
EMPLOYEE BENEFITS SECURITY ADMINISTRATION**Chapter 33, Administrative Subpoenas**

1. **Statutory Authority - ERISA Section 504(c).** For the purposes of any Title I ERISA investigation, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, records, and documents) of the Federal Trade Commission Act (15 U.S.C. §§49 and 50) are applicable (without regard to any limitation in such sections respecting persons, partnerships, banks, or common carriers) to the jurisdiction, powers, and duties of the Secretary or any officers designated by him. These provisions give the Secretary 1) the authority to administer oaths, 2) the power to compel the attendance of witnesses, and 3) the access to and the right to copy documentary evidence.

2. **Subpoena Duces Tecum.** A subpoena *duces tecum* is a command to a person or organization to appear at a specified time and place and to bring certain designated documents, to produce the documents, and to testify as to their authenticity as well as any other matter concerning which proper inquiry is made.

3. **Subpoena Ad Testificandum.** A subpoena *ad testificandum* is a command to a named individual or corporation to appear at a specified time and place to give oral testimony under oath. A verbatim transcript is made of this testimony.

4. **Accommodation Subpoena.** An accommodation subpoena is a subpoena issued to persons or entities who are willing to testify or to produce the documents requested but are concerned about protecting themselves from any potential adverse consequences of doing so without a legal requirement.

5. **Subpoena Request EBSA Form 207.** Subpoena requests are reviewed and approved by PBSO or the appropriate RSOL and issued by the designated issuing official. A separate request, with a copy of the subpoena attached, must be submitted for each subpoena requested. The Investigator/Auditor responsible for the investigation must complete the subpoena request [Tab H] in the following manner.

a. **Case Name and Number.** Enter the case name and file number assigned by the office with primary jurisdiction.

b. **Subpoena Subject - Name and Address.** Enter the full name and address of the individual or organization on whom the subpoena is to be served. If there is doubt whether the subject is a corporation, check with the appropriate state office to determine if it is incorporated.

c. **Check-off Boxes.** In the boxes on the upper right side of the form, check the appropriate box to indicate the nature of the subpoena subject.

d. **Delivery of Subpoena.** Enter the name and address of the person to whom the executed subpoena is to be delivered.

e. **Contact and Telephone.** Provide the appropriate information for the Investigator/Auditor responsible for the investigation.

f. **Should Subpoena be Expedited.** Indicate whether expedited processing of subpoena is being requested. Provide an explanation for such treatment when it is requested.

g. **Identification of Records.** If this is a request for a subpoena *duces tecum*, the description of documents in the subpoena itself should be attached. The description must be sufficiently broad to include all documents necessary for the investigation, though not so broad as to require the production of unneeded documents. For example, in an investigation of a health and welfare plan, it is rarely necessary to subpoena individual participant claim records which comprise the bulk of documents possessed by the plan. In such a case, the subpoena should be specifically written to exclude these documents.

h. **Description of Investigation.** Include a description of the allegations being investigated sufficient to show a clear legal connection (nexus) between the subpoena and the investigation.

i. **Justification for Issuance.** State fully and concisely how the evidence expected to be obtained by the subpoena relates to the investigation. In all cases involving a subpoena *duces tecum*, the justification must be complete enough to justify all of the documents listed in the identification of records.

Include a statement describing the efforts made to obtain the evidence without a subpoena. In those rare situations in which a formal request would likely result in the destruction or concealment of documents, this fact may be used together with a brief description of the evidence expected to be obtained to justify the issuance of the subpoena prior to making a formal request.

For a subpoena *ad testificandum*, the justification should contain the following information:

- 1) the relationship of the individual to be deposed to the plan or related entity and the reason the testimony is necessary to the investigation;
- 2) the estimated number of days stenographic services will be required;
- 3) the name of the individual who will be taking the testimony as well as the name of the Investigator/Auditor assigned to the case, if different; and
- 4) whether any reason exists to expedite preparation of the transcript.

Check the appropriate boxes in the bottom portion of the justification section.

6. Review, Approval, and Distribution of the Subpoena Request.

a. **Review by the Regional Office.** Subject to the direction and guidance of the Director of Enforcement, each of the RDs is delegated the authority to execute and issue administrative subpoenas. In their absence or in the event of potential conflict of interest or other compelling reason, RDs may delegate authority to execute and issue administrative subpoenas to the Deputy Regional Director, Associate Regional Director, or other staff designated by written notice as Acting Regional Director. The RDs shall review the subpoena request initiated by their offices and shall initial and date the subpoena request form at the bottom of the page. The subpoena request form, along with the subpoena, shall be forwarded to the appropriate RSOLs for review and approval. Accommodation subpoenas directed to individuals or entities not covered by the Right to Financial Privacy Act may be issued without prior approval by PBSD or by the RSOL. All subpoenas must be approved by the Office of the Solicitor of Labor when they are signed by other than the Regional Director or the Deputy Regional Director.

b. **Review by the RSOL or by PBSD.**

PBSD or the RSOL will review each subpoena submitted for legal sufficiency. Each subpoena must be approved in order to ensure that the subpoena can be judicially enforced if the subpoenaed subject fails to comply with the subpoena.

7. Preparation of the Subpoena EBSA Form 200. EBSA uses one subpoena format for both subpoenas *ad testificandum* and subpoenas *duces tecum*.

a. The original subpoena, EBSA Form 200 [Tab I] will be served on the subject of the subpoena (Subject Copy). The Subject Copy, which requests specific records, should not include the Return of Service and Certification of Compliance sections on the back. The Subject Copy should be completed as follows:

1) **Subject.** At the top to the right of the printed word "To," enter the subject's name and address. If service is on a legal entity other than an individual, such as an employee benefit plan or corporation, immediately above the name of the entity insert the words "Custodian of Records."

