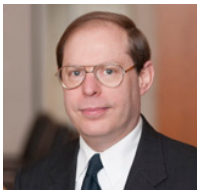


Department of Labor as ERISA's Cops: DOL ERISA Enforcement Overview and Current Priorities

A Practical Guidance® Article by
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This article discusses the U.S. Department of Labor's (DOL) enforcement strategy and 2022 priorities.

The DOL has, over the years, maintained a robust investigatory program for enforcing the fiduciary and prohibited transaction provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Under the Biden administration, the DOL's ERISA enforcement activities and investigations remain a high priority. As a result, ERISA plan fiduciaries and service providers can expect the DOL to continue its ever-evolving enforcement program targeting both fiduciaries and nonfiduciary service providers.

In this article, we provide an overview of ERISA's fiduciary duties and prohibited transaction rules. We then describe the DOL's ERISA enforcement organizational structure and its enforcement resources. We follow this with details regarding the recent increase in DOL enforcement activities. We conclude with a discussion of the DOL's current and potential future enforcement priorities.

Overview of ERISA's Fiduciary Duties and Prohibited Transaction Rules

ERISA empowers the DOL (through the Secretary of Labor) to pursue investigations and civil litigation related to ERISA fiduciary breaches and prohibited transactions. Title I of ERISA imposes a series of fiduciary duties on "fiduciaries" to ERISA plans and prohibits certain transactions between ERISA plans and "parties in interest" as well as transactions involving ERISA plans and their plan fiduciaries. ERISA fiduciaries can range from plan officials and plan sponsor employees to ERISA plan service providers, such as investment consultants and managers. The DOL also has investigatory authority over certain ERISA plan service providers that are not fiduciaries.

ERISA's duty of care requires that fiduciaries act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims" with respect to ERISA plans for which they have fiduciary responsibilities. ERISA § 404(a)(1)(B) (29 U.S.C. § 1104(a)(1)(B)). Fiduciaries are also subject to a duty of loyalty that

requires them to “act solely in the interests” of the ERISA plan and “for the exclusive purpose of providing benefits to participants and defraying reasonable expenses of the plan.” ERISA, § 404(a)(1)(A) (29 U.S.C. 1104(a)(1)(A)). ERISA also requires fiduciaries to diversify the investments of the plan to minimize the risk of large losses and act in accordance with the documents and instruments governing the plan to the extent consistent with Title I and Title IV of ERISA. ERISA § 404(a)(1)(C), (D).

These fiduciary standards have been characterized as “the highest known to the law.” *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir.), cert. denied, 459 U.S. 1069 (1982).

ERISA also includes two sets of prohibited transaction rules. The first set, in ERISA Section 406(a), prohibits a fiduciary from causing plans to engage in certain transactions with “parties in interest”—a class that includes plan fiduciaries, employers of employees covered by the plan, nonfiduciary providers of services such as broker-dealers, and their affiliates. These transactions include sales or exchanges, or leasing of any property, between a plan and a party in interest; lending of money or other extension of credit between a plan and a party in interest; furnishing of goods, services, or facilities between a plan and a party in interest; and the transfer to, or use by or for the benefit of, a party in interest of the income or assets of a plan. ERISA § 406(a)(1) (29 U.S.C. § 1106(a)(1)).

The second set of prohibited transaction rules, in ERISA Section 406(b), is focused on situations where a fiduciary’s own interests, or its interest in others, could conflict with those of a plan. These include prohibitions on a fiduciary dealing with the assets of a plan in the fiduciary’s own interest or own account (self-dealing) and a fiduciary receiving any personal consideration in connection with a plan. The primary concern here is whether the fiduciary has used its authority as a fiduciary to receive a benefit such as an additional fee for itself. These provisions also include a prohibition against a fiduciary acting on both sides of a transaction involving a plan. ERISA § 406(b) (29 U.S.C. § 1106(b)).

Because of the broad scope of the prohibited transaction rules, there are statutory and regulatory exemptions. Congress wrote several prohibited transaction exemptions into the text of ERISA Section 408. Further, the DOL has promulgated many administrative class and individual exemptions providing relief for transactions that comply with the conditions of these exemptions. Nonetheless, there are many transactions that will remain prohibited.

