

Subpoenas

1. **Statutory Authority - ERISA Section 504(c)**. The Secretary has the following authority¹:
 - a. To administer oaths,
 - b. To compel the attendance of witnesses, and
 - c. To access and copy documentary evidence.
2. **Subpoena Duces Tecum**. This subpoena requires a person or organization to appear at a specified time and place to produce requested documents and testify as to their authenticity.
3. **Subpoena Ad Testificandum**. This subpoena requires a named individual or corporation to appear at a specified time and place to testify under oath. There is a transcript of this testimony.
4. **Accommodation Subpoena**. This subpoena is issued at the request of a person or entity willing to testify or produce documents. The subject requests the subpoena to protect them from the consequences of cooperating without a legal requirement.
5. **Subpoena Request - EBSA Form 207**. Generally, EBSA seeks to obtain documents through voluntary production of records. However, EBSA has the discretion to issue a subpoena to obtain document production even before attempting to obtain records voluntarily through a document request letter. PBSO or the appropriate RSOL reviews and approves subpoena requests and subpoenas issued by the designated issuing official. Each subpoena requires a separate request. The subpoena request should include a copy of the subpoena. To request a subpoena, complete Form 207:

The *ad testificandum* subpoena justification should contain:

- a. The individual's relationship to the plan and the reason the testimony is necessary to the investigation;
 - b. The estimated number of days stenographic services are required;
 - c. The name of the individual taking the testimony or the Investigator/Auditor assigned to the case, if different; and
 - d. Whether there is any reason to rush the preparation of the transcript.
6. **Review, Approval, and Distribution of the Subpoena Request**.
- a. **Review by the Regional Office**. Regional Directors are delegated the authority to execute and issue administrative subpoenas, subject to direction and guidance. In their absence or in the event of potential conflict of interest or other compelling reason,

Regional Directors may delegate authority to execute and issue administrative subpoenas to the Deputy Regional Director, Associate Regional Director, Senior Advisor for Criminal Investigations (in connection with criminal investigations) or other staff designated by written notice. The Regional Directors shall review the subpoena request initiated by their offices, initial and date the bottom of the page, and forward the subpoena request form, along with the subpoena, to the appropriate SOL Office for review and approval. Regional Directors may issue accommodation subpoenas directed to individuals or entities not covered by the Right to Financial Privacy Act without PBSO or RSOL approval. The Office of the Solicitor of Labor must approve all subpoenas, including accommodation subpoenas, when signed by someone other than the Regional Director or the Deputy Regional Director.

b. **Review by the RSOL or by PBSO.** PBSO or the RSOL will review each subpoena submitted for legal sufficiency. SOL must approve each subpoena to ensure it can judiciously enforce the subpoena 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. EBSA serves the original subpoena, **EBSA Form 200** on the subpoena subject (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:

i.**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."

ii.**Investigator/Auditor.** The next sentence of the printed form, "You are hereby required to appear before" should include the name of the person, usually the Investigator/Auditor, who will receive the documents or testimony pursuant to the subpoena.

iii.**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 an accommodation and no contest is expected, the place of production should be mutually convenient to the person providing the evidence and the Investigator/Auditor. If a contest is likely, the Regional Office should be the place of production to assure proper control of the production and evidence if protested. If the subpoena specifies the Regional Office as the place of production but it becomes evident after service of the subpoena that no contest is likely, the Investigator/Auditor may accept a more convenient place for inspecting the documents or taking testimony.

iv. **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 for production changes after the signed subpoena, but before served, the Regional Office issues the subpoena 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.

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

vi. **Description of Documents.** If the subpoena requests three or more documents, enter "See attachment" and describe the documents on a separate sheet of paper. Draft all descriptions of documents to fit the case as well as the subpoenaed subject.

