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Feeling The Heat

Navigating the DOL audit process

Of the 3,677 Department of Labor (DOL) qualified retirement plan audit investigations closed in 2013, violations were found in nearly three-quarters of them. DOL investigators also closed some 320 criminal investigations in 2013, securing 88 indictments and 70 guilty pleas or convictions. For plan sponsors, the settlements for plan-related criminal cases and violations, taken together, cost a collective \$1.7 billion in plan reimbursements and fines last year alone.

Bruce Ashton, an attorney with Drinker Biddle & Reath LLP's Employee Benefits and Executive Compensation Practice Group in Los Angeles, says those numbers contain a clear message for plan fiduciaries and financial advisers working with retirement plans: The best way to survive a plan audit unscathed is to avoid an audit in the first place. And once an audit is triggered, only the most carefully governed plans can expect a clean bill of health.

"In my time as a practicing attorney, I've rarely, if ever, seen a client avoid a plan audit once it has been identified as a possible target by the DOL," Ashton says, pointing to a number of common triggers that can attract regulators' attention. These include anything from a participant filing a complaint directly with the DOL or Internal Revenue Service (IRS), which tends to happen when the plan fiduciaries consistently ignore participants' questions or concerns, to negative media coverage around a business problem or bankruptcy.

Ashton suggests that advisers and sponsors ensure they have a robust communications system in place to field and address participant anxieties, and says that any participant concerns that arise should be taken seriously. Other common triggers include both minor and significant mistakes made on required annual plan disclosures, especially Form 5500. (See "Form 5500 Tips," page 59.) In the eyes of government auditors, a small mistake on critical documentation could signal more substantial issues with plan governance efforts, he notes.

Tips to Take the Heat Off

Janet Nahorney, a certified public accountant (CPA) and partner at the accounting firm BlumShapiro in West Hartford, Connecticut, says once an audit is triggered, plan fiduciaries should cooperate fully with the DOL and provide whatever information is requested. Any stalling or misleading behavior will only bring heightened scrutiny, she warns.

In most cases, much or all of the audit process happens remotely, Nahorney says, so plan fiduciaries should first and foremost be diligent about tracking and meeting all deadlines for returning requested plan data. If possible, fiduciaries could arrange a meeting with all service providers to make sure everyone understands his role in the audit, as well as what information each will have to provide.

Nahorney says it is critical to be upfront about any violations, potential or actual, contained in the requested disclosures—federal regulators take a far more favorable view of plan fiduciaries who are honest about mistakes or compliance issues that exist in their plans. A good place to start identifying issues is to compare the annual Form 5500s with the employer's financial statements, she says.

"We get questions from sponsors and service providers, who ask, 'Why should I point out my mistakes? Let the DOL find them,'" Ashton says. "Well, from experience I can tell you they will find them, so it's better to be proactive."

Gathering and closely reviewing plan data for potential violations is a time-consuming process, Nahorney and Ashton observe, so fiduciaries will likely have to file for a reasonable extension, such as an extra two or three weeks beyond the initial 10-day deadline often set by the DOL. According to Ashton, Labor Department auditors almost always grant reasonable extension requests.

He suggests that plan fiduciaries make full use of the time between when an audit is triggered and

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when the DOL or IRS investigators arrive or—more likely—conduct phone reviews. If the fiduciaries can put fixes in place before the auditors even identify specific problems, that may not absolve the fiduciaries of all liability, but it will go a long way toward satisfying the auditors and improving outcomes.

While it is critical to give the DOL the information it requests, Ashton and Nahorney point out that no unrequested, supplementary information need be sent.

It is important to keep close track of what is being turned over to the DOL and why. Having a single party—e.g., the compliance consultant, asset custodian, recordkeeper or another gatekeeper—in charge of tracking all audit information coming in and going out can be especially helpful.

Once all the required information is submitted, it becomes a game of “hurry up and wait,” Nahorney says. “I’ve seen audits that have lasted for years,” she says, noting one extreme example that took more than five years to close. “At the end, you’ll either be cleared, or, if there are problems, you’ll need an attorney to negotiate a reasonable outcome with the regulators.”

Ashton is quick to caution sponsors and fiduciary advisers not to “roll over and play dead” when a violation is found and penalties or plan reimbursements are sought by the DOL or IRS.

“Sometimes the investigators make mistakes,” Ashton says. “Don’t just enter a ‘settlement,’ because there are extra penalties involved with a settlement. Very often, we send a letter back that says we disagree wholeheartedly with your conclusion, but nevertheless we [have] put \$5,000 back into the plan voluntarily, or whatever amount the DOL is pursuing. We make it clear that we’re not settling with the DOL and triggering additional penalties. Be very careful about not settling.”

Linda Fisher, a plan governance expert who heads Linda T. Fisher 5500 Consulting LLC in Buffalo Grove, Illinois, says that many retirement plan sponsors outsource a lot of the work involved in the annual plan review and disclosure process, so they assume they are offloading the related liability if mistakes come to light later. Not so, she says. Fiduciaries are required to review and approve all of the disclosures, so they maintain much or all of the original liability.

“For people who are filling this out as a side part of their job, it’s pretty common to see errors or misunderstandings,” Fisher explains. “I’m doing this all year-round, and it’s still challenging to keep up with changes and the new requirements coming out from the DOL.”

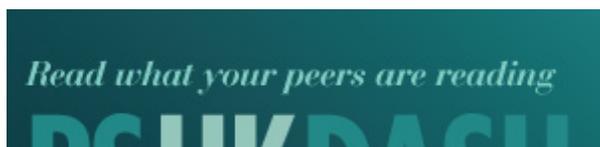
Form 5500 Tips

When it comes to preparing annual plan disclosures, Linda Fisher of Linda T. Fisher 5500 Consulting LLC says one of the most powerful things sponsors can do is make sure they work with a recordkeeper that can automatically provide the reporting required in Form 5500 and all its constituent schedules.

“In these cases, often I can bypass the sponsor and talk directly to the recordkeeper and the trustees to obtain the data needed for the annual reports,” Fisher says. If recordkeepers do not provide aggregate reporting, the disclosure process is far more burdensome, she notes, and those sponsors are more prone to mistakes.

Sponsors can contribute to the review process to ensure good documentation is made. Sponsors should be able to show participant deferrals are being deposited into plan accounts, Fisher says, and that the deposits are timely. “That’s a big one in the DOL [Department of Labor]’s perspective,” she says. “If it takes more than three days for the participant contributions to get into their accounts, we make sure the sponsor has a good explanation.”

Sponsors are often ill-prepared for filings related to fidelity bonding when there is a trust that holds plan assets, she says. According to Fisher, sponsors should confirm annually that their fidelity bonding is adequate, and supply the most up-to-date information to recordkeepers and consultants engaged in the filing process. Mistakes related to outdated fidelity bonding information may seem esoteric and minor, she says, but the DOL often uses those errors as a trigger to launch a more comprehensive plan audit.





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