2) **Investigator/Auditor.** The next sentence of the printed form, "You are hereby required to appear before" should be followed by the name of the person, usually the Investigator/Auditor, who will receive the documents or testimony pursuant to the subpoena. The names of two Investigators/Auditors should usually be entered in case one is unavailable on the date of return of the subpoena.

3) **Place of Production.** On the third line of the form, enter the room number and street address at which production of documents and/or testimony is required. The

fourth line should contain the city, state, and zip code. If the subpoena is being served as a matter of accommodation and no contest is expected, the place of production should be that which is mutually convenient to the person providing the evidence and the Investigator/Auditor.

If, on the other hand, a contest is likely, the RO should be the place of production to assure proper control of the production and evidence if protested. If the RO has been specified as the place of production but it becomes evident after service of the subpoena that no contest is likely, a more convenient place for inspection of the documents or the taking of testimony may be accepted by the Investigator/Auditor.

4) **Date and Time.** On the fifth line of the form, enter the day, month, year, and time at which production of documents or testimony is required. If the time is changed after the subpoena has been signed but before the subpoena is served, the subpoena is either served as prepared with a cover letter noting the new time, or a new subpoena must be prepared. Never make changes on the face of the subpoena.

5) **Subject of Investigation.** The sixth line should contain the case name identified on the EBSA case opening form.

6) **Description of Documents.** Unless only one or two documents are being requested, the description of documents will be set forth on a separate sheet of paper, and the phrase "See Attachment" should be entered. All descriptions of documents must be crafted to fit the case as well as the subpoenaed subject.

If the subpoena is for testimony only and no documents are required, the word "None" should be inserted for the description of documents. In most circumstances, however, documents will also be required to provide reference material in order to assist the witness in remembering names, dates, places, and events.

7) **Signature Block.** The first line of the signature block will identify where the subpoena is signed, followed by the day, month, and year of signature. Below that, the subpoena will be signed on the signature line immediately below which will be typed the name and title of the person signing the subpoena.

b. A copy of the subpoena, EBSA Form 200B (Office Copy) [Tab I], which includes the Return of Service and Certification of Compliance sections, is retained in the Regional Office case file. The Office Copy should be completed as follows:

1) **Subpoena.** Duplicate the information provided in the Subject Copy (Subject, Place of Production, Date and Time, Subject of Investigation, Description of Documents, Signature Block, etc.).

2) **Return of Service.** Complete this section when service has been effected. The person serving the subpoena will check the block certifying how the subpoena was served. This person will also provide the date that the subpoena was served, his or her name, and official title.

3) **Certification of Compliance.** Complete this section when compliance has been achieved. The person certifying compliance should attest to where and when the subject of the subpoena was in attendance as a witness or produced the subpoenaed records. The person certifying compliance should also provide his or her name and official title.

The Certification of Compliance should never be filled out until all documents and testimony requested by the subpoena have been obtained.

8. **Service of the Subpoena.** The Subject copy of the subpoena is served on the subject and the Office Copy is retained in the RO.

a. **Service by Mail.** Normally, subpoenas will be served by certified or registered mail, return receipt requested. Service should be arranged, when at all possible, by prior phone conversation. Service may also be arranged through the subject's attorney.

If the subpoena is being served on an individual, mail delivery should be restricted to that individual. In all cases, a letter, with references to telephone discussions when appropriate, should accompany a subpoena. (See Figures 1, 2, 3, 4, and 5 for model letters.) The file copy of the letter accompanying the subpoena should note the specific number of the certified or registered letter for evidence that it related to the specific subpoena. When service is complete, the second box of the return of service should be checked and a copy of the return receipt should be kept with the copy of the subpoena.

b. **Service in Person.** Where it proves impractical or impossible to serve the subpoena on an individual by mail, it may be served personally, although a copy should also be sent by mail. Personal service is complete when the subpoena 1) is delivered directly to the subject; or 2) is left at the subject's residence with a person of suitable age and discretion residing there fulltime, such as a spouse; or 3) is left with the person in charge at the office or place of business of the subject.

9. **Altering the Subpoena after Service.** If, after the subpoena has been served on the subject, the Investigator/Auditor agrees to alter any significant requirement in the subpoena, such as the date and time testimony is to be taken or the categories of documents to be produced, such agreement should be confirmed in writing.

10. **Voided Subpoenas.** If a subpoena is voided or not served within 45 days of the date of issuance, it will be returned to the issuing office with an appropriate explanation. The subpoena will then be destroyed and the action recorded in the appropriate log(s).

11. **Subpoena Enforcement.** In any case in which a subject fails to respond properly to a subpoena, the subpoena should be judicially enforced by the RSOL or PBSO unless 1) the subpoena was improperly served, 2) the subpoena was altered or in some other way voided, 3) its approval and signature were based on erroneous information, or 4) events which have transpired after the subpoena's approval have changed circumstances to an extent that makes enforcement inappropriate. In a case requiring enforcement, the subpoena and a request for enforcement will

be sent to PBSO or the appropriate RSOL with a copy to OE/DFO. The attorney will assist the Investigator/Auditor in preparing an affidavit to be filed in the proceeding.

