

# DOL/EBSA Focus in 2008

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The views expressed are those of the speaker  
and do not necessarily represent the official position of the Department or EBSA.

## TODAY'S TOPICS

### ERISA Enforcement

- National Enforcement Projects
- Regional Enforcement Initiatives
- Criminal Investigations

### Compliance Assistance

- Voluntary Fiduciary Correction Program
- Delinquent Filer Voluntary Correction Program
- HIPAA Compliance Assistance Program
- Abandoned Plan Program

## ERISA ENFORCEMENT

### EBSA's Strategic Enforcement Plan

- Supports DOL Strategic Goal 4, Strengthened Economic Protections  
Protect and strengthen worker economic security through ... securing pension and health benefits.
- FR Vol. 65, No. 67 – April 6, 2000
- Targeting
- Protecting At-Risk Populations
- Deterring Violations
- Facilitating Self-Correction

- Implementation
  - National Projects
  - Regional Initiatives

## **EBSA NATIONAL PROJECTS FY 2008**

### **1. Employee Contributions Project**

Delinquent Employee Contributions

Civil violation:

- Delay in sending salary deferrals
  - “Earliest Date” rule
  - ERISA Reg. 29 CFR 2510.3-102
  - Field Assistance Bulletin 2003-2 for Multiemployer DC Plans

Criminal:

- Conversion of contributions to other uses

### **2. REACT (Bankruptcy)**

Bankrupt or Financially Distressed Plan Sponsors

Rapid ERISA Action Team (REACT)

- Preserve plan assets
- Determine whether the sponsor has made all required contributions
- Ensure plan’s rights are protected
- Identify responsible fiduciaries to administer (or terminate) the plan

### **3. Health Fraud/MEWAs**

ERISA Issues:

- Unpaid claims due to
  - Insufficient funding
  - Inadequate reserves

- Excessive administrative fees
- Outright theft

#### Civil Enforcement Actions

- Temporary Restraining Order (TRO)
- Pursue Monetary Judgments
- Bar from future work with plans
- Appointment of Independent Fiduciary

#### Criminal Enforcement Actions

- Seizure of Assets
- Forfeiture of Assets
- Criminal Penalties
- 13 year bar
  - Knowing violation of bar causes additional criminal violations

### **4. Employee Stock Ownership Plans**

#### ERISA Issues:

- Failure to properly value employer security
  - Fraudulent valuations
  - “Optimistic” valuations
  - Dated valuations
- Refinancing of ESOP loans
  - Application of FAB 2002-1

### **5. Consultant/Adviser Project**

#### Subjects of Investigation:

- Pension Consultants
- Investment Advisers

- Plan Fiduciaries

ERISA Issues:

- Receipt of improper, undisclosed compensation
- Fiduciary's Failure to Monitor
- Potential criminal violations, such as kickbacks or fraud

**REGIONAL INITIATIVES**

**1. Real Estate**

- Prudence of investments
- Prohibited transactions
- Valuation

**2. Uncashed Distribution Checks**

- Reasonable procedures
  - Ensure timely distribution and actual receipt of funds
- Monitoring of process from start to end
  - Float
  - Field Assistance Bulletin 2002-03
- Missing participants
  - Field Assistance Bulletin 2004-02

## CRIMINAL INVESTIGATIONS

### ERISA Criminal Statutes

- Section 411 – ERISA Bar
- Section 501 – Reporting
- Section 511 – Coercive Interference

### Title 18, U.S. Code

- ❑ 18 USC 664 – Embezzlement
- ❑ 18 USC 1027 – False Records
- ❑ 18 USC 1954 – Kickbacks
- ❑ Health Care
  - 18 USC 669 – Embezzlement
  - 18 USC 1035 – False Statement
  - 18 USC 1347 – Health Care Fraud
- ❑ Other Relevant Criminal Statutes
  - Mail fraud, wire fraud, conspiracy, etc.

## Civil v. Criminal



### Crossing the Line

#### ERISA §406(b)(1)

- ❑ A fiduciary with respect to a plan shall not deal with assets of the plan in his own interest or for his own account [self dealing].

#### 18 USC 664

- ❑ It is a felony to convert to your own use or to the use of another moneys or other assets of a plan or of any other connected fund [embezzlement].

## Comparison

### ERISA §406(b)(1)

- A fiduciary
- Own interest
- Plan assets
- Shall not deal

### 18 USC 664

- Any person
- Own use or use of another
- Plan assets or connected fund
- Willfully [not deal]

§ 664 is much broader, but requires specific intent

### “RED FLAGS”

- Concealment
- Falsification, false statements, destruction of records
- Extravagant personal gain
- Flagrant disobedience of instructions
- Others:
  - Transactions different from usual course of action
  - Evasiveness, unresponsiveness
  - Missing records
  - Flight

### OTHER HOT ISSUES

- Fees and expenses
- Selection and monitoring of service providers
  - See DOL and SEC Tips for Selecting and Monitoring Pension Consultants

## COMPLIANCE ASSISTANCE PROGRAMS

### 1. Voluntary Fiduciary Correction Program

- Avoid investigation
- Avoid 20% civil penalty
- Avoid excise tax
- Do the right thing!
- Online calculator
- VFCP Coordinator David Matheney (415) 625-2475 or [VFCP-SFRO@dol.gov](mailto:VFCP-SFRO@dol.gov)

### 2. Delinquent Filer Voluntary Correction Program

- Missed the deadline for filing Form 5500
- Reduced penalties
  - Per filing cap on penalties
  - Per plan cap on penalties
- New** online penalty calculator

### 3. HIPAA Compliance Assistance Program

Health Disclosure and Claims Issues FY 2001 Compliance Project

- Baseline project completed in FY 2001
- Measured group health plans' compliance with ERISA Title I, Part 7
  - 45.3% of plans were cited for violations
  - Report available at [www.dol.gov/ebsa](http://www.dol.gov/ebsa)

HIPAA Compliance Assistance Program

- Strategies to increase compliance:
- New publications:
  - Compliance Assistance Guide
  - Self-audit checklist
- Compliance assistance web page
- Live workshops throughout the country

#### 4. Abandoned Plan Program

- Plan sponsor abandons the plan
- Custodial trustee is holding plan assets
- Participants want their distributions
- Program facilitates orderly termination of the abandoned plan

#### Contact Points

EBSA website: [www.dol.gov/ebsa](http://www.dol.gov/ebsa)

Technical Assistance nationwide: 1-866-444-EBSA (3272)

Publications: 1-800-998-7542

San Francisco Regional Office

**New address and phone number:**

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