Highlights for a DOL Plan Audit

2019 ABA Section of Taxation May Meeting
Employee Benefits Corporate Counsel Forum
Washington, DC
Friday, May 10, 2019

“Fodder for the Fray”

Compliance Triggers. Types of events that may prompt DOL inquiries:

• Plan participant complaints

• Late annual report (Form 5500) filings

• Recurring late participant contributions (for example, continuous/repeat stream of DFVCP filings)

• Referrals from other agencies
Recent Trends

Results from EBSA FY 2018 enforcement efforts include:

• Recovery of terminated vested participant benefits (for example, benefits due and owing to "found" missing participants)

• Indictments for ERISA fiduciary duty violations (for example, prohibited transactions involving plan officials and corporate officers)

• Resolution of informal benefit complaints totaling nearly $500m

*Department of Labor Fact Sheet (FY2018)*

Initial Contact

EBSA could contact a plan sponsor in a variety of ways:

• Phone call inquiring on behalf of a particular plan participant

• Letter requesting review of specific plan materials (for example, requesting a copy of the 401(k) SPD)

• Subpoena requesting various documents for one or more plans

• Interview (usually after review of submitted/subpoenaed documents)
Examples of “Fair Game” Plan Materials

- Plan documents, including superseded documents (for example, documents related to terminated employee claim)
- Summary plan descriptions
- Participant notices
- Electronic delivery process (written summary)
- HIPAA disclosures (for example, wellness plan disclosures)
- Initial disclosures process (written summary)
- Plan accounting reports
- Historical plan investment reports
- Automatic IRA rollover process (written summary)
- Materials distributed during plan fiduciary committee meetings

Interview Basics

- Determine who will attend
- PREPARE (even audit “veterans” need preparation)
- Carry minimal notes/tips to the interview
- Provide clear, concise, and complete (accurate) answers
Example of Costly Interview Misstatement

In connection with an audit of the XYZ Profit Sharing Plan, the Department of Labor interviews the Plan’s service provider (ABC Services) who has provided ERISA 3(21) investment advisory services to the Plan for 25 years. ABC Client Representative sits for the interview. After preliminary questions, the investigator moves to more substantive topics and asks:

Interview Question: “What is your role with respect to the XYZ Plan?”
Response: “We select the Plan’s investments.” (This is not a good result.)

With adequate preparation, the Client Rep should respond by highlighting ABC’s periodic review of the Plan’s investments and explaining that XYZ selects the Plan’s investments from ABC’s platform of options, based on XYZ’s criteria reflected in the investment policy statement. Preparation is key.

Tips

• Respond timely to DOL inquiries
• Communicate with the investigator
• If materials are not available by the subpoena’s deadline, request an extension
• If granted an extension, comply with the new deadline
• Provide relevant materials
• Plan officials attending the interview should read the plan document
• It is okay to refer to notes if the interviewee is not sure how to respond
• Do not provide evasive responses
• Keep the shared goal in mind: protection of the plan and its participants