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Strategies for Handling a DOL Investigation

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Tom is Of Counsel with The Wagner Law Group, a law firm specializing in ERISA & Employee Benefits. His expertise encompasses all aspects of employee benefits programs, including the design, implementation and compliance of retirement plans, health and welfare plans, and executive and incentive compensation arrangements. He also has a robust practice assisting covered service providers in meeting their ERISA compliance needs.

Earlier in his career, Tom worked for the law firm of Schlichter, Bogard & Denton including on such landmark cases as *Tibble v. Edison*, which was decided by the U.S. Supreme Court last year. Tom is also Editor-in-Chief of the Fiduciary Matters Blog, a blog visited over 160,000 times since its first publication in March 2013. He also teaches ERISA Fiduciary Law as an Adjunct Professor at the Washington University in St. Louis School of Law, his alma mater. Tom is also a co-author on the forthcoming Second Edition of *ERISA: Principles of Employee Benefits Law*, a one of a kind treatise discussing the policies behind our national employee benefits scheme.



About Thomas E. Clark Jr.

- Former Schlichter, Bogard, & Denton Plaintiffs' Attorney
- Current Of Counsel with The Wagner Law Group
 - Based in St. Louis
- Adjunct Law Professor
- Editor-in-Chief Fiduciary Matters Blog / ERISA Litigation Index
 - <http://www.fiduciarymattersblog.com>

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Source of DOL Enforcement Authority

Civil Enforcement

- ERISA 502(a) empowers DOL to bring civil actions.
- ERISA 502(l) requires 20% civil penalty on all DOL settlements (subject to limited exceptions).

Criminal Enforcement

- ERISA 501 imposes criminal sanctions for willful violations (maximum of \$100k/\$500k and 10 years).

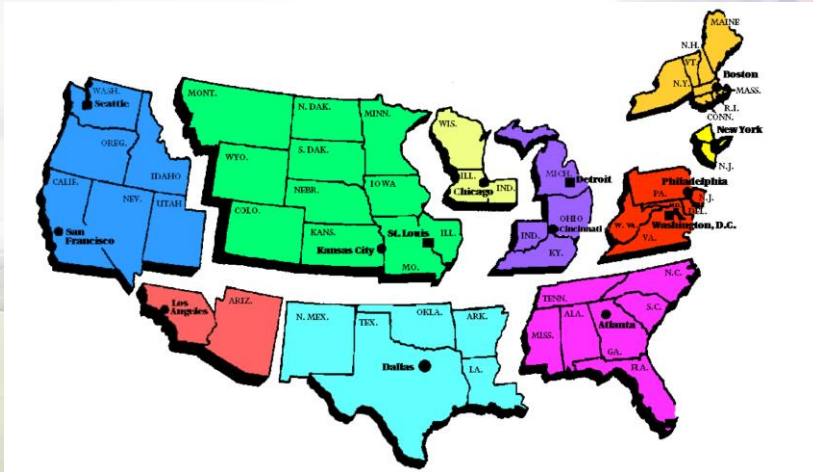
Investigative authority

- ERISA 504 grants DOL broad authority and may subpoena books/records.

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Enforcement Fact Sheet

- Fiscal Year 2015 - \$696.3 million
- Civil Investigations
 - Closed – 2,441
 - Closed with Results – 1,640
 - Referred for Litigation – 136
 - Litigation Filed – 89
- Criminal Investigations
 - Closed – 275
 - Guilty Pleas and Convictions – 67
 - Indictments - 61

DOL Investigation Process

Reasons for initiating investigations

- Participant complaints to Office of Participant Education
- Referrals from other regulators (e.g., SEC, IRS)
- Enforcement initiatives (National Enforcement Projects)
- Form 5500 filings
- Media

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EBSA's National Enforcement Projects

Contributory plans criminal project (CPCP)

- Targets employers and providers who commit fraud and abuse resulting in unpaid contributions to plans.

Rapid Erisa Action Team (REACT)

- Targets plans of employers filing for bankruptcy.

