



31st Annual Benefits Compliance Conference

Scheduled in 2 Hour Segments during
November 2020 Produced Virtually via Zoom

SESSION 1: DOL Updates: New Fiduciary Rule, Private Equity Investments and ESG Funds

Introduction: **Lauren Bump**, Regional Retirement Consultant, Gallagher

Speakers: **Alison Sulentic**, Partner, The Sulentic Law Firm PLLC

Christopher Jarmush, Area Sr.Vice President, Director of Defined Contribution,
Gallagher Fiduciary Advisors, LLC



A Special Thanks to our Sponsors



Our 45th Annual Conference

SW BA SouthWest BENEFITS Association | 45th ANNUAL CONFERENCE

Benefits Safari

May 19 - 21, 2021
Kalahari Resort / Round Rock, Texas

Kalahari
RESORTS & CONVENTIONS



CE Update

- Please be sure to answer the poll questions today – 1 question per session
- **Check the Chat Box to download (word doc) your Attendance Record**
- **Submit your Attendance record to registration@swba.org after Thursday**
- TX Dept of Insurance, TX MCLE, OK MCLE – With your name and Bar/License#
we will be able to submit your hours online
- Actuaries – Please send your recommendations re Core, Non-Core and No Credit Sessions
- All others – CPE, HRCI, SHRM, Other States, etc. –
we will send you a certificate of attendance



Today's Speakers

Alison Sulentic is a seasoned human resources attorney, mediator and coach, with 25 years' experience working in major law firms, corporations and universities. She is an insightful and effective advisor to leaders of organizations that operate in culturally diverse environments. Alison is the founder of The Sulentic Law Firm, PLLC, a Houston law firm providing services to the human resources community. With many years' experience as an attorney with the renowned international law firm, Baker Botts L.L.P., Alison's practice has always centered on legal issues relating to employee benefits and human resources. She also served as the associate general counsel for human resources with the in-house legal department of Transocean, Inc., a large international energy corporation. A prolific author and presenter, her numerous scholarly and professional articles focus on the ethical and legal decisions facing attorneys and managers responsible for the development and implementation of workplace effectiveness. She is deeply experienced in handling the problems faced by non-profit organizations and religiously affiliated corporations such as schools, universities and health care systems.

Christopher Jarmush is an Area Senior Vice President and Director of Defined Contribution with Gallagher Fiduciary Advisors LLC. He works with clients across a range matters related to investment policy, asset allocation and investment manager due diligence. Chris also leads the development of the firm's strategic DC plan initiatives, and serves as a member of Gallagher Fiduciary Advisors' Research Committee. Christopher has many years' experience in investment and fiduciary consulting, helping clients improve performance through tailored investment and fiduciary solutions, and promoting best practices on defined contribution plan design and governance. He has also directed the investment products and consulting services division for a leading retirement plan service provider, and managed institutional trust portfolios at a national bank and trust organization. Christopher holds a B.S. in Banking and Finance from Case Western Reserve University. He serves as a Board Member of the Public Policy Steering Committee at the Defined Contribution Institutional Investment Association (DCIIA), a member of the Chartered Financial Analysts Institute, and a member of the Washington Association of Securities Analysts.