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

vii. **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)**, which includes the Return of Service section, is retained in the Regional Office case file. The Office Copy should be completed as follows:

i. **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.).

ii. **Return of Service.** Complete this section with the service of the subpoena completed. The person serving the subpoena will check the block certifying the manner of subpoena service. This person will also provide the date of service for the subpoena, his or her name, and official title.

8. Serving the Subpoena.

a. **Service by Mail.** EBSA should serve subpoenas by certified or registered mail, return receipt requested. Delivery should be restricted to that subject. However, the Regional Office may send the subpoena to the subject's legal counsel, if counsel agreed in advance to receipt on behalf of the client. In such cases, the subpoena cover letter should memorialize that the subject's legal counsel has agreed to accept service. If

possible, arrange service in advance by phone or through the subject's counsel.

A letter should accompany a subpoena. (See Figure 1, Figure 2, Figure 3, Figure 4, and Figure 5 for model letters.) The letter should include the specific number of the certified or registered letter for evidence that it related to the specific subpoena.

When service is complete, check the second box of the return of service and keep a copy of the return receipt with the copy of the subpoena.

b. **Service in Person.** EBSA may serve a subpoena in person when it is impractical to serve an individual by mail, with a copy mailed. Personal service is complete when the subpoena is:

i. Delivered directly to the subject,

ii. Left at the subject's residence with a person of suitable age and discretion residing there fulltime, such as a spouse, or

iii. Left with the person in charge at the office or place of business of the subject.

9. Altering the Subpoena after Service. Investigator/Auditor should confirm in writing any agreements to alter any significant requirement in the subpoena after served. Such requirements may include date and time testimony will be taken or the categories of documents to be produced.

10. Voided Subpoenas. If a subpoena becomes void or not served within 45 days of the issuance date, it returns to the issuing office with an explanation. The Regional Office destroys the subpoena and the action recorded.

11. Subpoena Enforcement. If a subject fails to respond properly to a subpoena, RSOL or PBSO should judicially enforce the subpoena. The Regional Office should send the subpoena and a request for enforcement to PBSO or the appropriate RSOL. The attorney will assist the Investigator/Auditor with preparing an affidavit filed in the proceeding.

PBSO or RSOL may not enforce a subpoena when:

- a. The subpoena was improperly served;
- b. The subpoena was altered or in some other way voided;
- c. Approval and signature were based on erroneous information; or
- d. Circumstances changed, making enforcement inappropriate.

12. Administrative Depositions.

a. **Uses.** Sworn testimony may be useful if:

- i. A matter is likely to be referred for litigation;
- ii. Testimony is the only evidence available to establish a necessary element of proof;
- iii. There is a need to obtain a clear and definite statement from a witness;
- iv. An important witness may be unavailable at the time of discovery or trial;
- v. A critical witness refuses to voluntarily speak to an Investigator/Auditor; or
- vi. A clear explanation of a complex factual or technical matter is needed.

b. **Witness Fees and Mileage Reimbursement.** EBSA pays deposition witnesses the same fees and mileage paid to witnesses called in federal court. The witness claims reimbursement on Claims for Witness Attendance Fees, Travel and Miscellaneous Expenses, **Form SF-1156**. If it is necessary to stay overnight, EBSA may authorize per diem expenses in advance.

c. **Arrangements.** The site for depositions should be the regional office unless the witness and the Investigator/Auditor agree upon another location. The deposition should occur in a private room large enough to accommodate multiple people.

The Investigator/Auditor must arrange for a court reporter and for an attorney from PBSO or the RSOL. In special circumstances, an Investigator/Auditor may take the deposition.

d. **Format.** The court reporter should use the deposition format in **Figure 6**. The court reporter generally swears in the witness, but an Investigator/Auditor may administer the oath, if appropriate.

Figure 7 contains introductory language. The language:

- i. Identifies the witness;
- ii. Advises the witness of his/her right to counsel;
- iii. Introduces the witness' counsel, if present;
- iv. Advises the witness of his/her fifth amendment right against self-incrimination;
- v. Advises the witness his/her testimony is being given under penalty of perjury;
- vi. Confirms no threats or promises were made; and

vii. Informs the witness he/she may order a copy of the deposition transcript from the court reporter.