A failure to comply with ERISA can be costly. In the case of a fiduciary breach, ERISA can require the breaching fiduciary

to personally make the plan (and its participants) whole for all losses to the plan (or their accounts) and to disgorge any profits the fiduciary received from the breach. This liability can extend, in some cases, to a co-fiduciary’s breaches. Both fiduciaries and (in certain instances) nonfiduciaries can be liable for disgorgement of profits and, in the case of a prohibited transaction, Internal Revenue Service (IRS) excise taxes.

It is worth noting that the DOL’s enforcement powers can include powers unavailable to private litigants, such as the broad power to subpoena documents before filing litigation, the authority to impose (in addition to the monetary recoveries described above) a monetary penalty of up to 20% of the recovery amount, and the ability to refer civil matters to criminal enforcement. A DOL enforcement action may also spur private litigation and negative media attention.

DOL’s Organization and Enforcement Resources

ERISA’s fiduciary rules (described above) are primarily enforced by the Employee Benefits Security Administration (EBSA), a subagency of the DOL. EBSA claims regulatory authority over roughly \$12.9 trillion in employee benefit plan assets and 158 million Americans participating in those benefit plans, as well as related plan sponsors and service providers. [Fact Sheet, EBSA Restores Over \\$2.4 Billion to Employee Benefit Plans, Participants and Beneficiaries, U.S. Dep’t of Lab.](#) (2021 EBSA Fact Sheet) (last visited Feb. 14, 2022).

According to EBSA, these participants and assets are spread among approximately 734,000 private retirement plans, 2 million health plans, and 662,000 other welfare benefit plans. *Id.*

EBSA operates an active and prolific civil ERISA enforcement program. For example, in fiscal year 2021, EBSA reported recovering more than \$2.4 billion in payments to participants and plans through its enforcement and compliance actions. *Id.* This included the 70 actions in 2021 that the DOL referred for civil enforcement litigation. *Id.*

Within EBSA, enforcement is primarily directed from the National EBSA Office in Washington, DC (the “National Office”). [EBSA Organization Chart](#) (last visited Feb. 14, 2022).

The National Office sets enforcement priorities by identifying and planning enforcement programs, providing enforcement guidance, and, most importantly, supervising investigations and corrections of violations. *Id.* These investigations are largely conducted by the investigative staff in EBSA’s regional

field offices. Id. There are 10 EBSA regions with regional offices, plus 5 subregional district offices. Id. The EBSA regional offices operate on a semiautonomous basis at the direction of a regional director, and as discussed below, can set their own enforcement priorities in addition to National Office priorities.

Approximately one quarter of EBSA's regional field office staff are investigators. As of fiscal year 2020, EBSA's regional office staff included 364 investigators, 108 benefits advisors, and 20 specialists, compared to 10-year highs of 441 investigators in fiscal year 2013, 113 benefits advisors in 2014, and 22 specialists in fiscal year 2015. [Employee Benefits Security Administration: Enforcement Efforts to Protect Participants' Rights in Employer-Sponsored Retirement and Health Benefit Plans, U.S. Gov't Accountability Off., at 8 \(May 2021\)](#) (GAO 2021 Report) (last visited Feb. 14, 2022).

EBSA investigators often have specialized training or education—many are lawyers or certified public accountants. In addition, investigators can work in conjunction with personnel from other federal agencies and with the DOL's internal legal staff. If an investigation is referred for litigation, civil litigation will be handled by the DOL Solicitor's Office (Solicitor's Office), and criminal enforcement will be handled primarily by the Department of Justice (DOJ), as described below. The Solicitor's Office—another DOL subagency—provides general legal counsel to EBSA and handles most civil enforcement ERISA Title I litigation. Unlike many other federal agencies, the Solicitor's Office has independent litigation authority from the DOJ for most enforcement actions. Memorandum of Understanding entered into on February 11, 1975, see [DOL "Investigative Authority,"](#) In fiscal year 2021, EBSA referred 70 cases to the Solicitor's Office for civil litigation. [2021 EBSA Fact Sheet](#). Between fiscal years 2011 and 2020, the Solicitor's Office filed 925 ERISA civil complaints. [GAO 2021 Report](#), at 18 (noting that EBSA referred 1,784 cases to the Solicitor's Office during this time).

The Solicitor's Office employs approximately 600 full-time-equivalent employees, and a portion of these attorneys focus on ERISA enforcement. [Fiscal Year 2021 Budget in Brief, U.S. Dep't of Lab. \(2021\)](#). There are seven Solicitor's Office regional offices and seven subregional branch offices. [Regional Offices, U.S. Dep't of Lab.](#) (last visited Feb. 14, 2022).