12. **Administrative Depositions.**

a. **Uses.** The Investigator/Auditor must be alert to situations in which sworn testimony will be useful. Such situations include instances:

- 1) where a matter is likely to be referred for litigation;
- 2) where testimony is the only evidence available to establish a necessary element of proof;
- 3) where there is a need to obtain a clear and definite statement from a witness;
- 4) where there is a reasonable likelihood that an important witness will be unavailable at the time of discovery or trial;
- 5) where a critical witness refuses to voluntarily speak to an Investigator/Auditor; and
- 6) where it is important to have a clear explanation of a complex factual or technical matter.

b. **Witness Fees and Mileage Reimbursement.** Witnesses summoned pursuant to subpoena are paid the same fees and mileage paid to witnesses called in federal court. Fees and mileage need not be tendered in advance when either the United States or an officer or agency thereof is serving the subpoena. When a claim is made by a witness for fees and mileage, the claim should be made on Claims For Witness Attendance Fees, Travel and Miscellaneous Expenses, Form SF-1156, which may be obtained from any DOL administrative office. If a witness who has been subpoenaed is required to remain overnight at a location away from his/her home, *per diem* expenses may be authorized at the same rate as is available to government employees in travel status. Such authorization should always be secured in advance.

c. **Arrangements.** The deposition will usually be taken in the RO or DO unless the witness and the Investigator/Auditor agree upon another location. The deposition should be taken in a room large enough to accommodate at least two questioners, the witness, the witness's attorney, if any, and the court reporter. Privacy should be assured during the taking of the deposition. It is the responsibility of the Investigator/Auditor to arrange for a court reporter.

It is also the Investigator's/Auditor's responsibility to arrange for the person to take the deposition, usually an attorney from PBSO or the RSOL. In special circumstances, the deposition may be taken by a Regional Office Investigator/Auditor.

d. **Format.** The court reporter should be advised that the deposition format is that of Figure 6. Figure 7 contains an introductory monologue for administrative depositions.

This monologue begins by citing the statutory authority pursuant to which the deposition is taken. The witness is usually sworn in by the court reporter; however, the Investigator/Auditor has the authority to administer oaths and, if appropriate, may do so. After the witness has been identified, he/she should be expressly advised of his/her right to counsel and, if present, the witness's attorney should identify him/herself for the record. The witness should then be advised of his/her fifth amendment right against self-incrimination, that his/her testimony is being given under penalty of perjury, that the deposition is being taken pursuant to subpoena, and that no threats or promises have been made. Finally, the witness should be informed that he/she may order a copy of the deposition transcript from the court reporter.

e. **Immunity.** No DOL employee has the authority to grant either express or implied immunity to a witness.

13. **Custody of Documents.** Upon receipt of documents in response to a subpoena, carefully note the documents received and take steps to safeguard the records in the event that they become necessary in some future legal or administrative action. Fill out a History and Custody of Documents Record, EBSA Form 219, whenever you take originals [see Tab E]. See Chapter 32 for additional guidance on preservation of evidence.

In order to maintain a clear chain of custody of documentary evidence, the originals or initially made copies used as exhibits in Action ROIs should be preserved in their original state. A History and Custody of Documents Record should be maintained in the case file. During the course of the investigation, the Investigator/Auditor may keep a set of "working documents," that is, a duplicate set of documents received which can be written on and rearranged in any order. These working documents should be destroyed when the investigation is completed and the ROI is written, unless there is a compelling reason to keep them.

a. **Copies of Documents.** If the subpoenaed individual wishes to provide only copies and not original documents, this may be acceptable in many situations if the individual is willing to pay copying costs.

b. **On Site Inspection of Documents.** If the subpoena calls for a large number of documents, the production of which could interfere with the normal functioning of the subpoenaed subject, arrangements may be made to allow access to the subpoenaed documents in a manner less burdensome to the subpoenaed party (See Figure 5). For instance, if the circumstances are appropriate, the originals may be kept in the subject's office with a written agreement that the Investigator/Auditor can have access to the documents at a particular place during specified hours, and with no interference. The written agreement should also include a clause allowing access to the documents in the future. If the documents are to be inspected on site, prepare an index of all the documents produced.

c. **Receipts for Books, Records, and Documents.** When it is necessary to take possession of documentary evidence or property such as books, records, canceled checks, bank statements, receipt books, invoices, vouchers, letters, memoranda, or other materials provided pursuant to a subpoena or furnished voluntarily by an organization or individual, a signed, dated, and itemized Document Receipt, EBSA Form 220A, for the material should be

provided upon request [Tab D]. If such receipt is provided, retain a copy of the receipt in the case file.

d. **Return of Documents.** Upon return of the described documents to the owner or responsible individual, ask for the return of the original receipt and have the party receiving the documents acknowledge in writing such return. See EBSA Form 220B, Return of Documents [Tab F].

e. **Record of Documents Examined.** If the Investigator/Auditor reviews, but does not copy materials produced pursuant to a subpoena, he/she must complete a Report of Records Examination, EBSA Form 202C [Tab G].

