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A Man With Many Plans

This time last year, Bradford P. Campbell was responsible for nearly 700,000 retirement plans, as well as the several million other health, disability, and life insurance plans providing benefits to approximately 150 million people in America. Such are the worries of the assistant secretary of Employee Benefits Security for the US Department of Labor, the person charged with the administration and enforcement of Title I of ERISA.

Today, Campbell is the newest member of the Advisory Board to John Marshall's Employee Benefits LLM Program, and he is clearly no stranger to the field. Campbell granted me an interview to share some of his experiences, as well as his thoughts on some of the issues confronting the field of employee benefits.

Bradford P. Campbell began working on Capitol Hill in 1995, advising on tax and other issues as senior legislative sssistant to then-Congressman (and later Securities and Exchange Commission Chairman) Christopher Cox. In 1999, he became legislative director for then-Congressman Ernest Fletcher and dove into the Employee Retirement Income Security Act (ERISA) preemption, which was a central issue in the debate about Patients' Bill of Rights legislation. Rep. Fletcher, a physician willing to buck the American Medical Association and defend ERISA's role in health care, was a leader in that debate, and Campbell immersed himself in health plan law and regulation.

Campbell then left Capitol Hill to become senior legislative officer at the Department of Labor (DOL) when President Bush took office in 2001. There, he was in charge of representing the Administration's legislative and regulatory ERISA agenda to Congress. When the Enron collapse occurred, he became increasingly focused on retirement plan issues.

In 2004, Campbell became Employee Benefits Security Administration's (EBSA) Deputy Assistant Secretary for Policy. There, he helped develop the Administration's reform proposal that led the Pension Protection Act of 2006 (PPA), and worked with Congress in negotiating the final legislation. This immersion in the policy details of the PPA proved essential, as he was later named the acting assistant secretary of EBSA and began promulgating the regulations implementing the PPA. In 2007, he was formally nominated by the President and confirmed by the US Senate as EBSA's Assistant Secretary. Campbell received his AB from Harvard, and his JD from Georgetown University Law Center. At the time of this printing, Campbell had joined the Schiff Hardin LLP Employee Benefits, Executive Compensation, and ERISA Litigation Group as of counsel, in the firm's Washington, DC, office.

Fransen: You've held key legislative, policy, and regulatory positions over a fairly short period of time—spanning just 14 years from your work with former Congressmen Cox, and Fletcher, to assistant secretary for Policy at EBSA, and then to EBSA's helm as assistant secretary. What aspect of your career do you count as the most personally satisfying?

Campbell: Leading EBSA has been the most rewarding professional experience of my career so far. There are not very many jobs that allow you to work with incredibly talented people to really make a difference in peoples' lives, and I was blessed to have that opportunity. The intellectual challenge was very satisfying as well—because of the scope of the PPA's changes, we issued more regulations and guidance documents during those two-plus years than during any comparable period since the late 1970s, when the department was establishing ERISA's initial regulatory framework. Thinking through the hundreds of issues involved, working with everyone involved in the government, and in every segment of the regulated community to find answers that were both good policy and administrable in the real world was a fascinating process.

Fransen: Can you give an example of how your work at EBSA might make a difference to everyday Americans?

Campbell: The regulation I am most proud of, and the one that I think will most benefit workers, is QDIA (Qualified Default Investment Alternatives). Fully one-third of workers eligible to participate in a 401(k) plan don't, and it's not because they don't want to save—it's because they don't make all of the decisions about how much to contribute and where to invest the funds within the allotted time, and as a result, they miss one of the best retirement savings opportunities available to them. If that default assumption of needing a participant's affirmative "yes" is turned around to requiring an affirmative "no," automatic enrollment can increase participation rates up to more than 90 percent. We worked hard to get automatic enrollment included in the PPA, and it fell to EBSA to promulgate a regulation encouraging the investment of automatically enrolled workers' contributions into appropriate, long-term savings vehicles. Our final regulation provided three mechanisms that ensure workers will be invested in age-appropriate vehicles,

by

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and is projected to increase retirement savings by an additional $134 billion over the next 25 years. For the first time in decades, we are seeing a real, measureable increase in people saving for their retirements, and I am very proud of the part we played in making that possible.