DOL Updates: New Fiduciary Rule, Private Equity Investments and ESG Funds

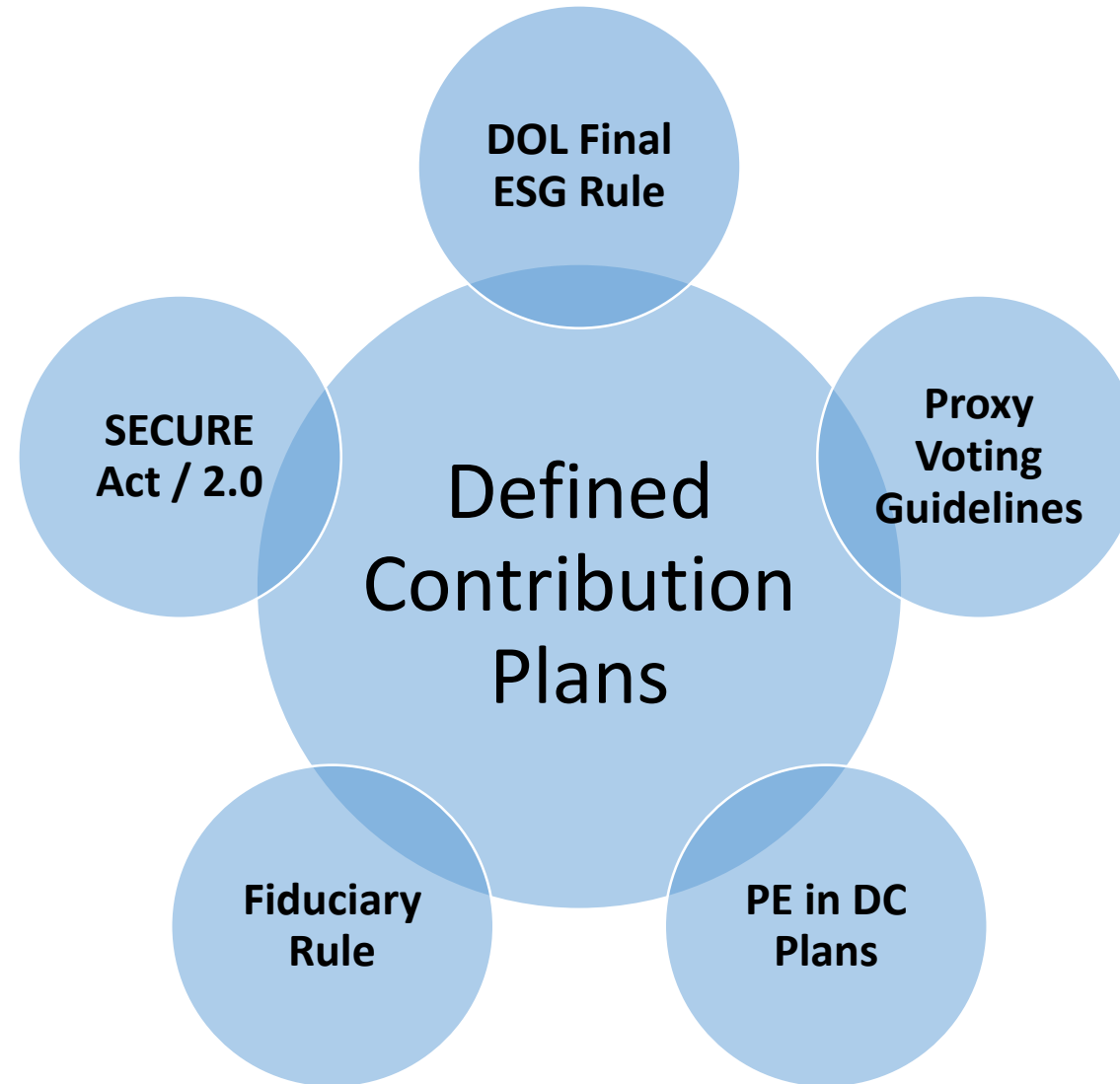
Christopher Jarmush,

Area Senior Vice President, Director of Defined Contribution
Gallagher Fiduciary Advisors, LLC