Employee stock ownership plans (ESOPs)

Plan Investment Conflicts

- Incorporated the former Fiduciary Service Provider Compensation Project and expand to include the investigation of conflicts of interest in relation to plan asset vehicles

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5500 Issues – Red Flags

- Excessive Admin Expenses
- Uncommon Investments
 - Partnership and joint venture, Real Estate, Employer Securities, Employer Real Property, Tangible Personal Property, Loans to Non-Participants, “Other”
- Failure to transmit employee contributions
- Loans or leases in default
- Nonexempt party in interest transactions
- Fraud or dishonesty losses
- Hard to value assets
- Insufficient bonding

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DOL Investigation Process

Procedure for DOL Investigation

- Phone Call
- Initial Letter (Document Request or Appointment Letter)
- Document Production
- On-Site Interviews
- Closing Letter: (1) No DOL action to be taken, (2) “Voluntary Compliance” notice, or (3) Litigation letter

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Basic Plan 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



Disclosure Emphasis

- 408(b)(2) Disclosures
- 404a-5 Disclosures
- Summary Plan Descriptions (SPDs)
- Summary of Material Modifications (SMM)
- Summary Annual Reports (SARs)
- “Blackout” Notices
- COBRA Notices / HIPAA Certificates & more
- Provide documents on request
- Participant Benefit Statements



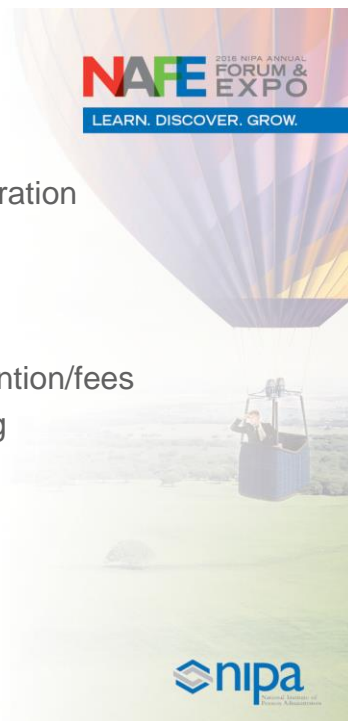
Provider Investigations

- Client lists
- Corporate and governance structure
- Service agreements
- Disclosure of affiliations
- Investment vehicles sponsored
- Approved recommended vendors
- Manuals and codes of conduct
- Fee schedules



On-Site Interview

- Corporate governance/plan administration
- Reporting and disclosure
- Bonding
- Funding
- Investment selection/monitoring/retention/fees
- Service provider selection/monitoring
- Participant loans
- Remittance of employee



Before the audit

- Track all client accounts subject to ERISA.
- Formalize procedure for 408(b)(2) notices and updates.
- Maintain “model” client documents that reflect current law.
- Ensure all client service agreements are signed.
- Develop “model” response for routine 5500 info requests.

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Before the Audit (Cont'd)

- For fiduciary services, ensure compensation is level.
- Confirm referrals (both ways) are fully disclosed and do not violate PT rules.
- Confirm affiliated and third party subcontractors are fully disclosed and do not violate PT rules.
- Provide ongoing education/training.
- Internal audits.
- Benchmarking.
- Insurance.

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During the Audit

- Choose one point person to serve as liaison.
 - Be kind and courteous and cooperate as much as possible
- Ask DOL for permission to bring in ERISA counsel.
- Negotiate scope of document request (e.g., limit to sampling of client documents).
- Perform legal review of subpoenaed and any other requested materials before delivery to DOL.
- Present the document to DOL in a neat and organized fashion.

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During the Audit

- If any discrepancies are uncovered, provide explanation and/or proposed remedial action.
- Prepare personnel for on-site interviews.
 - This is your practice deposition
 - Yes or No Answers
 - Eliminate "Chatty Kathy's" from the room
- Consider confidentiality provisions.
- Contact insurance provider.

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Closing the Audit

- Depends on any problems identified
 - If no problems are noted, closing letter
 - If problems are noted, then corrective actions are necessary
- Notice Letter
- Voluntary Compliance
- Closing Letter (if corrections made)
- Referral to Solicitor's Office (if corrections not made)
- Key Date - September 30

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Types of Corrections

- 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
- Final accounting

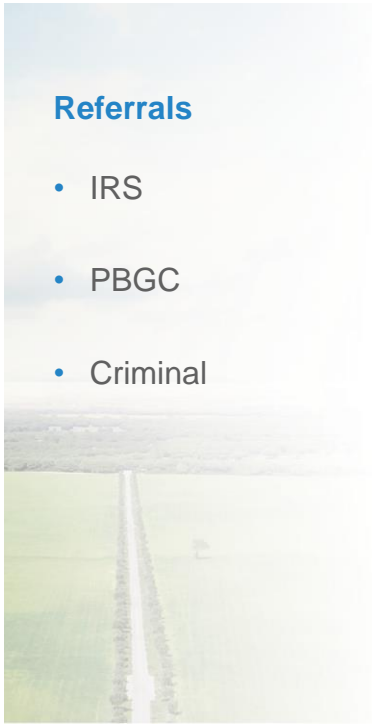
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Referrals

- IRS
- PBGC
- Criminal



QUESTIONS?

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