Attorneys in regional offices typically divide their time and expertise among various DOL-enforced statutes, of which ERISA is just one.

ERISA grants EBSA the power to assess civil penalties when its enforcement actions are successful. In addition to recovery of plan assets lost through fiduciary breaches or illicit profits, as described above, these penalties include, but are not limited to, monetary penalties of up to \$110 a day for disclosure failures and government penalties related to civil fiduciary enforcement actions. ERISA § 502(c)(1), (l) (29 U.S.C. § 1132(c)(1), (l)).

In addition to civil enforcement, EBSA has independent authority to conduct criminal investigations. Section 506(b) of ERISA provides that the Secretary of Labor shall have the responsibility and authority to detect, investigate, and refer to the DOJ, where appropriate, possible criminal violations of Title I of ERISA as well as other related federal laws, including Title 18 of the U.S. Code. [Emp. Benefits Sec. Admin./ERISA Enf't, U.S. Dep't of Lab.](#) (ERISA Enforcement) (last visited Feb. 14, 2022). EBSA also has the power to issue subpoenas in a criminal investigation and can conduct investigations of criminal violations regarding employee benefit plans such as embezzlement, kickbacks, and false statements. Id. Further, the DOL's Office of the Inspector General (OIG) has criminal investigative authority through its Office of Labor Racketeering. Memorandum of Understanding Between the Office of Inspector General and LMSA.

If a criminal investigation leads to an indictment, litigation is handled by the DOJ through the U.S. Attorney's Offices, although EBSA may continue to provide investigatory support. [ERISA Enforcement](#). Additionally, EBSA has the authority to refer investigations to state or local prosecutors if an Assistant U.S. Attorney does not express interest in pursuing the investigation at the DOJ. Id.

EBSA's criminal enforcement activities can be significant. In fiscal year 2021, EBSA referred 188 criminal cases to the U.S. Attorney's Office. [2021 EBSA Fact Sheet](#). The regional U.S. Attorney's Offices closed 208 criminal investigations. Id. Among these investigations, 72 led to indictments and 38 led to guilty pleas or convictions. Id.

It is also worth noting that the DOL can and does make and receive referrals from other regulators, including the IRS, the U.S. Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority, and the Office of the Comptroller of the Currency (OCC). The SEC and other authorities have established formal cooperation programs with the DOL and IRS. In February 2006, an interagency agreement was signed between the DOL and various federal financial institution regulatory agencies, including the Federal Reserve Board; the Federal Deposit agencies agreed to notify the DOL of possible violations of ERISA discovered in the course of their supervision of the fiduciary activities of

institutions subject to their respective jurisdictions. On July 25, 2013, the DOL and SEC entered into a Memorandum of Understanding (MOU) to facilitate the exchange of information between the two agencies. Under the MOU, the SEC grants the DOL standing access to nonpublic examination information with respect to examinations that SEC staff determines are relevant to the DOL's mission. Memorandum of Understanding Concerning Cooperation Between the U.S. Securities and Exchange Commission and the U.S. Department of Labor. Similarly, the DOL and IRS have long coordinated examination efforts with respect to retirement plans, including through an MOU entered into on June 3, 2003. Memorandum of Understanding – Internal Revenue Service/Department of Labor Coordination Agreement.

DOL Enforcement Has Remained Robust

In recent years, EBSA's own reporting has reflected a robust enforcement program that has increased significantly over the last two decades. EBSA annually reports its "total monetary results," a number that includes enforcement recoveries, disgorged profits, voluntary fiduciary corrections, abandoned plan recoveries, and informal complaint resolutions. In 2001, EBSA recovered \$721 million total monetary results. [EBSA Achieves Total Monetary Results Exceeding \\$1.7 Billion, U.S. Dep't of Lab.](#) (last visited Feb. 14, 2022).

By 2020, EBSA had raised that number to \$3.1 billion. [Fact Sheet, EBSA Restores Over \\$3.1 Billion to Employee Benefit Plans, Participants and Beneficiaries, U.S. Dep't of Lab.](#) (last visited Feb. 14, 2022). Though EBSA's 2021 monetary results of \$2.4 billion are slightly lower than in 2020, they remain in line with EBSA's five-year average, which hovers around \$2.2 billion per year. [2021 EBSA Fact Sheet](#); [GAO 2021 Report](#), at i. As compared to the 2001 reported recovery amount of \$721 million, these multibillion-dollar recoveries reflect a nearly 20-year upward trend of EBSA monetary recoveries and especially significant numbers over the last 5 years.