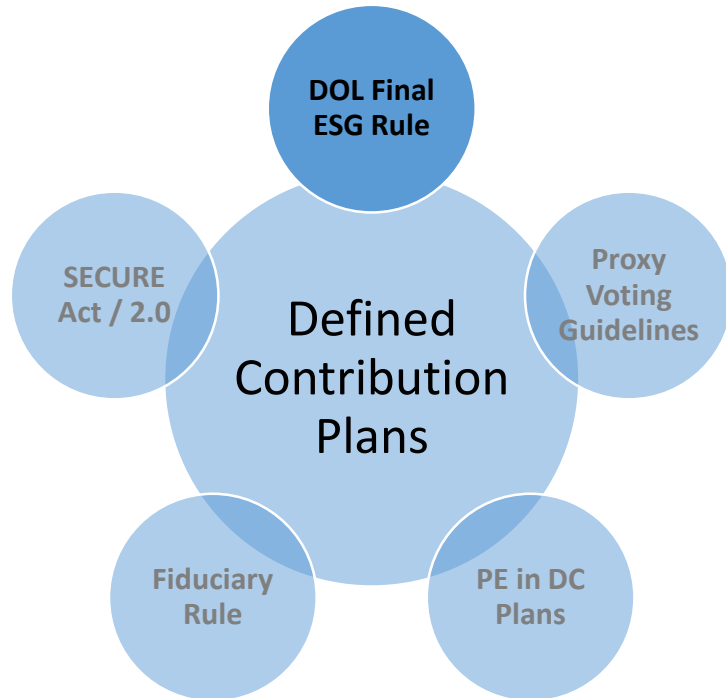
Alison Sulentic

The Sulentic Law Firm, PLLC

Topics



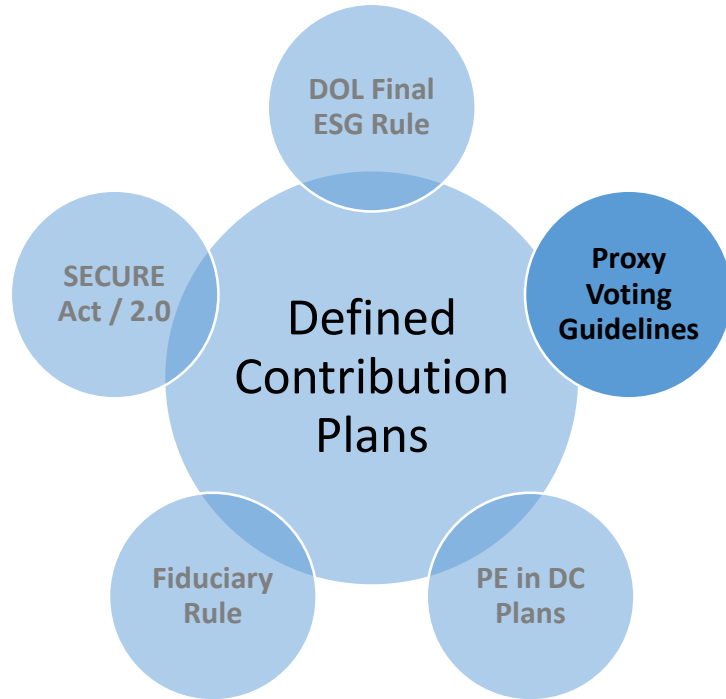
ESG – Environmental, Social and Governance



DOL ESG Rule

- ESG rule amends ERISA to codify a clear regulatory structure for considering investments for ERISA plans
- Explicitly prohibits sacrificing participants' financial interests in the pursuit of non-financial objectives
- Recognizes that certain ESG factors may be considered “pecuniary” in nature

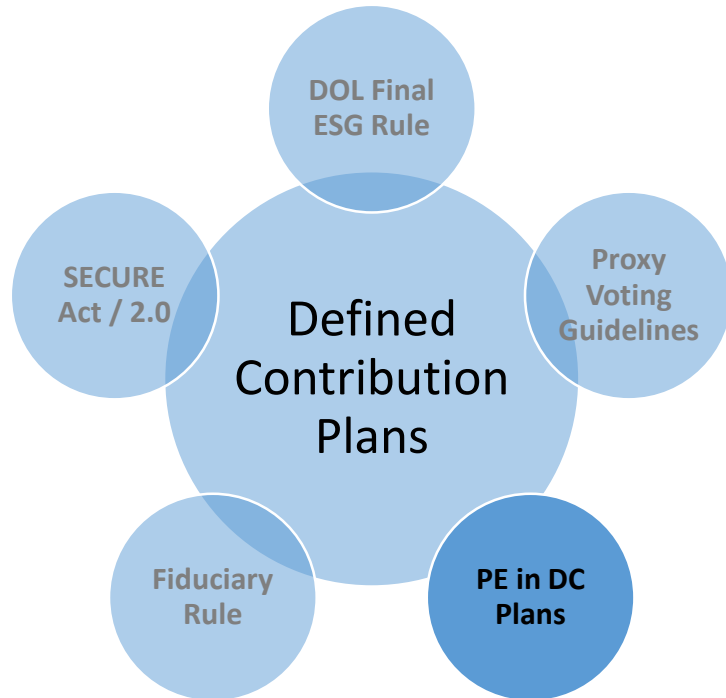
Proxy Voting Guidelines



DOL Proxy Voting Guidelines

- Fiduciaries would be prohibited from voting proxies unless the matter being voted upon was prudently determined to have an economic impact to the plan
- Investment managers and proxy voting firms must sufficiently document the rationale for each proxy voting decision

