What to Expect from an Employee Benefits Security Administration (EBSA) Investigation

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EBSA - Structure

Field Offices

- 10 Regional Offices
- Conduct Investigations
- Provide Compliance Assistance
The Employee Benefits Security Administration protects the security of the retirement, health and other workplace related benefits of American workers and their families. Our Agency accomplishes this by:

- developing effective regulations
- assisting and educating workers, plan sponsors, fiduciaries and service providers
- vigorously enforcing the law
EBSA Enforcement Strategy

- Strategic Enforcement Plan (STEP)
  - Describes basic enforcement strategy
  - Last published in 2000

- Program Operating Plan (POP Guidance)
  - Changes annually

- Each Regional Office creates its own POP
National Projects

- Contributory Plans Criminal Project (CPCP)
- Rapid ERISA Action Team (REACT)
- Employee Stock Ownership Plans (ESOPs)
- Consultant/Advisor Project (CAP)
- Health Care Fraud / Multiple Employer Welfare Arrangements (MEWAs)
Types of Investigations

- Civil
  - Plan
  - Service Provider

- Criminal
  - Plan
  - Service Provider
  - Employer
  - Individual
Issues/Areas of Review in Civil Cases

- Review of Plan Assets
  - Prudence, Prohibited Transactions, Self Dealing
- Reporting and Disclosure
- Bonding
- General Plan Operations
- In accordance with Plan Document
- Remittance of Employee Contributions
Civil Plan Investigations

- Start with phone call from Investigator / Auditor

- Followed by confirmation letter
  - Date & time of visit
  - Plan(s) to be reviewed
  - Records / documents needed
    - Varies depending on issue
Onsite Investigative Work

- Interviews with key personnel and plan fiduciaries

- Basic operations / services
  - Contributions
  - Benefit payments
  - Expenses
  - Investments

- Identification of
  - Service providers
  - Record-keeper(s)
Basic Documents

- Plan Document/ Trust Agreement
- Form 5500 filings (past 3 years)
- SPD
- SAR for last year
- Fidelity Bond
- Fiduciary Insurance Policy
- Trustee Statements (past 3 years) (asset records)
- Service Provider Contracts
- Meeting Minutes
- Benefit Statements
- Asset records
- Payroll/contribution records
Investigative Emphasis

Reporting Requirements
  » Annual Report (Form 5500)

New Health Care Provisions
  » Affordable Care Act
  » Genetic Information Nondiscrimination Act (GINA)
  » Mental Health Parity and Addiction Equity Act
Investigative Emphasis

Disclosure Requirements

– Summary Plan Descriptions (SPDs)
– Summary of Material Modifications (SMM)
– Summary Annual Reports (SARs)
– “Blackout” Notices
– COBRA Notices / HIPAA Certificates & more
– Provide documents on request
– Participant Benefit Statements
  » Field Assistance Bulletin 2006-03
  » Field Assistance Bulletin 2007-03
Investigative Emphasis

**Bonding**

- 10% of Funds Handled – not less than $1,000 nor more than $500,000 ($1,000,000 for plans with employer securities)
- No deductible
- Plan should be named as insured
- Discovery Period of no less than one year after termination or cancellation of bond is required
- See FAB 2008-04
Fiduciary must

- Act “solely in interest” of Ps & Bs

- Discharge his / her / its duties prudently
  (care, skill, prudence and diligence)

- Diversify plan investments

- Follow terms of governing documents
  (to the extent consistent with ERISA)
Investigative Emphasis

Fiduciary must NOT

– act in his / her / its own self interest

– act on behalf of a party with adverse interests

– accept “gratuity” from those doing business w/ the Plan (kickback)
Fiduciaries must NOT cause the Plan to engage in a “prohibited transaction”

» Sale / exchange with party in interest (PII)

» Loan / extension of credit with PII

» Goods, services & facilities with PII

» Transfer to, use by or for the benefit of a PII
Employee Contributions

- Handling of employee contributions

- Basic Rule –
  As soon as they can be
  “reasonably segregated”
  from Employer’s general assets

Safe Harbor Reg. – 1/14/2010 - for plans with fewer than 100 participants
Employee Contributions

- “As soon as” varies from plan to plan
  - will ask questions about handling
  - will review practice / experience
Employee Contributions

- Outside Limits (Not a safe harbor)
  
  » Pension – 15 Business Days after end of month of withholding / receipt
  
  << SIMPLE IRA Plans – 30 days after end of month >>
  
  » Welfare – 90 days after withholding / receipt
Concluding the Investigation

- Depends on any problems identified
- If no problems are noted, closing letter
- If problems are noted, corrective actions are necessary
Needing Correction