The DOL's increased enforcement in recent years could be driven by a number of factors. It could be driven by the DOL deliberately focusing resources on enforcement (as regulatory rulemaking has become more challenging). Other driving factors could include the increase of retirement assets, the decline of traditional pension plans in favor of defined contribution plans, and the arrival of the "Baby Boomers" to retirement age. In addition, in recent years the DOL has increased the level and types of disclosure required by plan sponsors and service providers. This facilitates

more enforcement actions by providing the DOL with more information to review for potential issues.

Current Enforcement Priorities

In the face of the DOL's robust enforcement program, ERISA fiduciaries and nonfiduciary service providers may find it helpful to understand the DOL's enforcement priorities. Luckily, there is a fair amount of information available regarding the DOL's current ERISA enforcement priorities.

At the national level, EBSA identifies "national enforcement priorities," which are broad enforcement initiatives, and "national enforcement projects," which are targeted investigatory projects. [ERISA Enforcement](#). These priorities guide EBSA's investigatory agenda and may be implemented through such measures as targeted audits.

In addition to National Office priorities, EBSA regional offices can engage in their own regional enforcement priorities. The setting of such regional priorities is partially an outgrowth of concerted efforts by the DOL, beginning in the 1990s, to decentralize enforcement and litigation activities. Starting in 2016, EBSA made cross-regional investigations an element of its enforcement strategy. [GAO 2021 Report](#), at 26. EBSA operating guidance provides that cross-regional investigations allow for greater access to resources and expertise. [GAO 2021 Report](#), at 27. For example, EBSA initiated 16 cross-regional investigations during fiscal year 2020. *Id.*

National Enforcement Priorities

Currently, the DOL identifies two national ERISA enforcement priorities.

First, EBSA identifies a "major case" enforcement priority, which EBSA describes as a focus on large service providers rather than individual plans, intended to "focus [EBSA's] enforcement resources on areas that have the greatest impact on the protection of plan assets and participants' benefits" and, in particular, by "focusing more investigative resources on professional fiduciaries and service providers with responsibility for large amounts of plan assets and the administration of large amounts of plan benefits." [ERISA Enforcement](#). This initiative suggests that EBSA is allotting greater resources to large service providers, such as large recordkeepers, investment managers, advisors, consultants, and brokers. Between fiscal years 2016 and 2020, EBSA reports having recovered increasing amounts as part of this "major case enforcement," growing its "major case" recoveries from \$276,799,800 in 2016 to \$2,491,694,236 in 2020. See [GAO 2021 Report](#), at 24.

Second, EBSA identifies an “employee contributions initiative” enforcement priority, which EBSA describes as focused on protecting employee contributions withheld from employees’ payroll and ensuring employers make promised contributions. [ERISA Enforcement](#). This is an area on which the DOL has long been focused. Id. The DOL treats participant contributions as plan assets, requiring that they be deposited into the plan by the date upon which the employer can reasonably segregate them from its general assets. While the DOL guidance sets an absolute deadline of the 15th business day of the month after the withholding month, the DOL generally expects the segregation period to be much shorter, particularly given current payroll system technology. Id. The DOL may also assess whether participant loan repayments are timely transferred to the plan. Much of the DOL’s enforcement activity arises from breaches due to untimely contributions, and in extreme situations these enforcement actions may lead to a criminal investigation.

National Enforcement Projects

In addition to the above two enforcement priorities, EBSA identifies seven national enforcement projects as targeted investigatory projects. These seven projects are:

1. The Voluntary Fiduciary Correction program
2. The Abandoned Plan program
3. The Contributory Plan Criminal project
4. The Plan Investment Conflicts project
5. The Protecting Benefits Distributions project
6. The Health Enforcement Initiatives –and–
7. The Employee Stock Ownership Plan (ESOP) project

[ERISA Enforcement](#).

We will focus on four of these seven projects: Plan Investment Conflicts, Benefit Distributions, Health Enforcement Initiatives, and ESOPs. We will also address a few other EBSA enforcement projects that are not official national enforcement projects, but are nonetheless visible as areas of current DOL enforcement interest or possible future priorities.