I am also very proud of our final regulation making face-to-face investment advice more readily available to plan participants. Such advice would prevent millions of people from losing billions in common investment errors, such as holding too much employer stock or not generally diversifying their 401(k) holdings. Our final regulation put in place many safeguards to mitigate conflicts of interest by advice providers, protecting workers from bad advice. Unfortunately, the new administration delayed the effective date of the final rule until November to review these safeguards, even though surveys are suggesting that more workers than ever are clamoring for such advice.

Fransen: Isn’t there also proposed Congressional legislation to overturn your investment advice rule?

Campbell: Yes, initiated by members of Congress who not only opposed our final rule, but also the original PPA provisions allowing for greater access to professional investment advice. Basically, opponents of expanded advice believe that only fully independent advice can be trusted to protect people, and it is not possible to mitigate conflicts. I disagree. Under the law even before the PPA, there is no prohibited transaction if the advice provider is fully independent. Therefore, plans could, and some did, get participant advice in this way. The problem is, if your goal is to get advice to as many participants as possible, this model doesn’t work as well as people had hoped—many plans, especially smaller plans, are not going to take the time to separately negotiate with, and take the risk for selecting and monitoring, an advice provider. In the real world, there needs to be a better way to let advice be a cost-effective part of ordinary plan services, even when purchased from a single provider. That’s why PPA was passed, and why we issued our final rule after a two-year regulatory process involving several public hearings and rounds of comment. I believe our final regulation achieves both objectives—it protects workers from conflicts with appropriate safeguards, and it allows advice to be more widely adopted in plan design.

Fransen: On the subject of QDIAs, the DOL deemed “lifecycle” funds, balanced funds, and managed accounts to be the acceptable models. But when you distinguished stable value funds as ones not meant for long term use, this appeared to be a contentious position for the department to be taking—as though you were picking winners. Can you talk about how the department settled on these models?

Campbell: There was a lot of pressure brought to bear on the department on this regulation, because virtually every entity offering a product wanted its product “sanctioned” as a QDIA. We rejected this way of thinking, because it is not the role of the government to pick winners and losers in the marketplace, and also because any product we picked would be fixed at one point in time, and could not be updated absent a formal regulatory amendment in the future. This would preclude any new developments in this area, and we didn’t want to do that.

So instead, we focused on how to construct an investment option that would be appropriate as the sole repository of an individual’s retirement savings, whether enrolled at 25 or 55. A 25 year-old should not be invested 100 percent in money market funds, and a 55 year-old should not be in a 100 percent equities portfolio, but the same QDIA needed to work for both of them. As a result, the final regulation does not endorse particular investment products. Instead, it describes three asset allocation mechanisms that adjust the asset mix to match the characteristics of that individual or group. The first is an individually-based product adjusting based on factors like age and retirement date, etc.; the second is an individually-based service that allocates among existing plan options in ratios based on those individual factors; and the third is a group-based product that allocates based on the characteristics of the group as a whole. Target date or lifecycle funds, managed accounts, and balanced funds are current examples of products or services that meet the requirements of one of the three asset allocation mechanisms.

We did not include stable value funds as a stand-alone investment option because they did not fit that model of adjusting the asset mix to the long-term retirement needs of that individual or group. However, we fully expect that stable value funds will be significant components of QDIAs. We also allowed the short term use of capital preservation options because some employers may wish to reduce potential administrative problems that could be caused by investment losses during the 90 days that some participants will have under the code to reverse their automatic enrollments without incurring a tax penalty. Employers are not required to use these short-term accounts, but may if they wish. I should also note that we did grandfather into the QDIA safe harbor amounts contributed to stable value funds prior to the new regulation.

Fransen: Your career has taken you from behind the scenes legislative work under Fletcher and Cox, to front line legislative and policy work with the DOL, then on to regulation and enforcement at EBSA. While assistant secretary, you commented that, with respect to the subject of fee disclosure, legislative action calling for such disclosure could disrupt the department’s efforts at effective regulation. Why did you think legislation in this area would be disruptive, while regulation might not?

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Campbell: Conceptually, the Bush Administration and Congress agreed on the problem—it is too hard for plans, particularly small plans, to get the information they need to evaluate the reasonableness of the fees the plan pays, and it is too hard for workers to figure out what their plan investment options are, how they've performed, and how much they cost. The disagreement comes in what to do about that.

