Session 6: Investigations by the DOL

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Agenda

• Understand the examination process.
• Figure out why a plan was selected for examination.
• Pinpoint potential areas of concerns.
• Identify common mistakes.
• Learn how to avoid (or at least minimize the risk of) an investigation.

DOL Enforcement Statistics

In FY 2019:

• EBSA closed 1,146 civil investigations with 770 of those cases (67%) resulting in monetary results for plans or other corrective action.
• Closed more than 166,000 inquiries and recovered $510.0 million in benefits through informal resolution of individual complaints.
• 1,600 applications for the VFCP.
• 20,088 annual reports through DFVC in FY 2019.
DOL Investigation Process

Employee Benefits Security Administration (EBSA):
In charge of investigating ERISA violations – has subpoena power!

**PROCESS:**
- Initial request for documents
- Interviews with Plan fiduciaries
- Identification of service providers
- Closing Letter
- Voluntary Action Request
- Correction

DOL Investigation Process

IRS - audit
- Plan Qualification Compliance forms v. operations
- Documentation
- Prohibited Transactions – excise tax
- Unrelated Business Income Tax
- Deduction for Contributions

DOL - Investigation
- Fiduciary Liability - conduct
- Prudence of Investments
- Liability for Prohibited Transactions
- Timeliness of 401(k) deferrals
- Co-fiduciary Liability
- Plan Expenses and Operations
- Plan Investments
- Real Estate Holdings
- Claims Procedures
- Bonding, Reporting, Disclosure
- Were required notices provided
What will the DOL ask for?

Initial request will come in the form of a letter.
- Plan Document, SPD and Trust Agreement
- Form 5500 (last 3 years)
- Payroll/contribution records
- Service Provider Agreements and Contracts
- Benefit Statements and Benefit Payment Records
- Minutes of Meetings
- Plan Asset Records, including appraisals, LLC Agreements, K-1s
- Fidelity Bond and Fiduciary Liability Insurance Policy
- IRS Determination Letter

Focus of the investigation

- EBSA does not identify the focus of the investigation in initial contact.
- It’s best not to raise issues you are aware of.

Why was my plan chosen for investigation?

- Employee or Participant complaints or inquiries
- Form 5500 responses- large amount of “other assets”
- Referrals from service providers or IRS
- EBSA targeting initiatives
- News and social media (bankruptcy)
- Are they random?
Interview with Fiduciaries

• Explain fiduciary decisions
• Describe processes: Forwarding employee contributions, Benefit payments, Expenses, Investments
• Identification of service providers

Hurry up and wait

A considerable amount of time can elapse in communication and contact between an investigator and a plan’s representatives.

Closing Letter

• a recommendation for voluntary compliance
• a finding that some corrections are needed, but with no formal EBSA action forthcoming
• a letter reporting that EBSA has found nothing- No action and closing letter
• Civil money penalties
• Referral to Solicitor’s Office for civil litigation
• Referral to U.S. Attorney’s Office for potential Criminal prosecution
Correction of Violations

General Rule
- The Plan must be made whole
- Prohibited Transactions corrected

Civil Penalties
- ERISA Section 502(l): DOL to assess 20% penalty on amounts recovered through settlement agreement or court order
- EBSA has discretion to waive or reduce penalty
- Penalty offset by PT excise tax paid

Correction of Violations Cont.
- Correction of prohibited transactions
- Restoration of losses
- Payment of penalties
- Removal of fiduciaries
- Removal of service providers
- Appointment of independent fiduciary
- Implementation of new internal controls
- Supplemental benefit distributions

How to Avoid an Investigation
- Perform regular compliance reviews- self correct problems ASAP
- Carefully review all documents to make sure there are no violations
- Fix errors before an active investigation begins
- If your plan has a CPA audit, correct any violations that are found
- Use the VFC Program
Voluntary Fiduciary Correction Program

- VFCP is not available if the plan is already under review by EBSA
- Covers specific transactions such as delinquent employee contributions, purchase or sale between the plan and a party in interest, loan between the plan and a party in interest, excess fees paid
- Must meet specific correction requirements