14. **Documents Covered by the Right to Financial Privacy Act.** The Right to Financial Privacy Act, 12 U.S.C. §§3401 *et seq.* (RFPA), preserves the confidentiality of financial records while at the same time allowing access for legitimate law enforcement activities. The RFPA prohibits any agency or department of the United States from obtaining financial records of a customer from a financial institution, such as a bank, savings and loan, credit union, consumer finance institution, or credit card company, unless the records are reasonably described and 1) either the customer authorizes such disclosure or 2) the records are disclosed in response to an administrative subpoena which meets specific requirements as set forth in the RFPA.

a. **Coverage.** The RFPA applies only to financial records of individuals or partnerships of five or fewer individuals. The RFPA does not protect corporations, associations, larger partnerships, employee benefit plans, or other legal entities. When requesting documents which are not protected by the RFPA it is good practice to enclose a cover letter to the financial institution explaining why the RFPA does not apply (See Figure 8).

b. **Certification of Compliance Requirement.** Before records may be obtained, the RD must submit to the financial institution a certificate stating that the RD has complied with all applicable provisions of the RFPA (See Figure 9). Good faith reliance by the employees and agents of the financial institution upon this certification of compliance absolves the institution of civil liability for any improper disclosure of records.

c. **Customer Authorization.** Customers may authorize access to identified records by giving approval in writing for a period of no more than three months; such authorization is revocable at any time before the records are disclosed (See Figure 10).

d. **Customer Notice Requirements.** Notice must be sent to a customer before the records can be obtained from the financial institution. The notice must include a description of the records sought, a statement of the purpose of the inquiry, and an explanation of the procedure by which the customer may challenge the government request in court. Along with the notice, the customer is to be provided a copy of the subpoena and blank motion and affidavit forms suitable for filing in court if properly completed (See Figure 11). The customer may then move to quash the subpoena. If notice to the customer will seriously jeopardize the investigation, the required notice to the customer may be delayed up to 90 days by court order.

e. **Costs.** The RFPA provides that the government must pay the financial institution any reasonable costs which are directly incurred in searching for, reproducing, or transporting the records requested to be produced.

f. **Civil Penalties.** Violations of the RFPA may result in a penalty of \$100, plus actual damages, plus punitive damages, plus court costs, plus attorney's fees, plus investigation by OPM, plus disciplinary action against the responsible government official.

g. **Custody of Documents.** Keep documents obtained pursuant to the RFPA segregated, since there are certain prohibitions against giving the documents to others, including other government agencies. (See Chapter 20, paragraph 5 and Chapter 32, paragraph 1.e.2).

15. **Subpoenas Used in Criminal Investigations.** Section 504 gives the Secretary, or the Secretary's designee, authority to use its subpoena power in conducting investigations of violations of Title I of ERISA. However, EBSA does not use its administrative subpoena power in Title I criminal investigations. (See Chapter 52).

16. **Parallel Investigations.** Caution must be exercised when handling parallel civil/criminal investigations.

17. **Obtaining Documents in the Possession of a Grand Jury.** Obtaining actual grand jury material, such as transcripts, is very difficult and should generally be left until after the initiation of litigation. However, there are methods of obtaining documents which have been subpoenaed by and are in the possession of a grand jury. In each instance, a subpoena *duces tecum* must be issued to the custodian of the documents, and the custodian must respond that the requested material is in the possession of the grand jury. It is important that the subpoena describe the required documents with as much specificity as possible. Once the response is received, the following steps should be taken:

a. Ask the custodian (or the custodian's attorney, if appropriate) to give written authorization to the U.S. Attorney in charge of the grand jury, permitting him/her to allow Investigators/Auditors to examine and copy those documents in the possession of the grand jury which are asked for in the subpoena.

b. If the custodian refuses to voluntarily permit access to the documents, refer the subpoena to PBSO or the RSOL with a copy to OE/DFO, with a request that a "non-6(e) Order" be obtained. A "non 6(e) Order" is a court order, which grants permission to Investigators/Auditors to examine and copy those documents in the possession of the grand jury, which are asked for in the subpoena. Access to the documents by this method avoids the restrictions which would be imposed if disclosure were made pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, since a "non-6(e) Order" preserves the Secretary's independent right of access to such documents.

c. If a "non-6(e) Order" cannot be obtained, the subpoena may be referred to PBSO or the RSOL with a request to obtain release of the material pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. This rule prohibits disclosure of any matters occurring

before the grand jury except when directed by a court preliminarily to or in connection with a judicial proceeding. A strong showing must be made of particularized need or compelling necessity. If disclosure of the subpoenaed documents is obtained pursuant to this rule, restrictions will be placed upon the use of information obtained (See Chapter 20, paragraph 8).

April 2009

MODEL LETTER ACCOMPANYING SUBPOENA
WHERE ONLY PRODUCTION OF RECORDS IS REQUIRED

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Name
Address

Re: Investigation of _____
EBSA Case No. XX-XXXXXX

Dear :

This office is conducting an investigation of the above-referenced matter pursuant to §504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1134(a)(1), to determine whether any person has violated or is about to violate any provision of Title I of ERISA. Enclosed is a subpoena which requires you to produce certain documents and records in connection with that investigation.

Your personal appearance pursuant to this subpoena will not be required at this time provided the documents are produced on or before the date noted in the subpoena. You will be informed at a later date if your personal appearance to testify is required. Inasmuch as your appearance is not now being required, please provide a cover letter with your response which identifies the documents being produced. Your cover letter should also state whether a diligent search has been made for the subpoenaed documents and that the documents transmitted constitute all documents called for by the subpoena.

The subpoena requests that documents maintained in electronic form, Electronically Stored Information (ESI), be produced in electronic form. The formats in which EBSA can accept ESI are listed in the subpoena. When producing ESI, the material should be produced as maintained on your computer system, i.e., ESI should be produced with all files, folders and sub-folders intact, and emails should be produced with all attachments intact.

If any documents called for are not furnished, please list such documents and indicate their location and the reason for their non-production.

This inquiry should not be construed as an indication that any violations of law have occurred or as a reflection upon any person involved in this matter.

April 2009

If you have any questions concerning your rights and duties, you may wish to consult counsel. If you have any questions concerning the subpoena or the documents required to be produced, including the production of ESI and the appropriate format and media, please call (name of investigator/auditor) at (telephone number).