My concern, which I expressed many times in Congressional testimony on fee issues, was two-fold: first, that the legislative process is not as well suited as the regulatory process to addressing highly technical, multifaceted issues like these, and, second, that the proposed legislation would impose a one-size-fits-all mandate that preferred the "unbundled" service provider business model over the "bundled" business model while deluging workers with lengthy and detailed disclosures that would go right in the trash can. Further, given that the Labor Department already had the statutory authority to address fee issues by regulation, legislation was unnecessary.

Our proposed regulation on service provider disclosure focused on ensuring the fiduciary gets the information he or she needs to understand the fees and compare across providers, and we determined that it was not necessary to force all service providers to disclose in one specific format to achieve that goal. I did not want the government to pick winners and losers from among competing business models, but instead to ensure fee transparency for the fiduciaries to pick the provider and model that best serves the needs of their plan participants.

On participant disclosure, our goal was quite simple, even though its execution was quite challenging. We wanted workers to be able to see on a simple chart, highly aggregated data that gives the basic minimum information they would need to make decisions about their plans. Participants could, of course, request additional information, but the mandatory minimum to be provided to all workers would be very concise and useful. The challenge was in making apple-to-apple comparisons across very different financial products subject to very different regulatory regimes.

Fransen: Do you generally prefer regulation over legislation because of the more detailed and nuanced nature of the regulatory process?

Campbell: Though there are times the regulatory process is preferable, I don't generally think it superior, primarily because the power is so broad. The regulatory process can be very arbitrary in that opponents of a proposed policy have very little ability to actually shape the final outcome, even though they are guaranteed ample opportunity to voice their concerns. Essentially, as long as the lengthy process requirements have been observed, executive regulatory authority is limited only by a very broad standard of legal reasonableness, or a disapproving act of Congress.

I think ERISA is somewhat unique in that it is a voluntary system. The more red tape the government creates, the more hoops plans have to jump through, then the fewer people who have access to benefits. As a result, I think the ERISA regulatory process is more cognizant of real world issues of plan administration and cost, and of the need to regulate efficiently. There is, of course, an inherent contradiction there. A one-size-fits-all regulation may be the most efficient from a compliance standpoint, but not be the optimal policy outcome because of its chilling effect on desirable activity in segments of the vastly diverse universe of plans, service providers, and investments. Therefore, part of ERISA's complexity, which boosts compliance costs, is its flexibility, which boosts benefit accessibility. ERISA's voluntary basis holds regulators' feet to the fire in trying to keep those forces in balance to the net benefit of workers, protecting their benefit plans without excessive cost.

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Fransen: On the subject of the diversity of interests at work in the plan participant, sponsor, and service provider universe, the public comments and testimony offered in response to the DOL's proposed three-part fee disclosure scheme (*i.e.,* the amendments to 408b-2, 404a-5, and Form 5500 Schedule C) yielded extensive and varied opinions—no doubt because it affected everyone in the business. Were you surprised by the response? Did you find yourself particularly sympathetic, or not, by some of the concerns raised?

Campbell: I was very pleased by the volume and range of comments we received, and the diversity of perspectives brought by commenters and presenters. Plans receive a vast array of services provided through many different business models, and it is imperative that these folks speak up to ensure that our regulations are as informed as possible. Naturally, there are competing interests among the comments, not just plan versus providers' concern, but also provider versus provider concerns born from business competition. All of this was very helpful to us as we made policy decisions in which we balanced all of these interests with the ultimate goal of protecting workers.

I'm pleased we finalized one of the three regulations, and I am disappointed we were not allowed to complete the other two in the final days of the Bush Administration. However, I am hopeful that as the Obama Administration considers these issues, and reviews the extensive record created, that it will continue with the course of action we were taking.

Fransen: The proposed amendment to regulation 408b-2 was aimed at revealing undisclosed compensation and conflicts of interest among plan service providers; the proposed amendment to regulation 404a-5 required fiduciaries to provide that information to participants; and more extensive reporting on the plan's Form 5500 Schedule C will require fiduciaries to certify that they received such information. In light of the fact that the 408b-2 and 404a-5 regulations may now be permanently stalled as a result of the change in administration, isn't this new looming obligation of the Schedule C something of a lame duck without the cooperating function of the first two proposed regulations?