- Usually, EBSA will send “Notice Letter”
  - Identifies problems
  - Offers chance to discuss correction

- EBSA encourages Voluntary Compliance

- Proper Correction >> “Closing Letter”
  - Identifies problems & corrective actions

- No Correction >> referral to the Solicitor’s Office
Needing Correction

Depending upon the circumstances, EBSA may seek

- Correction of prohibited transactions
- Restoration of losses
- Penalties
- Removal of fiduciaries
- Removal of service providers
- Appointment of independent fiduciary
- Implementation of new internal controls
- Supplemental distributions to Ps & Bs
- Final accounting
IRS Referrals

- IRS Coordination Agreement and Statute requires:
  - referral of prohibited transactions to IRS
    - IRC 4975 excise tax
      (tax qualified pension plans)
  - referral of potential issues affecting tax qualified status
Criminal Referrals

- Under some circumstances, criminal referrals may be made
  - Theft / embezzlement
  - Kickbacks / bribes
  - False statements to investigators
  - Willful failures to file / false filings
  - Health care fraud
Voluntary Fiduciary Correction Program
What is the VFC Program?

- Allows “Plan Officials” to correct certain violations before DOL investigates and if done properly, receive a “No-Action” letter from the Department.

Plan Official

DOL
NO ACTION

“You fixed it” DOL
VFC Program

- Designed to be a voluntary program
- No need to consult with EBSA
- Apply after correction
VFC Program - Advantages

- Compliance with ERISA
- Guidance regarding correction
- Restoration of losses
- Increased benefits for some Ps & Bs
- Enhanced benefit security
- More accurate valuations & reporting
**VFC Program - Advantages**

- “No Action” letter (upon completion)
- Avoid DOL investigations
- Avoid ERISA §502(l) penalty
  - 20% penalty on settlement agreements
- Avoid potential litigation
- In some cases, avoid IRC §4975 excise tax
VFC Program - Applicants

- Fiduciaries
- Plan sponsors
- PIIs
- Others in a position to correct
- May utilize “Representative”
  - Must include copy of signed authorization
VFC Program - Process

- Identify potential ERISA violations
- Determine VFCP eligibility
- Correct violations
- File an application with Regional Office
VFC Program - Transactions

- Not all fiduciary violations are included
- Must be 1 of 19 described transactions
VFC Program - Eligibility

- Neither plan nor applicant “Under Investigation”
- No evidence of criminal violations
- EBSA has not referred the transaction to the IRS; EBSA notified plan official of referral
VFC Program - Correction

- All losses must be restored to plan, all PTs corrected
  - Principal
  - Interest
- Supplemental distributions must be made (when appropriate)
- No correction costs paid by plan
- 5500s amended when appropriate
VFC Program - Application

- **Narrative**
  - Describe parties involved, explain breach and correction, and how “earliest reasonable date” was determined in delinquent EE contributions apps.

- **Supporting documentation**
  - *e.g.*, relevant parts of plan, loan documents, FMV determinations

- **Penalty of Perjury Statement**

- **Checklist**

- **Proof of Payment**
VFC Program - Application

- Model Application Form
  - Not required, but recommended
  - Helps ensure a complete and accurate application

- Includes Required Documents
  - Penalty of Perjury statement
  - Checklist
VFC Program – Exemption

- Delinquent Contributions/Loan Contributions to Pension Plans
- Loans to PIIs @ “Fair Market” Rates
- Purchases/Sales w/ PIIs @ FMV
- Sale/Leaseback to Employer Sponsor @ FMV
- Illiquid Assets
- Settlor fees paid to PII
VFC Program – Exemption

- Notice Requirement
- Notice Exception
  - Delinquent employee contributions/loan repayments
  - Excise tax \( \leq \$100 \)
  - Excise tax which would otherwise be payable to IRS is paid to plan
  - Distributed to participants as earnings would be
  - Do not have to file IRS Form 5330
Compliance Assistance

- EBSA website: www.dol.gov/EBSA
- EFAST website: www.efast.dol.gov
- Publications: 1-866-444-3272
- Technical Assistance (Toll-free number): 1-866-444-3272
- EFAST Hotline (Toll-free number): 1-866-463-3278 (Go EFAST)
Compliance Assistance

- Regional Offices
- 1-866-444-3272
Helpful EBSA Publications

- Meeting Your Fiduciary Responsibilities
- Understanding Retirement Plan Fees and Expenses
- Selecting an Auditor for Your Employee Benefit Plan
- Reporting and Disclosure Guide
- Selecting & Monitoring Pension Consultants – Tips for Plan Fiduciaries
- Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan