U.S. Department of Labor
Office of Inspector General—Office of Audit

**EMPLOYEE BENEFITS SECURITY ADMINISTRATION**

# EBSA COULD MORE EFFECTIVELY EVALUATE ENFORCEMENT PROJECT RESULTS

**Date:** March 31, 2009
**Report Number:** 05-09-003-12-001

**U.S. Department of Labor**
**Office of Inspector General**
**Office of Audit**

# BRIEFLY…

Highlights of Report Number: 05-09-003-12-001 to the Acting Assistant Secretary for Employee Benefits Security.

## WHY READ THE REPORT

The Employee Retirement Income Security Act of 1974 (ERISA) was enacted to protect pension, health, and other employee benefit plans of American workers. In 2008, there were more than 6 million plans, involving 150 million workers and $6 trillion in assets.

The Department of Labor's Employee Benefits Security Administration (EBSA) works to protect the integrity of these employee benefit plans and ensure that employees receive promised benefits. Specifically, EBSA develops related policies and regulations, educates plan participants and plan officials about their rights and responsibilities, and deters and corrects violations through civil and criminal enforcement programs.

EBSA administers its civil enforcement program through broad enforcement initiatives that it implements through a collection of National and regional enforcement projects.

Demonstrating the achievement of program results and the effective use of resources requires clear program goals and the measurement of program results in relation to those goals.

## WHY OIG CONDUCTED THE AUDIT

The OIG conducted a performance audit of EBSA's processes for evaluating its civil enforcement project results. The audit was designed to answer the following question: Is EBSA effectively evaluating its civil enforcement project results and directing its resources to enforcement issues that have a significant impact on American workers' health, pension, and other employee benefits?

## READ THE FULL REPORT

To view the report, including the scope, methodology, and full agency response, go to:

http://www.oig.dol.gov/public/reports/oa/2009/05-09-003-12-001.pdf

**March 2009**

## EBSA Could More Effectively Evaluate Enforcement Project Results

## WHAT OIG FOUND

With its current performance measurement process, EBSA could not (1) effectively measure outcomes of its civil enforcement projects or (2) demonstrate that it allocated civil enforcement resources to areas of highest impact on its mission.

EBSA could not evaluate the outcome of its civil enforcement projects because it did not clearly define project goals relative to its mission and it did not measure the impact of project results on its mission. While EBSA described each of its enforcement projects, it did not clearly define the intended outcome of each project.

EBSA benchmarked its individual civil enforcement projects using the same measure it reports under the Government Performance and Results Act for its overall civil enforcement program. It also tabulated several indicators of internal activity such as monetary results, staff days expended per case, and the number of civil cases converted to criminal cases (i.e., outputs). However, none of these indicators measured external events or conditions (i.e., outcomes). Thus, EBSA could not demonstrate the impact of these projects on its overall mission to deter and correct ERISA violations. In addition, EBSA could not show that it used enforcement project outcomes to direct enforcement efforts to areas of highest impact on its mission.

## WHAT OIG RECOMMENDED

We recommended that the Acting Assistant Secretary for Employee Benefits Security require EBSA to (1) better define the objective of each of its civil enforcement projects; (2) establish performance indicators that evaluate each civil enforcement project's results versus the stated objective; and (3) develop guidance for allocating enforcement resources based on intended civil enforcement outcomes and actual performance results.

EBSA agreed that the objective of each of the national enforcement projects could be clearer and agreed to expand its public description of the national enforcement projects.

However, EBSA views its current results indicators and guidance on resource allocation as adequate.

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**U.S. Department of Labor**

Office of Inspector General
Washington, D.C. 20210

March 31, 2009

## Assistant Inspector General's Report

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The Office of Inspector General conducted a performance audit of the Department of Labor's (DOL) Employee Benefits Security Administration's (EBSA) Office of Enforcement. EBSA protects the integrity of pensions, health plans, and other employee benefits for more than 150 million Americans. The mission of EBSA is to assist workers in obtaining information needed to exercise benefit rights; assist plan officials in understanding the requirements of relevant statutes so they can meet legal responsibilities; develop policies and regulations that encourage the growth of employment-based benefits; and to deter and correct violations of relevant statutes through strong administrative, civil, and criminal enforcement efforts to ensure workers receive promised benefits. The Employee Retirement Income Security Act of 1974 (ERISA) was enacted to protect pension, health, and other employee benefit plans of American workers. In 2008, there were more than 6 million plans, involving 150 million workers and $6 trillion in assets.

