department has "declared war on ESOPs"?

The Department has not declared war on ESOPs. Claims to the contrary are soundbites that only serve to inflame tensions between the Department and the regulated community, impact the morale of the Department's workers, and undermine the Department's important work. I believe ESOPs can play an important role in building wealth across income and seniority levels, and ensuring worker voice. However, particularly for transactions in thinly traded private markets that can be dominated by corporate insiders who have financial conflicts of interest, having a regulator that ensures participants are getting a fair deal is essential. I viewed and continue to view the Department's role in ESOP enforcement as making sure that ESOPs complied with the law.

In one case I worked on as an EBSA investigator, the first appraiser hired to independently value the company for the sale transaction was fired after providing a value that was too low, and the first attorney hired to represent the ESOP was fired after disagreeing with the selling owner's preferred terms of sale. The transaction went forward with a new appraiser and a new ESOP attorney who worked with the selling owner to ensure the valuation represented a number the owner was satisfied with – not the fair market value. The Department's actions returned millions of dollars to participants and is illustrative of why the agency's work is essential.

The Department's track record in court also disproves the "war" narrative. Federal judges have overwhelmingly sided with the Department's views on ESOPs – in fact, part of why the Bowers + Kubota case stands out is because it is one of the only instances of the Department ever losing an ESOP case it litigated.

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<sup>2</sup> The Solicitor's Office at the Department of Labor also received supplemental funding from the NSA, and estimated the loss would cause it to reduce headcount by approximately 30 full-time employees.

The notion of a “war” on ESOPs is also at odds with the Biden Administration’s efforts to promote worker ownership. Even absent funding, we created the Division of Employee Ownership in EBSA to educate the public and promote worker ownership, including through ESOPs. By contrast, the second Trump Administration has (1) rescinded a Biden Administration proposal to provide regulatory clarity to the appraisal process; and (2) first firing, and ultimately rehiring, the head of the Division on Employee Ownership.

3. One witness claimed during the hearing, without providing supporting evidence, that there is a “revolving door” between the plaintiffs’ bar and the Department of Labor. Please respond to this assertion.

This is another attention-grabbing, but misleading, claim. My quick review of the biographies at the witness’s own law firm revealed eight professionals who previously worked at the Department of Labor. Presumably the witness does not view that as evidence of a problematic “revolving door” between his firm and the Department.

In my time at the Department, including my time in leadership roles, I regularly engaged with valued employees who were considering leaving the agency. The overwhelming majority of those employees departed because they were being offered higher salaries in less demanding roles, either at other government agencies (like the SEC, which operates on a different salary scale) or private-sector law firms (like the witness’s). I cannot recall a single instance from my time at the Department when I was counseling an employee who ultimately left because they wanted to join the plaintiff’s bar.

Finally, to the extent EBSA had a hiring priority, it was bringing on recent graduates in order to build a talent pipeline, not to recruit plaintiff’s attorneys. The notion of a “revolving door” between EBSA and the plaintiff’s bar is not borne out by my experience, or the facts.

4. In evaluating the timeliness of the Department of Labor’s handling of enforcement matters, one statistic cited by Republicans during the hearing was that a large number of cases remain open for extended periods of time. My understanding is that this might not paint a full picture—i.e. many of the cases described as “open” have effectively been closed. Could you clarify the meaning of when a case is considered “closed” by EBSA?

Many cases EBSA has marked as “open” are no longer under active investigation by the agency. This is an important distinction that is essential when evaluating timeliness. While I was at the agency, we aimed to ensure that investigations were both timely and thorough, but an “open” case for EBSA does not always mean an “active” case.

Once EBSA completes its fact-finding – meaning it has conducted interviews, reviewed documents, or completed other investigative steps to support any alleged noncompliance – the agency will typically send a “voluntary compliance” letter to the subject of an investigation<sup>3</sup> outlining potential civil violations of ERISA, including the factual basis, and inviting corrective action. From that point forward, the investigation is effectively concluded, but it is coded as “open” while the subject of the investigation responds, negotiates over corrective action, implements the correction, and provides proof of completion to the Department. Additionally, cases referred to the Solicitor’s Office for litigation are coded as “open” while the settlement negotiations are ongoing or court proceedings are concluded. In all of those situations, no real investigative work is happening, yet the case is still “open” in EBSA’s system.<sup>4</sup> EBSA only considers a case closed (and issues a formal closing letter) once no further action is anticipated, which could be years after the investigation is concluded.