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

13. Custody of Documents. When you receive documents, carefully note the documents received and safeguard the records in case they become necessary for potential legal or administrative action. Use EBSA's internal systems to process electronic information. **See Collection and Preservation of Evidence** for additional guidance on preservation of evidence.

a. **Copies of Documents.** Copies are acceptable if the individual is willing to provide the copies and/or pay copying costs.

b. **On Site Inspection of Documents.** If the subpoena calls for a large number of documents and production of documents interferes with the normal functioning of the subpoenaed subject, make less burdensome arrangements for access to subpoenaed documents. (See Figure 5). For example, the originals may remain 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 allow access to the documents in the future. Prepare an index of all the documents produced if inspected on site.

c. **Receipts for Books, Records, and Documents.** It may be 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. In such cases, the Investigator/Auditor provides a signed, dated, and itemized Document Receipt, EBSA Form 220A, for the material and retains a receipt copy 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 the return in writing. **See EBSA Form 220B**, Return of Documents.

e. **Record of Documents Examined.** Complete a Report of Records Examination, **EBSA Form 202C**, if you review, but do not copy materials produced.

14. Documents Covered by the Right to Financial Privacy Act. The Right to Financial Privacy Act (RFPA)² preserves the confidentiality of financial records while allowing access for legitimate law enforcement activities.

a. **Permitted Disclosure.** The RFPA permits a financial institution³ to disclose financial records to EBSA where EBSA reasonably describes the requested records, and, if the specific requirements of the RFPA are met, either:

- i. The customer authorizes such disclosure;
 - ii. The records are disclosed in response to an administrative subpoena that complies with the RFPA; or
 - iii. The records are disclosed in response to judicial subpoena that complies with the RFPA.
- b. **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 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](#)).
- c. **Certification of Compliance Requirement.** The Regional Director must certify to the financial institution that EBSA 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, its employees, and its agents of civil liability for any improper disclosure of records.

d. **Customer Authorization.** Where EBSA uses a customer's authorization for disclosure of financial records under the RFPA, the customer must write, sign, and date that authorization. That authorization must:

- i. Authorize disclosure within no more than three months;
- ii. Permit the customer to revoke the authorization before disclosure;
- iii. Identify the records in question;
- iv. Specify EBSA's authority to obtain the records in question;
- v. Specify EBSA's purpose for seeking records in question; and
- vi. State the customer's rights under the Right to Financial Privacy Act.

See [Figure 10](#).

e. **Customer Notice Requirements.** Where EBSA seeks financial records from a financial institution under the RFPA through either an administrative subpoena or a judicial subpoena, EBSA must send a notice to the customer.

- i. This notice must reasonably specify the purpose, under ERISA, of the investigation.

ii. This notice also must contain the following quoted language:

“Records or information concerning your transactions held by the financial institution named in the attached subpoena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose: “

[Here, describe the purpose of the investigation.]

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

“1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving 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 statement by mailing or delivering them to the clerk of any one of the following United States district courts” in these locations:

- the location of the financial institution;
- the residence of the customer;
- the District of Columbia; or
- the location of the employee benefit plan.

“3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement 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 employ 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 will be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer.”

iii. Along with the notice, provide the customer a copy of the subpoena and blank motion and affidavit forms suitable for filing in court if properly completed (See [Figures 11a-e](#)).

The customer may then move to quash the subpoena. If notice to the customer will seriously jeopardize the investigation, a court order can delay the required notice to the customer up to 90 days.

f. **Costs.** The RFPA provides that the government must pay the financial institution any reasonable costs directly incurred in searching for, reproducing, or transporting the records requested.

g. **Civil Penalties.** RFPA violations may result in a \$100 penalty, actual damages, punitive damages for willful or intentional violations, court costs, and attorney's fees. Additionally, OPM may investigate and impose disciplinary action against the responsible government official.

h. **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 Release of Information, paragraph 5 and Collection and Preservation of Evidence, paragraph 1.e.2).