Administration of ERISA is divided among EBSA, the Internal Revenue Service of the Department of the Treasury (IRS), and the Pension Benefit Guaranty Corporation (PBGC). EBSA is responsible for enforcing the fiduciary, reporting, and disclosure provisions of ERISA. The IRS assures that pension, profit-sharing, and stock-bonus plans meet requirements for established tax benefits. The PBGC provides insurance coverage for defined benefit pension plans.

EBSA enforces Title 1 of ERISA which, in part, establishes participant rights and fiduciaries' duties.

The audit objective was to answer the following question: Is EBSA effectively evaluating its civil enforcement project results and directing its resources to enforcement issues that have a significant impact on American workers' health, pension, and other employee benefits?

## SCOPE

We examined the current process of identifying and selecting enforcement cases in EBSA's National headquarters and regional and district offices. We reviewed the resources expended and the results identified in EBSA's civil enforcement cases either opened or closed in FYs 2006, 2007 and 2008.

We interviewed EBSA enforcement management personnel, Office of Management and Budget (OMB) staff, and the DOL Performance Officer to discuss their expectations and perceptions regarding EBSA's performance measurement efforts. We also interviewed IRS Employee Plan staff to discuss their ERISA related enforcement measurement practices and compared their applicability to EBSA.

Further, we obtained EBSA enforcement data and performed data analysis on data for FYs 2006, 2007, and 2008. We also reviewed information from external sources including OMB and EBSA consultants.

We conducted this performance audit in accordance with government auditing standards. Those standards require that we plan and perform the audits to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provided a reasonable basis for our findings and conclusions based on our audit objectives.

## RESULTS IN BRIEF

With its current performance measurement process, EBSA could not (1) effectively evaluate outcomes of its civil enforcement projects or (2) clearly demonstrate that it directed civil enforcement resources to areas with the most impact on its mission.

EBSA could not evaluate the outcome of its civil enforcement projects because project goals were not clearly defined relative to its mission and EBSA did not measure impact of project results on its mission. While EBSA described each of its enforcement projects, it did not clearly define the intended outcome of each project. EBSA benchmarked its individual civil enforcement projects using the same measure it reports under GPRA for its overall civil enforcement program. It also tabulated several indicators of internal activity such as monetary results, staff days expended per case, and the number of civil cases converted to criminal cases (i.e., outputs). None of these indicators measured external events or conditions (i.e., outcomes). Thus, EBSA could not demonstrate the impact of these projects on its overall mission to deter and correct ERISA violations. In addition, EBSA could not show that it used enforcement project outcomes to direct enforcement efforts to areas of highest impact on its mission.

EBSA believes its current indicators are adequate for measuring results and that attempting to develop true outcome measures would be too expensive, resource intensive, and of limited use.

We recommended the Acting Assistant Secretary for Employee Benefits Security require EBSA to (1) clearly define the objective of each of its civil enforcement projects; (2) establish performance indicators that evaluate each civil enforcement project's outcomes versus the stated objective; and (3) develop guidance for allocating enforcement resources based on intended civil enforcement outcomes and actual performance results.

## RESULTS AND FINDINGS

### Objective 1 — Does EBSA effectively evaluate its civil enforcement project results and direct its resources to enforcement issues that have a significant impact on American workers' health, pension, and other employee benefits?

### Finding 1 – EBSA could not effectively evaluate outcomes of its civil enforcement projects.

EBSA could not evaluate the outcomes of its civil enforcement projects. Specifically, EBSA had not (1) clearly defined the intended outcomes of individual enforcement projects or (2) developed project performance indicators of external rather than internal results. EBSA management believes that its use of a variety of performance indicators enables them to effectively evaluate the performance of its enforcement projects. However, with its current benchmarks, EBSA cannot determine whether its civil enforcement projects are increasing ERISA compliance and decreasing the risk that employee benefits will be lost.