Additionally, in creating ERISA’s statute of limitations, Congress effectively gave the Department three years from opening an investigation to bring a legal action. Any extension beyond that point can only happen with the agreement of the party being investigated. This reality shapes case management.

Finally, it’s important to note that the timeliness of an investigation is influenced by several factors – for example, how cooperative were the subjects of an investigation in turning over documents? Did they turn over documents voluntarily, or did the Department have to enforce a subpoena in court? Is the civil case on hold because a parallel criminal case needs to be completed first? More contemporaneously, an important issue (left unaddressed by the draft legislation on timeliness under consideration by the Committee) is whether the Trump Administration’s DOGE-driven personnel cuts have resulted in investigator turnover on a case – each time a new investigator is assigned, it will naturally

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<sup>3</sup> Voluntary compliance letters are not sent in criminal investigations. However, once an investigation is concluded, if a prosecutor is going to bring a criminal action, EBSA will continue to treat the case an “open” until the legal process is completed.

<sup>4</sup> As the Department reported in November 2023, only 3% of its open civil cases were both old and undergoing active investigation (and about two-thirds of those cases were open for an extended period of time because the investigation expanded after new statutory requirements related to mental health parity became effective).

take that individual some time to get up to speed with the evidence in the case file, no matter how comprehensive or thoughtful the transition is.

Ultimately, because EBSA keeps cases coded as open long after an investigation is actively concluded, evaluating timeliness simply by examining reports of “open” cases risks significantly overstating how many cases are still being actively investigated.

5. When ERISA was enacted in 1974, Congress emphasized the need for enforcement to protect participants, declaring that it was the intent of Congress to “provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.” Could you describe how ERISA is enforced by both EBSA and by participants? Why must this system be preserved and strengthened, rather than rolled back?

When ERISA was passed, Congress recognized that the statute’s fiduciary obligations provided very important consumer protections. Just as in 1974 when ERISA was passed, the reality today is that although many fiduciaries do the right thing, some do not, and the statutory scheme needs to provide appropriate ways to hold fiduciaries accountable.

At the same time, upholding ERISA’s promise is difficult without *both* (1) participants being able to bring lawsuits and (2) the government enforcing on behalf of plan participants. Even with a much less complex statute in 1974, Congress recognized that the Department would never have sufficient resources to discover and address every employee benefit plan issue. As such, Congress wisely created not just the private right of action for fiduciaries, participants, and beneficiaries, it also specifically authorized broad information sharing by the Secretary. The private right of action remains an important accountability mechanism, alongside the Secretary’s enforcement program.

Unfortunately, recent calls to limit participants’ rights to bring lawsuits come on the heels of the second Trump Administration’s severe cuts to EBSA and threaten the entire remedial regime envisioned by Congress. The notion of limiting participant lawsuits is especially troubling given that there are reasons to question whether the current Administration believes in enforcement at all. EBSA’s civil enforcement program typically results in hundreds of millions of dollars being returned to participants and beneficiaries each year, which is commonly a return of thousands of dollars per investigator per day. Yet even though the public can find DOL news releases highlighting this Administration’s nonenforcement policies, the agency has not issued a news release highlighting even a single ERISA enforcement action in this Administration – and the EBSA nominee has been publicly critical of both the enforcement program and participant lawsuits.

6. Under section 504 of ERISA, the Department of Labor has broad power to investigate potential violations of the law. Could you please describe the process of undertaking an ERISA investigation?