15. Administrative Subpoenas Used in Criminal Investigations.

Before issuing an administrative subpoena in a criminal investigation, Investigators/Auditors should arrange with the Senior Advisor for Criminal Investigations to review the civil case file for the desired material (See Criminal Investigations, Paragraph 17). Criminal administrative subpoenas should be reviewed by the Senior Advisor for Criminal Investigations and do not need review by RSOL or PBSO.

Subpoenas issued in criminal investigations follow the same procedures as civil investigations, including the RFPA procedures at paragraph 14 above. Differences in criminal investigations are:

- EBSA does not issue subpoena *ad testificandum*.
- U.S. Attorney's Office (USAO) must enforce subpoenas.

a. **Subpoena Duces Tecum.** This subpoena requests a person or organization to appear at a specified time and place, to produce documents and to testify as to their authenticity.

b. **Accommodation Subpoena.** This subpoena is issued at the request of a person or entity willing to testify or produce documents. The subject requests the subpoena to protect them from consequences of cooperating without a legal requirement.

c. **Authority to Execute Subpoena.** Every RD has the authority to execute and issue administrative subpoenas. RDs may delegate this authority:

- i. In the Regional Director's absence;

- ii. In the event of a conflict of interest; or
- iii. For other compelling reason.

RDs may delegate the authority to execute subpoenas to the Deputy Regional Director, Senior Advisor for Criminal Investigations, or other staff designated by written notice.

- d. **Serving the Subpoena.** EBSA serves subpoenas by certified or registered mail, return receipt requested. Subpoenas issued in criminal investigations should include a cover letter that specifically identifies the criminal investigation.
- e. **Subpoena Enforcement.** EBSA should only issue non-accommodation administrative subpoenas in criminal investigations if the USAO for the district where the investigation Subject resides indicates they will take appropriate action to ensure compliance. While the Solicitor's Office has legal authority to seek to enforce all administrative subpoenas, it is their general policy to defer to the U.S. Department of Justice concerning the enforcement of administrative subpoenas issued in criminal cases.

16.

Parallel Investigations. Exercise caution when handling parallel civil/criminal investigations. See Criminal Investigations, section 4.

17. Obtaining Documents in the Possession of a Grand Jury⁴. In order to obtain documents from a grand jury, you must issue a subpoena *duces tecum* to the custodian. The custodian must respond that the requested material is in the possession of the grand jury.

It is important that the subpoena describe the documents with as much specificity as possible. Upon receipt of response, take the following steps:

- 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, to grant Investigators/Auditors access to the documents 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 request that a "non-6(e) Order"⁵ be obtained.

Access to the documents by this method avoids the restrictions imposed if disclosure made pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. This is because a "non-6(e) Order" preserves the Secretary's independent right of access to such documents.

- c. If a "non-6(e) Order" is unsuccessful, EBSA may refer the subpoena 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 a court directs preliminarily to or in connection with a judicial proceeding. A strong showing must be made of a particular need or compelling necessity. If EBSA obtains disclosure of the subpoenaed documents pursuant to this rule, there may be restrictions placed upon the use of information obtained.

(Figure 1)
**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: _____

We are conducting an investigation pursuant to §504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA). Enclosed is a subpoena that requires you to produce identified documents.

Your personal appearance as requested by the subpoena is not required if the documents are produced by _____. We will inform you at a later date if you will be required to testify. Please provide the required documents with a cover letter identifying the documents you are producing. In the letter, you should also state whether you conducted a diligent search for the subpoenaed documents and whether the documents you are producing include all of the requested documents. If any identified documents are not furnished, please list those documents and your reason for not producing them.