Campbell: I don't think so. I think the new Schedule C is going to help, regardless of whether the other regulations are finalized. One of the problems has been that plan fiduciaries have a duty to consider fees, but there is no corresponding duty by providers to give all the information needed. While the 408(b)(2) regulation would have made this corresponding duty very clear, the Schedule C still gives plan administrators a new tool to seek additional information from their service providers, as they can check a box indicating that they didn't get what they needed. That's not to say the new Form 5500 regulation is perfect—we did that regulation first because we had to simultaneously contract for, design, and build an electronic filing system to accommodate the new form, a several-years-long process, which meant our efforts on the 408(b)(2) regulation were not able to inform the Schedule C. As a result, I would not be surprised to see more guidance from the department. On the whole, though, after the jitters from doing the first filing for 2009 are past, I think people will be comfortable with the Schedule C and find it useful.

Fransen: EBSA touts that it often coordinates enforcement efforts with other federal and state enforcement agencies such as the Federal Bureau of Investigation (FBI), Securities and Exchange Commission (SEC), and federal banking and state insurance agencies. Word on the street has it, however, that there is a disconnect among the enforcement efforts and interests of EBSA and other agencies such as the SEC. In fact, some say that ERISA is being used by Congress as a sort of end-run option in order to clamp down on the behaviors in the financial services sector that the SEC has failed to rein in. Is there such a disconnect? Is ERISA being used in this way?

Campbell: ERISA operates alongside several other bodies of law. Plans routinely purchase investment products and other services from entities subject to securities regulation, or banking laws, or state insurance laws. In order to carry out their enforcement duties, the different agencies have to coordinate. While I led EBSA, I worked with Chairman Cox and Secretary of Labor Elaine Chao to develop and sign the first formal agreement with the SEC codifying how DOL and SEC coordinate on enforcement and policy matters. For example, the agreement gives EBSA access to SEC enforcement data that previously were difficult to get, and improves the process to share policy priorities and proposals. This cooperation makes sense for enforcement agencies, because they routinely run across matters in another agency's jurisdiction, and having a formalized process makes it easier for information to cross from one to the other.

In terms of using ERISA as a regulatory "end run," I think it is more common that changes in the other areas of the law are made without adequately considering their impact on ERISA. For example, the earliest version of the Sudan divestment bill would have removed all ERISA protections over such funds in order to facilitate divestment—we caught that early on and were able to fix it to conform with our guidance on similar matters.

While it is not an "end run," there is currently legislative and regulatory interest in target date funds and whether the range of difference from one "glidepath" to another is a problem in need of a solution by DOL or SEC or both. This will be a potentially significant issue in the months to come, and is a good example of why SEC and DOL need to be on the same policy page where their jurisdictions rub together.

Fransen: EBSA began its Consultant/Adviser Project (CAP) in October 2006, which attempts to penalize plan consultants and advisers who bring harm to a plan by way of their conflicting interests and undisclosed compensation. Nevertheless, in light of the hue and cry about the financial services industry fleecing Americans' nest eggs, enforcement in this area still appears to be lacking. What's your take on the successes or failures of CAP?

Campbell: The CAP project is a good example of several things EBSA is doing right with its enforcement program. First, it was born of cooperation with the SEC. Second, it provides EBSA with useful empirical experience on what violations are found …or not found. This data can help determine whether this is a problem, and if so, whether it can be solved with disclosure like that sought in the proposed 408(b)(2) regulation, or whether more significant change to the nature of fiduciary duty and liability is necessary. That is not a change to be taken lightly. Changing where the line is drawn on what is fiduciary conduct and what is not has significant ramifications for plans and service providers, and ultimately, cost to participants.

Fransen: On the subject of problems yet to be solved, what's the most important issue you had to leave unfinished?

Campbell: The 408(b)(2) and participant disclosure initiatives were some of the most technically challenging issues from my time with EBSA, and also the most important unresolved regulations. However, I am very pleased with how much we accomplished during my time there, and I am very proud of the work the excellent EBSA staff did. It was a privilege to serve with them. ■