Plan Investment Conflicts

The Plan Investment Conflicts (PIC) project began in fiscal year 2016. Under this project, EBSA focuses on concerns pertaining to compensation and conflicts of interest among fiduciary service providers to ERISA plans and ERISA plan assets. [ERISA Enforcement](#). The PIC continues the work of

prior DOL ERISA enforcement projects that had a similar focus, such as the Fiduciary Service Provider Compensation Project and Consultant/Advisor Project.

These projects, and the current PIC project, focus on fiduciary consultants’ and other investment advisors’ receipt of improper and improperly disclosed service provider compensation. Additionally, the PIC focuses on conflicts of interests among service providers (e.g., fund managers and investment consultants) that result in conflicted investment decisions or guidance. As part of this PIC effort, EBSA also reviews the due diligence by plans and plan fiduciaries to mitigate conflicts of interest, such as when engaging a service provider and the monitoring of such service providers thereafter. EBSA focuses its evaluation on indirect compensation agreements, concealed and conflicted compensation arrangements, and agreements that are beyond market standards. Under this PIC effort, EBSA also engages in criminal investigations for potential fraud, embezzlement, or kickbacks among investment managers and advisors. [ERISA Enforcement](#).

Examples of potential violations targeted by PIC investigations include:

- Service providers (such as advisors, insurance brokers, etc.) collecting higher-than-disclosed fees or improper compensation from ERISA plan assets
- Prohibited transactions involving investments
- Whether plan assets are being used to pay nonplan expenses
- Whether there are loans using plan assets that run afoul of the prohibited transaction rules
- Improper or undisclosed compensation, such as undisclosed indirect compensation
- Proprietary fund investments by mutual fund companies

The last category, proprietary fund investments by mutual fund companies, has been a particular focus of the DOL in recent years, as the DOL has conducted investigations of plan sponsors’ use of their proprietary services or proprietary investment funds for their in-house plans. In these investigations, the DOL typically examines whether the plan fiduciaries selected and retained the services and funds according to a proper fiduciary process. The DOL also reviews fee or compensation arrangements related to the proprietary funds that might be conflicted. Finally, the DOL examines prohibited transaction compliance (since the use of proprietary funds can necessitate a prohibited transaction exemption).

Protecting Benefits Distribution, Including “Missing Participant” Issues

Another DOL investigatory project is the Protecting Benefits Distribution (PBD) project introduced in fiscal year 2018. Id. The DOL describes the PBD project as focused on protecting the payment of retirement benefits.

A key focus of the PBD project is the Terminated Vested Participant Project (TVPP). The TVPP is also commonly referred to as “missing participant investigations.” The DOL designed these investigations to ensure defined benefit plans maintain and sustain appropriate records and mechanisms for contacting terminated participants with vested account balances. These investigations frequently focus on whether plans have adequate processes to ensure vested participants are collecting retirement benefits upon attaining retirement age.

The DOL has been aggressively pursuing missing participant investigations since 2015. The enforcement efforts have led to a large number of open investigations from DOL regional offices and an evolution of investigatory scope—the DOL now examines uncashed check protocols and assesses defined contribution plans as well.

Health Enforcement Initiatives

The Health Enforcement Initiatives, established in 2018, is, as the name suggests, focused on ERISA compliance by health and welfare plans. Under this project, the DOL focuses on such issues as inappropriate plan administration or fund management practices, self-dealing among health service providers, improper claims payment, excessive service provider fees, and noncompliance with claims procedure rules. EBSA also conducts investigations to assess compliance with the provisions of the Affordable Care Act (ACA) that are incorporated into Title I, Part 7 of ERISA, such as market reforms, patient protections, extension of dependent coverage, and internal claims and appeals processes. [ERISA Enforcement](#).

In recent years, there has been a particular focus by the DOL on enforcement related to compliance with federal healthcare parity laws, including the Paul Wellstone and Pete Domenici Mental Health Parity Addiction Equity Act of 2008 (MHPAEA). In part, this increased enforcement resulted from congressional pressure to ensure compliance with the MHPAEA. EBSA has increased focus on ensuring that group health plans comply with mental health and substance use disorder parity requirements. EBSA also focuses on assessing treatment restrictions imposed on benefits to treat substance use addictions, as well as restrictions on mental health and substance use disorders through administrative practices that are more restrictive when applied to mental health and

substance use disorder benefits than applied to medical and surgical benefits.