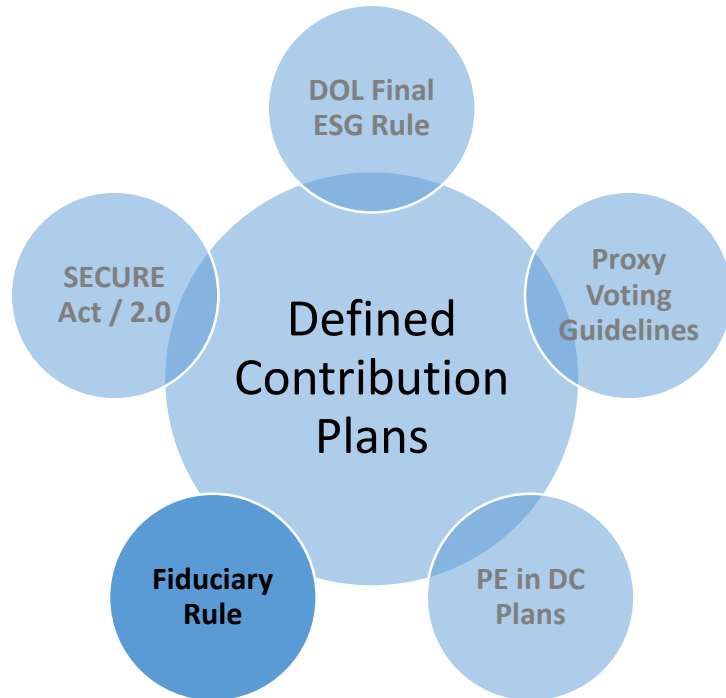
Private Equity



Private Equity in DC Plans

- DOL issued an *Information Letter* affirming that PE investment can be prudently included in a DC plan
- Provides a framework for plan fiduciaries when considering a diversified investment option that contains private market exposures
- PE strategies have not gained a strong foothold in DC plans due to costs and concerns about liability

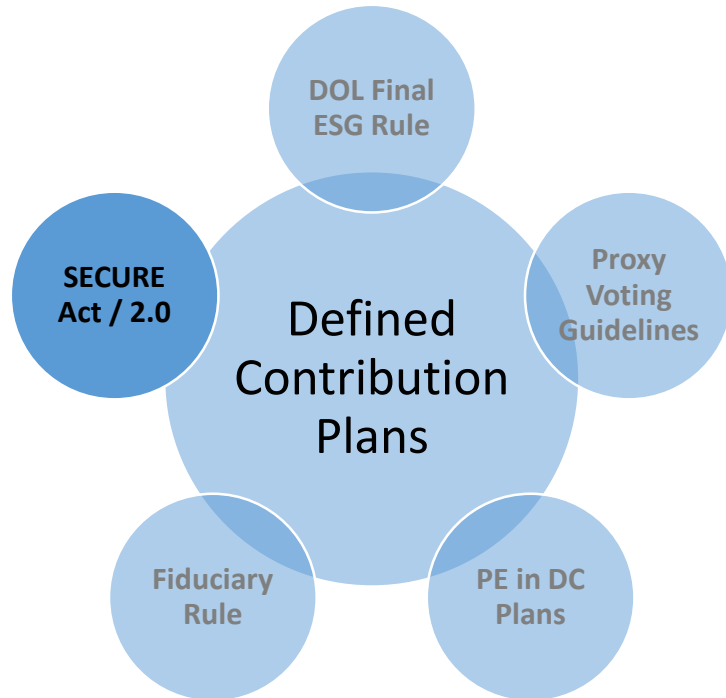
Fiduciary Rule



DOL Fiduciary Rule / SEC Reg BI

- A new Fiduciary Rule is proposed after previous rule was vacated by the 5th Circuit Court of Appeals
- Rule would exempt certain transactions currently prohibited under ERISA and seek better alignment with the SEC's Regulation Best Interest
- Fiduciary "5-Part Test" is reinstated renewing concerns of potential conflicts of interest

Secure Act



Setting Everyone Up for Retirement (SECURE) Act

- Establishes open Multiple Employer Plans or MEPS
- RMDs to begin at age 72
- Opens DC plans to certain part-time employees
- Provides fiduciary safeguards for in-plan annuities
- Monthly income estimates are a requirement
- Provides tax credit incentives to small businesses