Sincerely,

Regional Director

Enclosure

(Figure 1)

April 2009

MODEL LETTER ACCOMPANYING SUBPOENA
TO TESTIFY ONLY

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Name
Address

Re: Investigation of _____
EBSA Case No. XX-XXXXXX

Dear :

This office is conducting an investigation of the above-referenced matter pursuant to §504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1134(a)(1), to determine whether any person has violated or is about to violate any provision of Title I of ERISA. Enclosed is a subpoena, which requires your appearance for the purpose of giving sworn testimony in connection with that investigation. You are entitled to be accompanied by an attorney when you testify if you so desire.

This inquiry should not be construed as an indication that any violations of law have occurred or as a reflection upon any person involved in this matter.

If you have any questions concerning your rights and duties, you may wish to consult counsel. If you have any questions concerning the subpoena please call (name of Investigator/Auditor) at (telephone number).

Sincerely,

Regional Director

Enclosure

April 2009

MODEL LETTER ACCOMPANYING SUBPOENA
FOR APPEARANCE TO PRODUCE RECORDS AND TESTIFY

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Name
Address

Re: Investigation of _____
EBSA Case No. XX-XXXXXX

Dear :

This office is conducting an investigation of the above-referenced matter pursuant to §504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1134(a)(1), to determine whether any person has violated or is about to violate any provision of Title I of ERISA. Enclosed is a subpoena, which requires you both to produce certain documents and records and to appear for the purpose of giving sworn testimony in connection with that investigation. You are entitled to be accompanied by an attorney when you testify if you so desire.

The subpoena requests that documents maintained in electronic form, Electronically Stored Information (ESI), be produced in electronic form. The formats in which EBSA can accept ESI are listed in the subpoena. When producing ESI, the material should be produced as maintained on your computer system, i.e., ESI should be produced with all files, folders and sub-folders intact, and emails should be produced with all attachments intact.

If any documents called for are not furnished, please list such documents and indicate their location and the reason for their non-production.

This inquiry should not be construed as an indication that any violations of law have occurred or as a reflection upon any person involved in this matter.

If you have any questions concerning your rights and duties, you may wish to consult counsel. If you have any questions concerning the subpoena or the documents required to be produced, including the production of ESI and the appropriate format and media, please call (name of Investigator/Auditor) at (telephone number).

Sincerely,

Regional Director

Enclosure

April 2009

MODEL LETTER ACCOMPANYING SUBPOENA
WHERE ATTORNEY HAS AGREED TO ACCEPT SERVICE

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Name
Address

Re: Investigation of _____
EBSA Case No. XX-XXXXXX

Dear :

This office is conducting an investigation of the above-referenced matter pursuant to §504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1134(a)(1), to determine whether any person has violated or is about to violate any provision of Title I of ERISA. As we discussed by telephone on (date), you agreed to accept service of the enclosed subpoena, which requires the production of certain documents in connection with that investigation.

A personal appearance pursuant to this subpoena is not required provided the documents are produced on or before the date noted in the subpoena. Inasmuch as a personal appearance is not now being required, please provide a cover letter with your response, which identifies the documents being produced. Your cover letter should also state whether a diligent search has been made for the subpoenaed documents and that the documents transmitted constitute all documents called for by the subpoena. If any documents called for are not furnished, please list such documents and indicate their location and the reason for their non-production.

The subpoena requests that documents maintained in electronic form, Electronically Stored Information (ESI), be produced in electronic form. The formats in which EBSA can accept ESI are listed in the subpoena. When producing ESI, the material should be produced as maintained on your computer system, i.e., ESI should be produced with all files, folders and sub-folders intact, and emails should be produced with all attachments intact.

This inquiry should not be construed as an indication that any violations of law have occurred or as a reflection upon any person involved in this matter.

April 2009

If you have any questions concerning the subpoena or the documents required to be produced, including the production of ESI and the appropriate format and media, please call (name of Investigator/Auditor) at (telephone number).

Sincerely,

Regional Director

Enclosure

April 2009

MODEL ACCOMMODATION LETTER ACCOMPANYING SUBPOENA

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Name
Address

Re: Investigation of _____
EBSA Case No. XX-XXXXXX

Dear :

This office is conducting an investigation of the above-referenced matter pursuant to §504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1134(a)(1), to determine whether any person has violated or is about to violate any provision of Title I of ERISA. Enclosed is a subpoena which requires the production of certain documents and records in connection with that investigation. Your personal appearance pursuant to this subpoena will not be required provided the documents as requested in the subpoena are produced.

To minimize the interference with normal functioning of your business, we are willing to arrange a procedure for our access to all subpoenaed documents in a manner which would lessen the impact on your day-to-day operations and which would involve the least necessary expenditure of time and resources for all parties. Therefore, in lieu of production of all documents at the time and place specified in the subpoena, we are willing to inspect the documents at their present location followed by a written agreement setting forth a procedure for access to all subpoenaed documents for more detailed inspection and copying. If you have any other suggestions to reduce the impact of compliance with the subpoena, we would be willing to consider them.

To make arrangements for the procedure as discussed please contact (name of Investigator/Auditor) at (telephone number) on or before (date). In the absence of any agreement, such as the one proposed above, we will expect full compliance with the subpoena at the time and place indicated therein.