The subpoena requests that you produce documents in electronic form (Electronically Stored Information (ESI)) if you maintain those documents in electronic form.¹

You should

not construe this inquiry 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

(Figure 2)

Model Letter Accompanying Subpoena to Testify Only

Certified Mail - Return Receipt Requested

Name

Address

Re: Investigation of _____

EBSA Case No. XX-XXXXXX

Dear: _____

We are conducting an investigation pursuant to §504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA). Enclosed is a subpoena that requires you to appear to give sworn testimony in connection with that investigation. You are entitled to be accompanied by an attorney if you so desire.

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

(Figure 3)
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: _____

We are conducting an investigation pursuant to §504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA). Enclosed is a subpoena that requires you to produce certain documents and to appear to give sworn testimony in connection with that investigation. You are entitled to be accompanied by an attorney if you so desire.

The subpoena requests that you produce documents in electronic form (Electronically Stored Information (ESI)) if you maintain those documents in electronic form.¹ If any documents called for are not furnished, please list those documents and your reason for not producing them.

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 4)
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: _____

We are conducting an investigation pursuant to §504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA). As we discussed on (date), you agreed to accept service for your client, _____, 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 your client produces the requested documents by _____. Please include a cover letter identifying the documents that your client is producing. In the letter, you should also state whether your client has conducted a diligent search for the subpoenaed documents, and whether the documents produced include all of the required documents. If any documents called for are not furnished, please list such documents and indicate their location and the reason for not producing them.

The subpoena requests that your client produce documents in electronic form (Electronically Stored Information (ESI)), if your client maintain those documents in electronic form.¹

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 5)
Model Accommodation Letter Accompanying Subpoena

Certified Mail - Return Receipt Requested

Name

Address

Re: Investigation of _____

EBSA Case No. XX-XXXXXX

Dear: _____

We are conducting an investigation pursuant to §504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA). Enclosed is a subpoena that requires you to produce identified documents in connection with that investigation. Your personal appearance pursuant to this subpoena will not be required provided you produce the requested documents.

We can discuss arrangements to minimize the time and interference with normal day-to-day operations. Instead of producing all of the requested documents at the time and place specified in the subpoena, we can inspect the documents at their present location, pursuant to a written agreement with procedure for access, inspection and copying. We are willing to consider your suggestions to reduce the impact of compliance with our subpoena.

To discuss arrangements for subpoena production, please contact (name of Investigator/Auditor) at (telephone number) by (date). In the absence of an agreement, we will expect full compliance with the subpoena by (date).

Sincerely,

Regional Director

Enclosure

(Figure 6)
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

(Figure 7)

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. ERISA section 504(c), 29 U.S.C. section 1134(c), 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?

Mr./Mrs./Ms./Miss _____, are you appearing here today in response to a subpoena issued by the Employee Benefits Administration of the United States Department of Labor?

Mr./Mrs./Ms./Miss _____, is that subpoena the document that I have marked as Exhibit __ to this deposition?

[If necessary, describe the subpoena briefly by
date, witness, investigation subjects, and examples of any documents sought.]

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.

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.

(Figure 8)

Name of Financial Institution

Address

Re: Name of Investigation

EBSA Case No. XX-XXXXXX

Dear: _____

We are conducting an investigation of (subject) pursuant to Title I of the Employee Retirement Income Security Act of 1974. We are sending you the enclosed subpoena, which requires (Name of Financial Institution) to produce the identified documents for our investigation.

We do not believe that the material requested concerns an account maintained in the name of an individual or a partnership of five or fewer individuals. Therefore, the notice requirements of the Right to Financial Privacy Act¹ do not apply.

If legal counsel for (the Financial Institution) believes 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.

We are willing to discuss alternative arrangements for production of the requested documents in order to minimize interference with (the Financial Institution's) normal operations.

Please contact us with any questions regarding this subpoena.

Thank you for your cooperation in this matter.

Sincerely,

Regional Director

Enclosure

(Figure 9)
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.