Securing a Strong Retirement Act of 2020

- SECURE Act 2.0
- Requires Auto-Enrollment/Auto-Escalation
- RMDs to begin at age 75
- Revise rules on QLACs
- 403(b) plans can invest in CITs and participate in MEPs
- Permits employer matching contributions for “student loan payments”



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SESSION 2: Best Practices and New Tips for Department of Labor Audits

Introduction: **Rance Buss**, CPA, Partner, Employee Benefit Plan Audit Services, Weaver
Speaker: **James Stringham**, Sr. Investigator, U.S. Department of Labor, EBSA



Today's Speaker

Jim Stringham is a Senior Investigator in the Dallas Regional Office for the U.S. Department of Labor's Employee Benefits Security Administration (EBSA). Jim began his career at EBSA in the Los Angeles Regional Office before transferring to Dallas in 2016. He has conducted numerous complex civil and criminal investigations involving multiemployer plans, employee stock ownership plans, alternative investments, self-funded health plans, and plan service providers. Jim has also served as the Major Case coordinator and the MEWA coordinator for the Dallas Regional Office. Prior to joining EBSA, Jim managed decedent trusts and estates for the Public Administrator's Office in Orange County, California and worked as a Deputy Sheriff with the Los Angeles County Sheriff's Department. Jim has received his Bachelor's degree in Criminal Justice and his Master's degree in Political Science from California State University, Fullerton.