Sincerely,

Regional Director

Enclosure

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
EMPLOYEE BENEFITS SECURITY ADMINISTRATION

_____)
In the Matter of:)
)
XYZ Health and Welfare Fund)
)
_____)

Philadelphia, Pennsylvania
Friday, August 31, 2002

Deposition of Richard R. Roe taken on behalf of the Employee Benefits Security Administration in the above-entitled matter, at the offices of the Department of Labor, Employee Benefits Security Administration, Room M-300, 3535 Market Street, Philadelphia, Pennsylvania, pursuant to notice, beginning at 9:13 a.m., before Janet Jones, a notary public in and for the State of Pennsylvania, when were present on behalf of the respective parties:

For the Department of Labor:

Samantha Smith, Esquire
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Avenue, N.W.
Room N-4611
Washington, D.C. 20210

For Richard R. Roe:

Stephen Johnson, Esquire
Johnson and Martinez
123 Fourth Street
Philadelphia, Pennsylvania 19102

FORMAT FOR TAKING SWORN TESTIMONY

This sworn testimony is being taken in the matter of [(case name)] involving an investigation undertaken pursuant to section 504 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. section 1134, to determine whether any person has violated, or is about to violate, any provision of Title I of ERISA or any regulation or order issued thereunder. The witness is appearing here today in response to a subpoena issued pursuant to ERISA section 504(c), 29 U.S.C. section 1134(c), which section expressly incorporates Sections 9 and 10 of the Federal Trade Commission Act, 15 U.S.C. sections 49 and 50. A copy of this subpoena will be attached to the transcript as Exhibit ____.

At this time, I would like to call the witness, and have him/her sworn.

Could you, for the record, please state your name and home address?

Mr./Mrs./Ms./Miss _____, are you represented by counsel today?

(If so) Could counsel please identify himself/herself for the record?

(If not) I wish to advise you at this time that you have a right to be accompanied, represented, and advised by counsel. This means that you may have an attorney present and that your attorney can advise you before, during, and after your examination here today. Do you understand that?

The principal purpose of your testimony is fact finding, to determine whether violations of ERISA have occurred or may be occurring. However, information that you give may be referred to other governmental agencies if the facts developed constitute violations of other laws.

Mr./Mrs./Ms./Miss _____, at this time I would expressly advise you that any evidence or testimony you give may be used against you. You may refuse to answer any question asked you if your answer might tend to incriminate you or subject you to fine, penalty, or forfeiture. This right is guaranteed you by the Fifth Amendment to the Constitution of the United States.

Do you understand what I have just said?

I would like to advise you of the penalty for perjury contained in 18 U.S.C. section 1621, which provides that a person who violates this provision shall be fined as provided under Title 18 or imprisoned for not more than 5 years, or both. An individual is guilty of perjury if, contrary to an oath such as you have just taken, he/she willfully states or subscribes any material matter which he/she does not believe to be true. I also wish to advise you of the penalty contained in 18 U.S.C. section 1001, which provides that anyone who knowingly and willfully makes any materially false statements or representations in any matter within the jurisdiction of any department or agency of the United States shall be fined as provided under Title 18 or imprisoned for not more than 5 years, or both.

(Figure 7)

Do you understand what I have just said?

I would like to have the record clear that you are appearing here today pursuant to subpoena and that no threats have been made nor have any promises been offered by me or any other official of the Department of Labor to secure your testimony and that no immunity of any kind, either express or implied, can or is being offered in connection with your testimony today. Is that correct?

You or your attorney may purchase a copy of the transcript of your testimony from the court reporter. The court reporter is instructed that the transcript of your testimony shall not be made available to anyone other than the parties here present without the express consent of the Department of Labor.

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Name of Financial Institution
Address

Re: Name of Investigation
EBSA Case No. XX-XXXXXX

Dear :

Accompanying this letter is a subpoena duces tecum directed to the (Name of Financial Institution), requiring the production of certain specified documents. These documents are necessary and relevant to the above-referenced investigation being conducted by this office pursuant to its responsibilities for enforcement of Title I of the Employee Retirement Income Security Act of 1974 and are not in the possession of the Department of Labor.

In our opinion, because the material requested concerns an account which is not maintained in the name of an individual or a partnership of five or fewer individuals, the notice requirements of the Right to Financial Privacy Act (12 U.S.C. §3401 et seq.) do not apply.

If legal counsel for (the Financial Institution) concludes that the requirements of the Right to Financial Privacy Act are applicable, we would request immediate identification of the customer to whom we must provide notice.

In connection with this subpoena, we wish to minimize as much as possible interference with the normal functioning of (the Financial Institution). We would be agreeable to discussing alternative arrangements for production of the requested documents. Please have the responsible officials of (the Financial Institution) or legal counsel contact the undersigned regarding any question arising from this subpoena.

Thank you for your cooperation in this matter.

Sincerely,

Regional Director

Enclosure

UNITED STATES DEPARTMENT OF LABOR

Employee Benefits Security Administration
Address

CERTIFICATE OF COMPLIANCE
WITH THE RIGHT TO FINANCIAL PRIVACY ACT

TO: Name and Address of Financial Institution

FROM: Regional Director
U.S. Department of Labor
Employee Benefits Security Administration
Address

I hereby certify that the applicable provisions of the Right to Financial Privacy Act of 1978, 12 U.S.C. §§3401-3422, have been complied with as to the subpoena presented on (date) for the following financial records of (name):

Date

Regional Director
U.S. Department of Labor
Employee Benefits Security Administration
Address
Telephone Number

Pursuant to the Right to Financial Privacy Act of 1978, good faith reliance upon this certificate relieves your institution and its employees and agents of any possible liability to the customer in connection with the disclosure of these financial records.

