



DOL & IRS ENFORCEMENT UPDATE

May 17, 2017

1. Overview
2. Fact Sheet – 2016 Enforcement
3. IRS Compliance Trends
4. Form 5500 Modernization
5. Best Practices-Action Steps

DOL REGULATORY AGENDA

- ➔ Fiduciary Rule
- ➔ 5500 Modernization
- ➔ Lifetime Income Projections
- ➔ Brokerage Windows

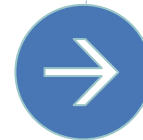
DOL ENFORCEMENT ACTIVITY

- ➔ Monetary recovery for plans, participants, beneficiaries
- ➔ Success with voluntary programs

INTERNAL REVENUE SERVICE

- ➔ Examination Activity
- ➔ Common Errors
- ➔ Internal Controls

- ➔ “Conflict of Interest Rule”
- ➔ 5500 Modernization Proposal
- ➔ Participant Benefit Statements-lifetime income illustrations/projections
- ➔ Brokerage Window Project



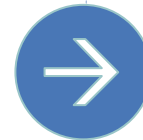
A REGULATION IS A GENERAL STATEMENT ISSUED BY AN AGENCY, BOARD, OR COMMISSION THAT HAS THE FORCE AND EFFECT OF LAW. FEDERAL REGULATIONS SPECIFY THE DETAILS AND REQUIREMENTS NECESSARY TO IMPLEMENT AND TO ENFORCE LEGISLATION ENACTED BY CONGRESS.

“ERISA fiduciaries are said to be charged with the highest duty known to the Law”

**Donovan v. Bierwirth, 680 F.2d 263 (2nd Cir. 1982)*

DOL Enforcement Activity in 2016

- ➔ \$777.5 million in direct payments recovered for plans, participants and beneficiaries
- ➔ 2,002 civil investigations closed with 67.7% resulting in monetary results or other corrective action
- ➔ 144 civil investigations referred for litigation, 62 civil cases with litigation filed
- ➔ 333 criminal investigations closed, 75 with guilt pleas or convictions, 96 individuals indicted



THROUGH ITS ENFORCEMENT OF ERISA, EBSA IS RESPONSIBLE FOR ENSURING THE INTEGRITY OF THE PRIVATE EMPLOYEE BENEFIT SYSTEM IN THE UNITED STATES. EBSA'S OVERSIGHT AUTHORITY EXTENDS TO NEARLY 681,000 RETIREMENT PLANS.

Source: DOL Fact Sheet

“a pure heart and empty head” are not enough to satisfy ERISA fiduciary duties*

- ✓ ERISA fiduciaries must understand their duties and responsibilities
- ✓ ERISA fiduciaries can be personally liable for breaches

*Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983)

DOL Enforcement Activity in 2016 (cont'd)

- ➔ EBSA's Benefits Advisors closed more than 193,000 inquiries and recovered \$394.2 million for workers through informal resolution of complaints

- ➔ 662 investigations opened based on inquiry referrals

- ➔ Voluntary compliance programs successful
 - ➔ **1,490 Voluntary Fiduciary Correction Program Applications received**

 - ➔ **22,070 Delinquent Filer Voluntary Correction Program filings received**

Source: DOL Fact Sheet

Consequences of “An Empty Head”

What’s the worst that can happen?

- ➔ DOL investigation/IRS Examination
- ➔ Participant lawsuits
- ➔ Restoration of losses to plan and participants
- ➔ Fines and penalties
- ➔ Plan qualification issues
- ➔ **Personal** liability for breaches of fiduciary duty
- ➔ Banned from serving as a fiduciary....forever

How can you help your clients protect themselves?

Internal Revenue Service Compliance Trends

Recurring 401(k) plan mistakes that IRS sees in audits, voluntary compliance submissions, determination letter applications and annual return filings:

- ➔ Failure to update plan documents;
- ➔ Operating the plan in a way that does not conform with plan documents;
- ➔ Improper definitions of compensation for plan deferral and matching purposes;
- ➔ Exclusion of eligible employees from deferrals and/or employer contributions;
- ➔ Failure to comply with contribution limits;
- ➔ Nondiscrimination testing errors;
- ➔ Failure to recognize the plan as a top heavy plan;
- ➔ Late remittance of employee or employer contributions; and
- ➔ Use of erroneous participant data.