(Figure 10)
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 are described below the signature line below in 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. The basic elements of these protections and procedures are summarized below.

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, if you elect to go to court to challenge such a subpoena, summons, or formal written request. 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 sending advance notice to you as well as without 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].

(Figure 11a)

Name

Address

Dear (customer name):

We are seeking records or information concerning transactions from your accounts held by the financial institution named in the attached subpoena in accordance with the Right to Financial Privacy Act¹. We are seeking the information for an investigation pursuant to Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Below, this letter notifies you of the purpose of the investigation and of steps that you must take if you want to seek to prevent that financial institution's disclosure to the U.S. Department of Labor of the requested financial records in response to the attached subpoena.

Records or information concerning your transactions held by the financial institution named in the attached subpoena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose:

[Here, describe the purpose of the investigation.]

If you want to prevent the requested disclosure of financial records, you must:

1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving 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 statement by mailing or delivering them to the clerk of any one of the following United States district courts.
3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to any 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
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 employ 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 will be made available. These records may be transferred to

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

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 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

(Figure 11b)

Instructions for Completing and Filing the Motion and Sworn Statement

1. Type or print in ink the indicated information in the spaces provided on the enclosed motion and sworn statement forms (except where signatures are required).¹
2. Provide the reasons that the financial records sought are not relevant to the legitimate law enforcement inquiry. 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 motion and sworn statement with payment of the Court's filing fee.²
4. You must also deliver one copy of your motion and sworn statement to the government official whose name appears on the Customer Notice.³
5. Contact the government official whose name and telephone number appear on the Customer Notice if you have questions.

(Figure 11c)

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 11d)
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)

(Figure 11e)

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)

Name

Movant

v.

U.S. Department of Labor

Respondent

) Miscellaneous No. _____

) (Will be filled in by Clerk)

)

)

) Sworn Statement of Movant

)

)

)

)

)

)

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, as shown by the following facts

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)

(Figure 12)
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: _____

We are conducting a criminal investigation of the abovereferenced matter pursuant to Section 504(a) and 506(b) of the Employee Retirement Income Security Act of 1974 (ERISA) or other related Federal laws, including Title 18 of the United States Code.

The enclosed subpoena requires you to produce identified documents in connection with that investigation. Your personal appearance pursuant to this subpoena is not required provided you produce the requested documents.

We can discuss arrangements to minimize the time and interference with normal day-day to operations. Instead of producing all of the requested documents at the time and place specified in the subpoena, we can inspect the documents at their present location, pursuant to a written agreement with procedures for access, inspection and copying. We are willing to consider your suggestions to reduce the impact of compliance with our subpoena.

To discuss arrangements for subpoena production, please contact (name of Investigator/Auditor) at (telephone number) on or before (date). In the absence of an agreement, we will expect full compliance with the subpoena by (date).

Sincerely,

Regional Director

Enclosure

(Figure 13)

United States Department of Labor
Employee Benefits Security Administration
Model Letter Accompanying Criminal Subpoena Duces Tecum

Certified Mail - Return Receipt Requested

Name

Address

Re: Investigation Involving __ (name of plan) _____

EBSA Case No. XX-XXXXXX

Dear: _____

We are conducting a criminal investigation of the abovereferenced matter pursuant to Section 504(a) and 506(b) of the Employee Retirement Income Security Act of 1974 (ERISA) and other related Federal laws, including Title 18 of the United States Code.

The enclosed subpoena requires you to produce identified documents in connection with that investigation. Your personal appearance pursuant to this subpoena is not required provided you produce the documents.

Please provide the required documents with a cover letter identifying the documents you are producing. In the letter, you should also state whether you conducted a diligent search for the subpoenaed documents and whether the documents you are producing include all of the requested documents. If any documents called for are not furnished, please list those documents and your reason for not producing them.

The subpoena requests that you produce documents in electronic form (Electronically Stored Information (ESI)) if you maintain those documents in electronic form.¹

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