EBSA investigations are typically opened as a result of information (such as reports filed with EBSA, referrals from other government agencies, or calls to the agency) that indicates there is a potential violation of ERISA. The investigation would typically proceed as follows:

1. Initial Planning: investigators may prepare a written plan for the investigation and collect background information such as filings, public or proprietary information about the entity).
2. Information gathering: investigators send document requests to the relevant party or parties and conduct interviews with relevant officials in order to develop the factual context. The time to complete these steps vary depending on the nature of the investigation (including the complexity of the issue being investigated) and the level of cooperation from the parties. It is not uncommon for parties to delay and resist document requests, for example, ultimately requiring an administrative subpoena to be issued, or for that subpoena to be enforced in court – which causes significant delays as the case must first be referred to the DOL Solicitor’s Office and then a court must consider the case and make a decision.<sup>5</sup>
3. Expert analysis: In complex cases, an outside expert may need to be hired to deliver an opinion before the agency will decide whether to pursue a violation. Hiring an expert can be artificially delayed until a new fiscal year because of the agency’s budgetary situation.
4. Voluntary compliance: EBSA will typically send a voluntary compliance letter outlining potential violations to the subject of investigation to attempt to resolve any potential issues without litigation.
5. Litigation: If necessary, EBSA refers the case to the Solicitor’s Office for civil litigation.

As previously mentioned, ERISA’s statute of limitations – three years from actual knowledge – effectively imposes a timeline on many of EBSA’s investigations. If EBSA concludes it will refer a case for litigation, the formal referral needs to take place well ahead of the three-

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<sup>5</sup> The decision is solely on the Department’s ability to receive documents pursuant to an administrative subpoena, not the validity of any violations of ERISA. Also, although routinely issuing subpoenas might quicken cases by reducing the time the Department currently spends negotiating over voluntary production, it would routinely require plans – even plans of small employers – to hire legal counsel, which can be fairly costly.

year deadline, so that the lawyers in the Department's Office of the Solicitor have sufficient time to familiarize themselves with the details of the case and prepare legal filings.<sup>6</sup>

Lawyers defending plans in EBSA investigations are well aware of the statute of limitations, which means that the Department's leverage – both in voluntary compliance discussions and settlement negotiations – becomes more limited after the two-year mark. Although the Department can extend the statute of limitations through a tolling agreement, that can only happen with the agreement of the party that the Department might sue.

### **Questions for the Record from REPRESENTATIVE DONALD NORCROSS**

#### **Representative Donald Norcross (D-NJ)**

#### **Questions for Ali Khawar**

1. Under the Mental Health Parity and Addiction Equity Act (MHPAEA), health plans and insurers are prohibited from imposing barriers on access to mental health or substance use disorder benefits that don't apply to medical and surgical benefits. Yet, the Department has repeatedly found widespread noncompliance by the industry, and the Trump Administration has turned its back on this bipartisan legislation by slashing EBSA's workforce and refusing to enforce the Biden Administration's 2024 Final Rules.

a. Could you discuss the importance of Mental Health Parity for workers?

When an individual seeks treatment for a mental health or substance use condition, they and their loved ones deserve to put their focus on getting the care they need, not on fighting with an insurance company.

Mental health parity stands for the promise that when workers – and their family members who may be covered by the health plan – seek treatment for a mental health or substance use condition instead of a traditional medical condition, they will not have to jump over additional administrative hurdles or cut through extra red tape just because they have the “wrong” type of disease.

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<sup>6</sup> EBSA has a variety of mechanisms to ensure that the Solicitor's Office is aware of and up to speed on potential litigation, but ultimately formal referrals are required before litigation can occur.

b. What additional tools does the Department need to improve its enforcement of the law?

Giving the Department authority to impose civil monetary penalties on the health insurance companies that (often more than their plan sponsor clients) are the bad actors would make a significant difference to EBSA's enforcement. I support your Parity Enforcement Act, which would do that.

Additionally, I believe the Biden Administration's rulemaking on mental health parity standards would have generally resulted in improved compliance, and when enforcement was required, would have made noncompliance clearer and therefore easier to prove. Unfortunately, the Trump Administration has indicated that it will not enforce those rules.

Finally, EBSA's enforcement staffing has also been severely cut, and the second Trump Administration has refused to seek any replenishment of the supplemental funding that was EBSA's primary source of money for mental health parity work. I remain concerned that those trends, along with a general reluctance to enforce mental health parity by this Administration, will limit EBSA's ability to ensure that mental health parity is a reality.