GPRA, which was enacted to systematically hold Federal agencies accountable for achieving program results, guides the Federal performance measurement process. GPRA stresses the establishment of goals and the measurement of program outcomes[1] as a means of effective program management. In response to GPRA, DOL established department-wide performance goals in its strategic plan and has maintained and updated these goals since 1998. Within this framework, EBSA worked with OMB and specialized consultants to develop and implement performance reporting for its various functions, including civil enforcement. EBSA has periodically modified its performance measurement in an effort to improve it. The current measure, adopted in 2007, computes "closed cases with a fiduciary correction" as a percentage of the total closed civil enforcement cases.

**EBSA Civil Enforcement Measure**

$$\frac{\text{Closed cases with fiduciary corrections}}{\text{Closed civil enforcement cases}}$$

[1] OMB Circular A-11 defines outcomes as "the intended results of carrying out a program and relate to conditions external to the agency."

EBSA administers its civil enforcement program through broad enforcement initiatives that it implements through a collection of National and regional enforcement projects. Although GPRA does not require agencies to establish performance goals and measures at an individual project, doing so facilitates and supports development of the required overall performance measures. EBSA used a variety of quantitative indicators to evaluate its individual civil enforcement projects, including internal activity such as monetary results, staff days expended per case, and the number of civil cases converted to criminal cases (i.e., outputs). None of these indicators measured external events or conditions (i.e., outcomes). Thus, EBSA could not demonstrate the impact of these projects on its overall mission to deter and correct ERISA violations.

Moreover, as discussed in the following sections, the individual projects did not have clearly defined objectives and the measures and indicators did not provide an ability to assess the project's success in relation to either EBSA's overall enforcement goal or a specific project goal.

Employee Contribution Project (ECP) focuses on the timely deposit of participant contributions, which EBSA described in the following manner:

> . . . an aggressive enforcement project intended to safeguard employee contributions to 401(k) plans and health care plans by investigating situations in which employers delay forwarding employee contributions into these plans. In some cases, employers do not promptly forward the contributions to the appropriate funding vehicle. In other cases, the employer simply converts the contributions to other uses, such as business expenses. Both scenarios may occur when the employer is having fiscal problems and turns to the plan for unlawful financing.

As described above, and in other EBSA internal documents we reviewed, the project's annual and long-term annual goals are not clear. In addition, EBSA measured its ECP project performance by its outputs rather than its outcomes. While EBSA extensively analyzed ECP results, it reported the performance as cases with corrected fiduciary violations as a percentage of all closed cases, the same ratio as the overall GPRA measure. This measure did not gauge impact. For example, equal weight was given to all violations resulting in a dollar recovery. In addition, violations in large plans were equal to violations in small plans.

This measure did not clearly relate the results of the ECP project with EBSA's overall mission to deter and correct ERISA violations and enhance the security of employee benefits. These performance indicators did not demonstrate that the ECP project had a positive impact on the problem of delayed contributions in the employee benefit plan universe.

Overall, we believe EBSA should better relate its intended ECP project outcomes and its performance indicators to its mission.

Employee Stock Ownership Plans (ESOPs) – According to EBSA:

> ESOPs are designed to invest primarily in employer securities. Due to their unique nature, ESOPs can have distinct violations, as well as violations that might occur in any employee benefit plan. One of the most common violations found is the incorrect valuation of employer securities. This can occur when purchasing, selling, distributing, or otherwise valuing stock. Other issues involve the failure to provide participants with the specific benefits required or allowed under ESOPs, such as voting rights, ability to diversify their account balances at certain times, and the right to sell their shares of stock when received.

There was no clear correlation to EBSA's mission or description of ESOP's intended outcomes.

Our discussion with EBSA regional directors and staff disclosed conflicting views of the ESOP objectives. Some investigators and managers referred to the ESOP project as being complex and important cases, but others regarded the results largely as "technical violations" which did not yield direct benefit to plan participants.

Furthermore, while EBSA monitored the ESOP project in detail, it reported the performance of the ESOP project in the same manner as the overall GPRA measure: cases with corrected fiduciary violations as a percentage of all closed cases. This does not relate to EBSA's overall mission or show the impact of the ESOP project on the employee benefit plan universe.

In addition, this performance indicator may discourage the initiation of complex cases such as in the ESOP project. These cases may be time consuming and require extensive ERISA knowledge. A case involving large monetary amounts may involve a single fiduciary violation and be counted the same as an ECP case which are generally much more simple.