Potential Areas of Concern

- Are the assets held in the trust titled properly
- Investment diversification
- Have fiduciary responsibilities been allocated to other people
- Are deferrals being deposited timely
- Does the SPD accurately reflect the terms of the Plan

Common Mistakes

Prohibited Transactions:
- Loan or extension of credit to party in interest
- Fiduciaries having any ownership or involvement in or receiving any renumeration from brokers, consultants or agents of the plan
- Failure to properly value LLC interests
- Failure to search for missing participants
Civil Violations

- Failing to operate the plan prudently and for the exclusive benefit of participants;
- Using plan assets to benefit certain related parties to the plan, including the plan administrator, the plan sponsor, and parties related to these individuals;
- Failing to properly value plan assets at their current fair market value, or to hold plan assets in trust;
- Failing to follow the terms of the plan (unless inconsistent with ERISA); 
- Failing to properly select and monitor service providers;
- Taking any adverse action against an individual for exercising his or her rights under the plan (e.g., being fired, fined, or otherwise being discriminated against).

Criminal Violations

Violations involving employee benefit plans:

1. Theft or Embezzlement from Employee Benefit Plan
2. False Statements or Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act of 1974
3. Offer, Acceptance, or Solicitation to Influence Operations of Employee Benefit Plan

DOL Compliance Projects That May Trigger an Investigation

- Employee Contribution Initiative - workers had contributions to their pension or health plans withheld from their paychecks, but the employers did not deposit their contributions in the plans. Instead, the employers kept the workers’ contributions and used them for their own purposes or other purposes unrelated to the plans.
- Protecting Benefits Distribution (PBD) - focuses on ensuring that participants are paid retirement benefits that remain stagnant and may be at risk due to plan sponsor actions or failures to act. May be abandoned by defunct or bankrupt plan sponsor.
DOL Compliance Projects That May Trigger an Investigation

- **Terminated Vested Participant Project (TVPP)** - Aims to ensure that DB plans maintain up-to-date census records and effectively communicate to terminated vested participants their eligibility to apply for benefit distributions as they near normal retirement age.

- **Distressed Plan Sponsors** - Seeks to protect participant benefits placed at risk by a plan sponsor’s financial distress, including bankruptcy, state court receivership or the company’s poor financial condition. Evaluate whether a lawsuit should be filed against fiduciaries to ensure plans are made whole and benefits secured.

- **Custodial Abandoned Plans** - Confirming that service providers are not charging abandoned plans unreasonable fees and draining the remaining participants’ accounts. Identifies institutions with large number of abandoned plans.

- **Plan Investment Conflicts** - Investigates issues related to fiduciary service provider compensation and conflicts of interest in relation to plan asset vehicles. Receipt of improper or undisclosed compensation, ensures disclosures about service provider compensation and conflicts of interest. Examines plan fiduciary due diligence related to investment decisions, service provider selection and valuation preparation.

- **Contributory Plans Criminal Project (CPCP)** - National criminal project. Employers may convert employee payroll contributions for their own personal use or to pay business expenses. Service providers may target these plans for their own personal benefit and profit. Employee accounts can be susceptible to theft by internal employees or third parties who may steal from these accounts through identity theft and by tampering with personal data records.

- **Abandoned Plan Program (APP)** - results from mergers, acquisitions, and other similar transactions affecting the status of the employer. Sponsoring employer may be incarcerated, died, or fled the country. Financial institutions holding the assets do not have the authority to administer the plan. Participants and beneficiaries are unable to access their plan benefits. APP facilitates termination of, and distribution of benefits from individual account plans that have been abandoned.
Case Studies

Case 1

TPA is in business providing administrative, consulting and actuarial services to clients and their qualified retirement plans. Its business activities are limited to designing, establishing, implementing administering and terminating qualified plans including preparation of annual tax, valuation and actuarial reports, participants statements, etc. Client has engaged in several prohibited transactions and the Department of Labor ("DOL") is investigating the plan and its fiduciaries.