Three other areas of DOL focus under the Health Enforcement Initiatives are:

- **Emergency Services.** EBSA places a focus on plans and claims administrators that do not satisfy the ACA through inadequate coverage of emergency services. These cases include situations where claims are rejected because of the participant's diagnosis without considering a participant's current symptoms or where out-of-network emergency services claims are not adequately covered. We expect this focus will only grow as the requirements of the No Surprises Act take effect in 2022.
- **Service Provider Self-Dealing (Undisclosed/Hidden/Excessive Fees).** Where service provider fees or hidden costs are not disclosed to plans, and the service provider maintains discretion over plan assets, the service provider's setting of its own compensation or using plan assets for its own gain constitutes a fiduciary breach, according to the DOL. Id. In these situations, EBSA may pursue disgorgement of the service provider's gains and seek to rectify the illegal practices.
- **Multiple Employer Welfare Arrangements (MEWAs).** EBSA also seeks to recognize fraudulent MEWA operators to ensure MEWAs are not terminated simply to open another arrangement in a new state. Id. The Secretary of Labor is empowered to issue cease and desist orders for clearly fraudulent operations as well as seize MEWA assets where there is probable cause to believe that the plan is in a dangerous financial condition. EBSA may engage in criminal investigations of MEWAs that have participated in crimes such as mail fraud, wire fraud, and bankruptcy fraud. EBSA has also engaged in criminal investigations for fraud of self-funded health plans by medical and service providers. These cases have resulted in jail sentences and court-ordered restitution. Id.

We expect that the DOL will continue to be very active in its enforcement around health and welfare plans. In fact, the DOL has announced that its special areas of focus for fiscal year 2022 will include the pursuit of major health investigations, including investigations of potential MHPAEA violations and health fraud. [Employee Benefits Security Administration, Congressional Budget Justification FY 2022](#), p. 11 (last visited Feb. 14, 2022).

ESOP Project

The ESOP project is designed to identify and correct violations of ERISA in connection with ESOPs and has been a focus of the DOL since 2005. Implementing and maintaining an ESOP is complicated and requires the retention of many

independent advisors, a transactional fair market valuation, annual valuations, audited financial statements, and ongoing benefits administration, legal, and accounting support.

EBSA is particularly concerned with the proper valuation of employer stock at the time it becomes a retirement plan asset through an ESOP transaction. [ERISA Enforcement](#), note 22. ESOP investigations therefore tend to focus on plan fiduciaries who purchase or sell the plan sponsor's stock on behalf of the plan for, respectively, more than or less than the fair market value. Investigations are also focused on potential conflicts of interest in ESOP transactions, especially where the transacting party serves as an ESOP fiduciary or other advisor.

EBSA also evaluates ongoing ESOP operation, fiduciary monitoring and control of wasteful corporate spending, and the fiduciaries' duty to ensure participants receive their benefits under the plan. Id. EBSA considers the oversight role of independent trustees and the importance of these trustees maintaining sound practices and policies.

The DOL actively pursues enforcement actions involving ESOPs and ESOP advisors, particularly in relation to ESOP valuations, the provision of specific benefits required or allowed under ESOPs to participants, and corporate governance in ESOP companies.

Additional (Unofficial) DOL Enforcement Priorities

Although EBSA has established formal enforcement priorities and projects, it often pursues enforcement in other areas without formally designating them as enforcement priorities or projects. These areas include:

- **Required plan documents and disclosures.** The DOL consistently examines plans to verify that they appropriately maintain the necessary documents and circulate required disclosures. For example, the maintenance and/or disclosure of a plan's summary plan description, participant-level disclosures, and other Title I disclosures are encompassed by this investigative focus.
- **Bonding.** The DOL routinely seeks evidence of a fidelity bond covering a plan's fiduciaries and (to the extent applicable) service providers that complies with ERISA Section 412. The bond requirement is designed to protect the plan from theft of assets. In the absence of a compliant bond, the DOL likely will require that the company (or applicable fiduciaries or service providers) acquire one before closing the investigation.

Claims and Appeals and Appropriate Fiduciary Process

The DOL may review benefit plans to ensure that they comply with DOL regulations when processing claims. In addition to evaluating plans for regulatory compliance, the DOL may assess whether plans adhere to "best practices" for complying with ERISA's fiduciary duties. The DOL typically views the absence of documented adherence to the best practices as indicative of insufficient fiduciary process. Id. The DOL may cite the absence of the best practices as supporting fiduciary breach.