UNITED STATES DEPARTMENT OF LABOR

Employee Benefits Security Administration
Address

CUSTOMER CONSENT AND AUTHORIZATION
FOR ACCESS TO FINANCIAL RECORDS

I, (Name of Customer), having read the explanation of my rights which is attached to this form, hereby authorize the (Name and Address of Financial Institution) to disclose these financial records:

to (Name of Investigator(s)/Auditor(s)) for the following purpose(s):

I understand that this authorization may be revoked by me in writing at any time before my records, as described above, are disclosed, and that this authorization is valid for no more than three months from the date of my signature.

Date

(Signature of Customer)

(Address of Customer)

STATEMENT OF CUSTOMER RIGHTS UNDER THE RIGHT TO
FINANCIAL PRIVACY ACT OF 1978

Federal law protects the privacy of your financial records. Before banks, savings and loans associations, credit unions, credit card issuers, or other financial institutions may give financial information about you to a federal agency, certain procedures must be followed.

Consent to Disclosure

You may be asked to consent to a financial institution making your financial records available to the government. You may withhold your consent, and your consent is not required as a condition of doing business with any financial institution. If you give your consent, it can be revoked in writing at any time before your records are disclosed. Furthermore, any authorization you provide is effective for only three months, and your financial institution must keep a record of the instances in which it disclosed your financial information.

Disclosure Without Your Consent

Without your consent, a federal agency that wants to see your financial records may do so ordinarily only by means of a lawful subpoena, summons, search warrant, or formal written request for that purpose.

Generally the federal agency must give you advance notice of its request for your records explaining why the information is being sought and telling you how to object in court. The federal agency must also send you copies of court documents to be prepared by you with instructions for filling them out. While these procedures will be kept as simple as possible, you may want to consult an attorney before making a challenge to a federal agency request.

Exceptions

In some circumstances, a federal agency may obtain financial information about you without advance notice or your consent. In most of these cases, the federal agency will be required to go to court for permission to obtain your records without giving you notice beforehand. In these instances, the court will make the government show that its investigation and request for your records are proper. When the reason for the delay of notice no longer exists, you will be notified that your records were obtained.

Transfer of Information

Generally, a federal agency which obtains your financial records is prohibited from transferring them to another federal agency unless it certifies in writing that the transfer is proper and sends a notice to you that your records have been sent to another agency.

Penalties

If a federal agency or financial institution violated the Right to Financial Privacy Act, you may sue for damages or to seek compliance with the law. If you win, you may be repaid your attorney's fees and costs.

Additional Information

If you have any questions about your rights under this law or how to consent to the release of your financial records, you may contact [name] at [regional office phone number].

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Name
Address

Dear (customer name):

Records or information concerning your transactions held by the financial institution named in the attached subpoena are being sought by the U.S. Department of Labor, Employee Benefits Security Administration, in accordance with the Right to Financial Privacy Act of 1978, 12 U.S.C. §3401-3422, for the purpose of determining whether any individual has violated or is about to violate any provision of Title I of the Employee Retirement Income Security Act of 1974 (ERISA).

If you desire that such records or information not be made available, you must:

1. Fill out the accompanying motion paper and sworn statement (as indicated by the instructions beneath each blank space) or write one of your own, stating that you are the customer whose records are being requested by the U.S. Department of Labor, and giving either the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

2. File the motion and sworn statement by mailing or delivering them to the Clerk of any one of the following United States District Courts:

(the location of the financial institution);

(the residence of the customer);

(the District of Columbia); or

(the location of the employee benefit plan).

It would simplify the proceeding if you would include with your motion and sworn statement a copy of the attached subpoena as well as a copy of this notice.

3. Serve the U.S. Department of Labor, EBSA, by delivering a copy of your motion and sworn statement, in person or by registered or certified mail, to (Regional Director, address).

4. Be prepared to come to court and present your position in further detail.

5. You do not need to have a lawyer, although you may wish to retain one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein may be made available. These records may be transferred to other government

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authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer.

Very truly yours,

Regional Director
U.S. Department of Labor
Employee Benefits Security Administration
Address
Telephone Number

Enclosures: Subpoena
Motion Form
Sworn Statement Form

INSTRUCTIONS FOR COMPLETING AND FILING THE ATTACHED
MOTION AND SWORN STATEMENT

1. Except where signatures are required, the indicated information should be either typed or printed legibly in ink in the spaces provided on the attached motion and sworn statement forms. The information required for each space is described in parentheses under each space to be completed.
2. The most important part of your challenge application is the space on the sworn statement form where you must state your reasons for believing that the financial records sought are not relevant to the legitimate law enforcement inquiry stated in the attached notice. You may also challenge the Department of Labor's access to the financial records if there has not been substantial compliance with the Right to Financial Privacy Act, or for any other reasons allowed under the law. You should state the facts that are the basis for your challenge as specifically as you can.
3. To file your challenge with the Court, either mail or deliver the original and one copy of your challenge papers together with cash, certified check, or money order in the amount of the Court's filing fee.
4. One copy of your challenge papers (motion and sworn statement) must be delivered or mailed (by registered or certified mail) to the government official whose name appears on the Customer Notice.
5. If you have further questions, contact the government official whose name and telephone number appear on the Customer Notice.

CUSTOMER'S MOTION TO CHALLENGE GOVERNMENT'S ACCESS TO FINANCIAL RECORDS

IN THE UNITED STATES DISTRICT COURT FOR THE _____ DISTRICT OF (Name of District) (State in which Court is located)

(Your Name) Movant v. U.S. DEPARTMENT OF LABOR Respondent.) Miscellaneous No. _____) (Will be filled in by Clerk)))) MOTION FOR ORDER) PURSUANT TO CUSTOMER) CHALLENGE PROVISIONS) OF THE RIGHT TO FINANCIAL) PRIVACY ACT OF 1978.)))