Source: <https://www.irs.gov/retirement-plans/ep-compliance-trends-and-tips>

IRS Top Tips to Prepare for an Efficient Audit

Recurring 401(k) plan mistakes that IRS sees in audits, voluntary compliance submissions, determination letter applications and annual return filings:

- ➔ Have documents, records and agreements with service providers organized and readily available
- ➔ Have appropriate people available (sponsor personnel, trustee, recordkeeper, rep with POA, actuary);
- ➔ Be prepared to:
 - ➔ **Explain plan terms and operation (e.g. admin forms, loans, hardships);**
 - ➔ **Provide all compliance test results;**
 - ➔ **Explain internal admin processes;**
 - ➔ **Identify plan errors (resolved through voluntary correction or in process or uncorrected);**
 - ➔ **Provide information about related entities (controlled or affiliated service groups, QSLOBs);**
- ➔ Consider annual self-audits as a verification tool; and
- ➔ Consider use of available IRS resources.

Source: <https://www.irs.gov/retirement-plans/top-ten-tips-to-prepare-for-an-efficient-audit>

Form 5500

ERISA and the Internal Revenue Code generally require pension plans to file annual returns/reports concerning the financial conditions and operation.

- ➔ A plan sponsor requirement
- ➔ The Form 5500, together with required attachments and schedules satisfies this reporting requirement
- ➔ 5500 is primary source of information about plan operation, funding, assets and investments
- ➔ Provides disclosures to plan participants and beneficiaries (publicly available on DOL website)
- ➔ Essential research tool for DOL, IRS, PBGC, other federal agencies and private sector
- ➔ Filed electronically with certain attachments and schedules as required per instructions

Source: DOL Fact Sheet – Proposal to Modernize and Improve Form 5500 Annual Return/Report

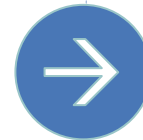
Examples of Schedules/Attachments to Form 5500

- ➔ Schedule A – Insurance Information
- ➔ Schedule C - Plan Expense Information
- ➔ Schedule I – Financial Schedule for Plans with less than 100 participants
- ➔ Schedule H – Financial Schedule for plans with 100 or more participants (requires attachment of independent accountant's audit report)
- ➔ Incomplete and/or late filings subject to rejection and/or penalties

5500 Modernization Proposal

Key Goals for Pension Plans

- Financial Reporting-improve transparency and reliability of investment and transaction information
- Enhance Data Mineability-data more computer-processable for analytical purposes
- Improve service provider fee information-track 408(b)(2) disclosures, more powerful tool for improved fee evaluation
- Enhanced reporting on plan compliance to improve plan operations, protect participants
- Educate and provide annual discipline for plan fiduciaries



“...QUESTIONS ARE INTENDED TO COMPEL FIDUCIARIES TO EVALUATE PLAN COMPLIANCE WITH IMPORTANT REQUIREMENTS UNDER ERISA AND THE CODE AND TO PROVIDE AGENCIES WITH IMPROVED TOOLS TO FOCUS OVERSIGHT AND ENFORCEMENT RESOURCES.”

Source: DOL Fact Sheet – Proposal to Modernize and Improve Form 5500 Annual Return/Report

The Prudent Expert Rule-Where do you fit in?

- ➔ “Hire experts where needed.”
- ➔ Plan documents allow fiduciaries to delegate duties and responsibilities
- ➔ The experts selected and hired by a plan fiduciary do not have to be fiduciaries themselves, but in some cases, they are...
 - ➔ **Four main categories that a sound plan governance structure must address:**
 - *Plan design and overall plan decisionmaking*
 - *Plan investments*
 - *Employee communication and education*
 - *Day-to-day plan operation and administration*
- ➔ Selection of experts is a ***fiduciary function***

Delegation to Non-Fiduciary Service Provider Partners

- ➔ Compliance Services (plan testing, **Form 5500**, employee notices, **audit support**, etc.)
- ➔ Recordkeeping and day-to-day administration and transaction processing
- ➔ Participant communication and education services (enrollment, plan and general investment education, retirement needs assessment, distribution counseling)
- ➔ ***Plan sponsor/fiduciary retains the duty to monitor the contractual relationships with service provider partners***

- ➔ ***Stay informed of compliance requirements and regulatory enforcement priorities related to retirement plans***
- ➔ Clearly communicate and document your role and responsibilities to your clients
- ➔ Educate your clients as to their role and responsibilities
- ➔ Work/coordinate with qualified financial professionals and other plan service providers
- ➔ Establish processes and procedures for your deliverables

Important Information

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