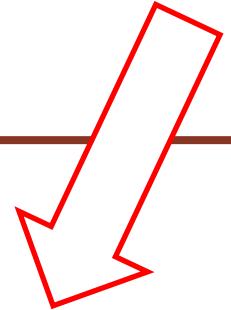


WHAT TO EXPECT FROM AN EMPLOYEE BENEFITS SECURITY ADMINISTRATION (EBSA) INVESTIGATION

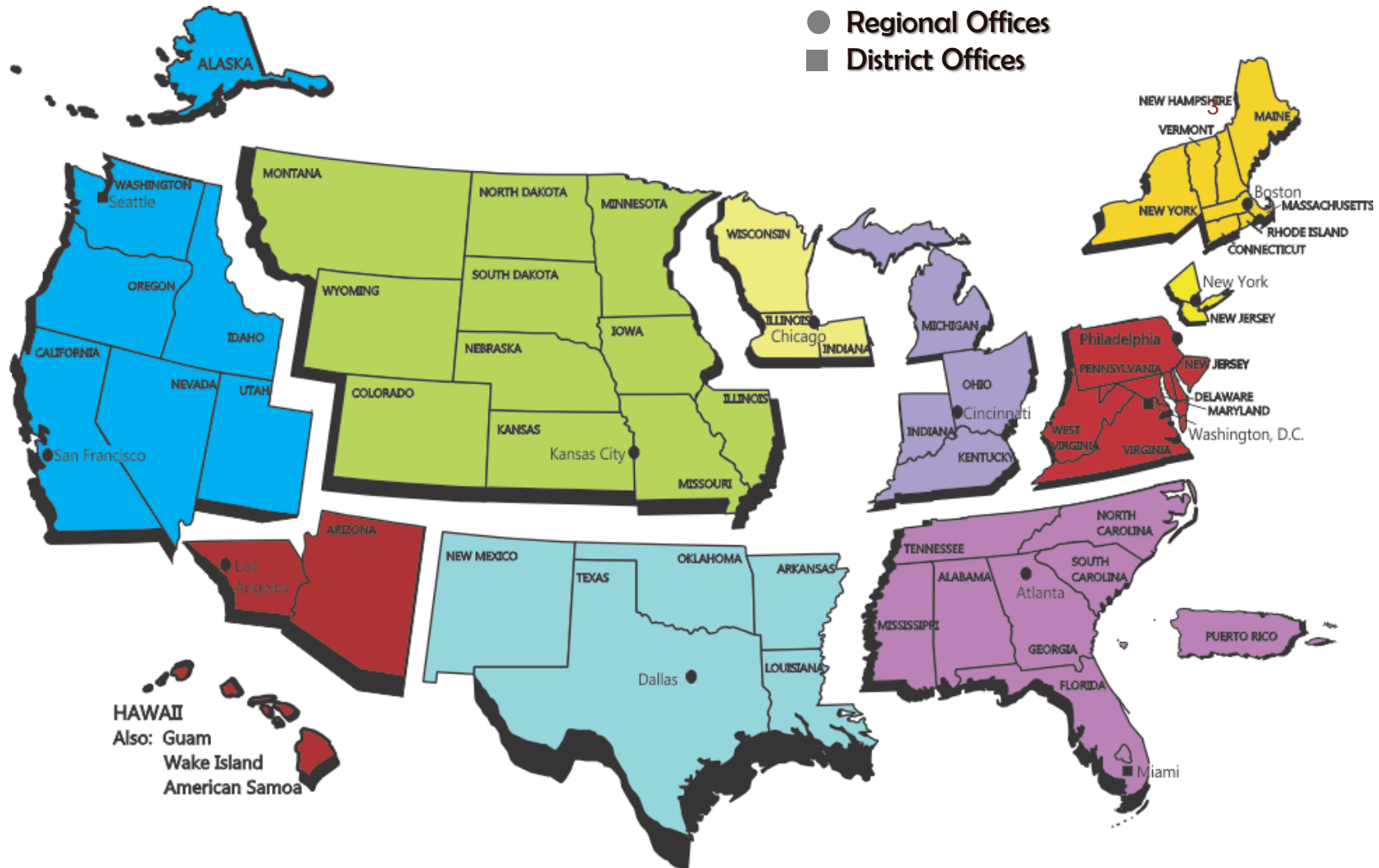


United States Department of Labor
Employee Benefits Security
Administration

EBSA Organizational Chart



EBSA Field Offices



EBSA - Structure

FIELD OFFICES

**10
REGIONAL
OFFICES**

**CONDUCT
INVESTIGATIONS**

**PROVIDE
COMPLIANCE
ASSISTANCE**

EBSA's Mission Statement

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

Enforcement Stats (estimated FY 20)

- 171,000 benefit inquiries in FY2020
- Over \$3 Billion recovered (agency-wide)
- 82 lawsuits filed by DOL
- 70 criminal indictments

National Projects (FY 20)

- Contributory Plan Criminal Project (CPCP)
- Protecting Benefits Distribution (PBD) Project
- Plan Investment Conflicts (PIC) Project
- Employee Stock Ownership Plans (ESOPs)
- Health Enforcement Initiatives Project

Sources of Cases

- Participant complaints
- Form 5500 Reviews
- Referrals from other agencies
- Media
- Other

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
- Health claims analysis

Civil Plan Investigations

- Initial contact with 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)



Onsite Investigative Work

Record Review

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
- Sample health claims data

Investigative Emphasis

Reporting Requirements

- Annual Report (Form 5500)

Disclosure Requirements

- Summary Plan Descriptions (SPD)
- Summary of Material Modifications (SMM)
- Summary Annual Report (SAR)
- Participant Benefit Statements
- “Blackout” Notices
- Documents on Request

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)
- See FAB 2008-04

Investigative Emphasis

Fiduciary must

- Act “solely in interest” of Participants & Beneficiaries
- Discharge his / her / its duties prudently (care, skill, prudence and diligence)
- Diversify plan investments
- Follow terms of governing document (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)
- take any adverse action against an individual for exercising his rights under the plan

Investigative Emphasis

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

Note: 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
 - 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

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

Effective
May 19, 2006

What is the VFCP?

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

Plan Official



VFCP

Designed to be a voluntary program

No need to consult with EBSA

Apply after correction

VFCP - Applicants

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

VFCP - Process

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

Compliance Assistance

- Office of Regulations & Interpretations
 - Advisory Opinion Letters, Regulations, Technical Rulings
 - (202)693-8500
- Office of Exemptions & Determinations
 - Exemptions from Prohibited Transaction Rules
 - Class & Individual basis
 - (202)693-8540

Compliance Assistance

- Office of Chief Accountant
 - Reporting & Disclosure issues
 - (202)693-8360
- Office of Health Plan Standards & Compliance Assistance
 - HIPAA & other group health laws
 - (202)693-8335

Compliance Assistance

- EBSA website: www.dol.gov/agencies/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

www.dol.gov/agencies/ebsa

Subscribe to the EBSA website
for receive alerts on new
guidance and events