To the extent that a company aims to adhere to the best practices, the DOL may evaluate the documented materials and treat them as evidence of fiduciary conduct or misconduct, as the case may be. Consequently, it is important that these documents are current and accurate.

Possible Future DOL Enforcement Priorities

The DOL continues to develop new priorities. Although not yet elevated as official enforcement priorities, nor appearing frequently enough to be "unofficial" priorities, the DOL has recently shown interest in these, which may signal more activity to come.

Cybersecurity

In April 2021, the DOL announced new cybersecurity subregulatory guidance for plan sponsors, plan fiduciaries, service providers, and plan participants. [U.S. Department of Labor Announced New Cybersecurity Guidance for Plan Sponsors, Plan Fiduciaries, Recordkeepers, Plan Participants, U.S. Dep't of Lab.](#) (Apr. 14, 2021) (last visited Feb. 14, 2022).

This guidance is framed as "tips" and "best practices" and is designed to help plan sponsors, fiduciaries, service providers, and participants better safeguard plan assets and data. Id. Because the DOL guidance is subregulatory, it does not carry the deferential authority of regulations subject to notice and comment. The guidance does nonetheless provide insight into the DOL's expectations under ERISA's prudence standard as it pertains to cybersecurity. As such, the DOL guidance can serve as a framework for forming and enhancing cybersecurity policies, establishing or revising service provider agreements, and educating plan participants on their role in protecting plan assets and data.

Prior to the announcement of this guidance, the DOL had been increasing its attention to cybersecurity. This

increased attention signaled the forthcoming guidance and a potential new audit initiative. Now, with the cybersecurity guidance issued, the DOL has begun issuing document and information requests and auditing plans for compliance. Thus far, the audits conducted by the DOL have been comprehensive, requesting all cybersecurity and information security program policies, procedures, and guidelines from plan fiduciaries that relate to the plan. Additionally, the DOL has been requesting documentation of any actions taken by plan fiduciaries and service providers as they pertain to cybersecurity and the DOL's subregulatory guidance.

Hard-to-Value Assets

In February 2012, the U.S. Government Accountability Office (GAO) issued a report finding that the DOL had not taken sufficient actions to regulate retirement plan investments in hedge funds and private equity funds and expressed concern with the DOL's limited actions in response to plans' investment losses and other challenges, including limited liquidity and transparency, when investing in hedge funds and private equity funds. [GAO, Defined Benefit Pension Plans: Recent Developments Highlight Challenges of Hedge Fund and Private Equity Investing, Feb. 2012](#) (last visited Jan. 17, 2022).

Following the GAO report, in September 2013, the DOL OIG issued a similar report focused on EBSA regulation of ERISA plan investments in hard-to-value assets. [U.S. Dep't of Lab.: OIG—Office of Audit, EBSA Needs to Provide Additional Guidance and Oversight to ERISA Plans Holding Hard-to-Value Alternative Investments](#) (last visited Jan. 17, 2022).

- In particular, the report concluded that the DOL had not taken sufficient steps to regulate plan holdings of "hard-to-value" assets and that, "[a]s a result, plans are using poor practices in valuing these investments." Among other things, the OIG recommended EBSA improve enforcement in this area. *Id.*

In light of the GAO and OIG reports and OIG letters, the DOL has indicated investigatory interest in hard-to-value assets, particularly in defined benefit plans. While the DOL has noted an investigatory interest in hard-to-value assets for almost 10 years, there has been little direct enforcement activity to date. That said, the DOL recently issued information letters on the use of private equity in 401(k) plans. See [DOL newsroom](#). This could be a harbinger of the DOL's long-standing interest in hard-to-value assets soon materializing into a DOL investigatory focus.

Conclusion

As the above discussion makes clear, DOL ERISA enforcement is active and remains robust. DOL enforcement activities and investigations remain a high priority for the agency. As a result, ERISA plan fiduciaries and service providers can expect the DOL to continue its evolving enforcement program targeting both fiduciaries and nonfiduciary service providers.

The DOL has the power to impose significant liability and disruption on ERISA fiduciaries and service providers. For these reasons, familiarity with the DOL enforcement efforts and priorities described in this article can be helpful in anticipating and addressing possible areas of vulnerability.

In light of this active enforcement program and the resulting recoveries, plan fiduciaries may want to consider a compliance self-review with a focus on the DOL enforcement priorities identified in this article.

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