Case Study 1

Will the DOL interview TPA as part of its investigation?

Will the DOL request a copy of the TPA's files and if not received will it issue a subpoena for same? Are the TPA's files privileged?

The DOL investigation concludes that Client and the fiduciaries engaged in several prohibited transactions. Will the DOL open an investigation of and/or subpoena the TPA to review its other client files to determine whether similar transactions have taken place?

Case Study 2

Same facts as Case 1, except that the DOL is investigating several clients of TPA and discovers that all of them engaged in prohibited transactions.

What if the prohibited transactions were all similar self dealing investments with the same investment broker or dealer?

What if the TPA referred the investment broker or dealer to these clients without consideration? And if so, what if the TPA received some form of fee, commission or expense allowance monetary reward for the referral?
Case Study 3
Same facts as Case 1, except that TPA becomes aware that Client has not deposited deferrals to the Plan for several months and the DOL has not yet notified the Client that an investigation has begun.

What should the TPA do? Resign? Send letters that are discoverable? Inform the DOL?

What if as part of its administration services, all 401k-client deferrals are forwarded to the TPA who intern forwards same to the investment vendor?

What if the TPA simply referred several investment vendors to Client who met with them and chose funds for its participant investment choices?

Case Study 3
What if TPA has an ongoing relationship with several investment funds or vendors and refers only these to Client.

What if the reason for the ongoing close relationship and referrals is that the TPA is receiving monetary or prize rewards for the referral if the investment vendor closes the deal (for example, cash, fees, commissions, expense allowances, client referrals, trips to Hawaii or Europe, etc.

Case Study 4
Same facts as Case 3, except that TPA has an insurance and/or securities license to sell product to its clients and is directly involved with the Clients’ investment decisions?
Case Study 5

Dentist has a profit sharing plan. The Plan covers an owner, spouse, child and one rank and file employee. The Plan has an investment in an LLC. The LLC owns a parking lot next to Staples Center and if sold, is worth $10 million. The Plan Sponsor has been reporting the value of the LLC interest to the TPA at what he believes is the Fair Market Value.

Case Study 5

The following are the failures/ corrections that were required:
1. Breach of fiduciary duty and violations of ERISA.
2. Improper loan from Plan to other corporation where the dentist was a majority owner.
3. Failed to make prudent investment decisions for the Plan.
4. Proof that sales proceeds from sale of an LLC were deposited in the Plan.
5. K-1 for LLC investment was in name of the dentist and not the Plan.

Case Study 5

6. Agreed going forward to value plan's assets at a fair market value.
7. Agreed to file accurate Form 5500s (listed he had a bond and didn't).
8. Agreed to keep all plan records for six years.
9. Agreed to get a fidelity bond.
10. Agreed to amend Form 5500 to accurately reflect values of LLC investments.
Case Study 6

Printing company maintained a 401(k) Plan with a tiered profit sharing contribution.

DOL Findings:
1. Late deposits which required earnings adjustment of $514.93.
2. Failed to provide accurate information in the SPD.
3. Failed to provide disclosures to all eligible participants.
4. QNECs for those who didn’t receive a profit sharing contribution.

Case Study 6

The DOL indicated that the SPD stated:
A Participant who had entered the plan and had completed 500 hours of service was entitled to a discretionary profit sharing contribution. The Plan in operation excluded terminated participants from an allocation and allocated 0% to those rate groups. While the plan passed testing and operated in accordance with its terms, the DOL felt that a participant could infer from the SPD that if a profit sharing contribution was made and they worked 500 hours, that they would receive an allocation. Thus, the Employer was told to make a QNEC for these participants in an amount that would be “fair”.

Getting More Information About The Investigative Process

Contact Points
• EBSA website: www.dol.gov/ebsa
• Technical Assistance nationwide: 1-866-444-EBSA (3272)
• Publications: 1-866-444-EBSA (3272)