_____ (Your Name) hereby moves this Court, pursuant to section 1110 of the Right to Financial Privacy Act of 1978, 12 U.S.C. §3410, for an order preventing the government from obtaining access to my financial records. The agency seeking access is the U.S. Department of Labor, Employee Benefits Security Administration. My financial records are held by

_____ (Name of Financial Institution)

In support of this motion, the Court is respectfully referred to my sworn statement filed with this motion.

Respectfully submitted,

_____ (Your Signature)

_____ (Your Name)

_____ (Your Address)

_____ (Your Telephone Number)

(Figure 11c)

CERTIFICATE OF SERVICE

I have mailed or delivered a copy of this motion and the attached sworn statement to

(Name of Official listed at item 3 of Customer Notice)

on (Date).

(Your Signature)

CUSTOMER'S SWORN STATEMENT
FOR FILING A CHALLENGE

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF (Name of District)
(State in which Court is located)

| | |
|--------------------------|--------------------------------------|
| _____ |) Miscellaneous No. _____ |
| (Your Name) |) (Will be filled in by Court Clerk) |
| |) |
| |) |
| Movant |) SWORN STATEMENT OF MOVANT |
| |) |
| v. |) |
| |) |
| U.S. DEPARTMENT OF LABOR |) |
| |) |
| Respondent |) |

I, _____ (Your Name) _____, am presently/was previously a customer of _____ (Name of Financial Institution) _____, and I am the customer whose records are being requested by the Government.

The financial records sought by the U.S. Department of Labor, Employee Benefits Security Administration:

are not relevant to the legitimate law enforcement inquiry stated in the Customer Notice that was sent to me because

OR

should not be disclosed because there has not been substantial compliance with the Right to Financial Privacy Act of 1978 in that

OR

should not be disclosed on the following other legal basis

I declare under penalty of perjury that the foregoing is true and correct.

(Date)

(Your Signature)

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MODEL ACCOMMODATION LETTER ACCOMPANYING SUBPOENA
IN A CRIMINAL CASE

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Name
Address

Re: Investigation Involving _____ (name of plan) _____
EBSA Case No. XX-XXXXXX

Dear :

This office is conducting a criminal investigation of the above-referenced matter pursuant to Section 504(a) and 506(b) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sections 1134(a) and 1136(b), in order to determine whether any person has violated or is about to violate any provision of Title I of ERISA, and to detect and investigate and refer where appropriate, civil and criminal violations related to the provisions of Title I of ERISA and other related Federal laws, including the detection, investigation, and appropriate referrals of related violations of Title 18 of the United States Code.

Enclosed is a subpoena which requires the production of certain documents and records in connection with that investigation. Your personal appearance pursuant to this subpoena will not be required provided the documents as requested in the subpoena are produced.

To minimize the interference with normal functioning of your business, we are willing to arrange a procedure for our access to all subpoenaed documents in a manner which would lessen the impact on your day-to-day operations and which would involve the least necessary expenditure of time and resources for all parties. Therefore, in lieu of production of all documents at the time and place specified in the subpoena, we are willing to inspect the documents at their present location followed by a written agreement setting forth a procedure for access to all subpoenaed documents for more detailed inspection and copying. If you have any other suggestions to reduce the impact of compliance with the subpoena, we would be willing to consider them.

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To make arrangements for the procedure as discussed please contact (name of Investigator/Auditor) at (telephone number) on or before (date). In the absence of any agreement, such as the one proposed above, we will expect full compliance with the subpoena at the time and place indicated therein.

Sincerely,

Regional Director

Enclosure

April 2009

UNITED STATES DEPARTMENT OF LABOR

Employee Benefits Security Administration
Address

MODEL LETTER ACCOMPANYING CRIMINAL SUBPOENA DUCES TECUM

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Name
AddressRe: Investigation Involving _____ (name of plan) _____
EBSA Case No. XX-XXXXXX

Dear :

This office is conducting a criminal investigation of the above-referenced matter pursuant to Section 504(a) and 506(b) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sections 1134(a) and 1136(b), in order to determine whether any person has violated or is about to violate any provision of Title I of ERISA, and to detect and investigate and refer where appropriate, civil and criminal violations related to the provisions of Title I of ERISA and other related Federal laws, including the detection, investigation, and appropriate referrals of related violations of Title 18 of the United States Code.

Enclosed is a subpoena which requires the production of certain documents and records in connection with that investigation. Your personal appearance pursuant to this subpoena will not be required provided the documents as requested in the subpoena are produced.

Please provide a cover letter with your response which identifies the documents being produced. Your cover letter should also state whether a diligent search has been made for the subpoenaed documents and that the documents transmitted constitute all documents called for by the subpoena.

The subpoena requests that documents maintained in electronic form, Electronically Stored Information (ESI), be produced in electronic form. The formats in which EBSA can accept ESI are listed in the subpoena. When producing ESI, the material should be produced as maintained on your computer system, i.e., ESI should be produced with all files, folders and sub-folders intact, and emails should be produced with all attachments intact.

If any documents called for are not furnished, please list such documents and indicate their location and the reason for their non-production.

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This inquiry should not be construed as an indication that any violations of law have occurred or as a reflection upon any person involved in this matter.

If you have any questions concerning your rights and duties, you may wish to consult counsel. If you have any questions concerning the subpoena or the documents required to be produced, including the production of ESI and the appropriate format and media, please call (name of investigator/auditor) at (telephone number).

Sincerely,

Regional Director

Enclosure