As shown in the following table, the ESOP project had only 548 cases in our time period while the ECP project had nearly 4,000—seven times the volume of case as ESOP. In contrast, ESOPs, with over 13 percent of the caseload of ECPs, had more than ten times the monetary recoveries, averaging $2.3 million in recoveries per case while ECP cases averaged about $29,000 in monetary results per case.

**Monetary Recoveries by National Emphasis Project**

| Project | Number of Cases | Monetary Result($) | Monetary Results/Case ($) |
|---|---|---|---|
| ESOP | 548 | 1,280,283,804 | 2,336,284 |
| REACT | 518 | 125,387,518 | 242,061 |
| ECP | 3,951 | 116,396,399 | 29,460 |
| MEWA | 119 | 58,914,543 | 495,080 |
| CAP | 9 | 35,447 | 3,939 |
| Total | 5,145 | 1,581,017,711 | 307,292 |

Source: EBSA EMS database, closed cases in FYs 2006 – 2008

We recognize that monetary results are not the only, or even the most important, indicators of success for all projects. However, EBSA could not point out which indicators it used to judge the success of each project. We concluded that EBSA should better relate its intended ESOP project outcomes and its measurements to its mission.

Rapid ERISA Action Team (REACT) – EBSA stated:

> Under REACT, EBSA responds to employer bankruptcies by ensuring that all available legal actions have been taken to preserve pension plan assets. When a plan sponsor faces severe financial hardship, the assets of any plans and the benefits of participants are placed at great risk. …Under REACT, when a company has declared bankruptcy, EBSA takes immediate action to ascertain whether there are plan contributions which have not been paid to the plans' trust, to advise all affected plans of the bankruptcy filing, and to provide assistance in filing proofs of claim to protect the plans, the participants, and the beneficiaries. EBSA also attempts to identify the assets of the responsible fiduciaries and evaluate whether a lawsuit should be filed against those fiduciaries to ensure that the plans are made whole and the benefits secured.

While this project statement did describe a clear objective to protect plan participants, EBSA did not relate measurement of its results to this objective. As with the other projects, the outcomes of the REACT project were measured in the same manner as the overall GPRA measure: cases with corrected fiduciary violations as a percentage of all closed cases. There was no measurement of the success in protecting the rights and benefits of plan participants.

Consultant/Advisor Project (CAP) – EBSA newest National Project will:

> … focus on the receipt of improper, undisclosed compensation by pension consultants and other investment advisers. EBSA's investigations will seek to determine whether the receipt of such compensation violates

> ERISA because the adviser/consultant used its position with a benefit plan to generate additional fees for itself or its affiliates. EBSA may also need to investigate individual plans to address such potential violations as failure to adhere to investment guidelines and improper selection or monitoring of the consultant or adviser. The CAP will also seek to identify potential criminal violations, such as kickbacks or fraud. Although the project is focused primarily on the indirect and undisclosed compensation of pension consultants and advisers, a related objective is to determine whether fiduciaries understand the compensation and fee arrangements into which they enter.

These goals do not address intended overall impact on ERISA compliance, nor do they address how EBSA intends for this project to deter these violations from occurring. EBSA measured the results of the CAP project in the same manner as the overall GPRA measure: cases with corrected fiduciary violations as a percentage of all closed cases.

This measure does not gauge impact. Again, a CAP case, which yielded a large dollar recovery, counted in the measurement the same as an ECP case that closed with a small monetary recovery. A violation affecting a small plan counted the same as a violation affecting a large plan. This did not relate to EBSA's overall mission or show the impact of the CAP project on the employee benefit plan universe.

Multiple Employer Welfare Arrangements (MEWAs) – EBSA's description of this project's objective was to:

> Emphasize… abusive and fraudulent MEWAs created by unscrupulous promoters which sell the promise of inexpensive health benefit insurance, but default on their obligations.
>
> EBSA continues to find instances where MEWAs have been unable to pay claims as a result of insufficient funding and inadequate reserves, or in the worst situations, where they were operated by individuals who drained the MEWA's assets through excessive administrative fees or by outright theft.

While this goal is related to EBSA's overall mission of deterring ERISA violations, the success of this project was measured the same as the overall GPRA measure: cases with corrected fiduciary violations as a percentage of all closed cases. This neither measured the number of individuals EBSA prevented from serving as fiduciaries or service provider, nor how many participants EBSA protected.

Regional Enforcement Activities – Outside the National Projects, EBSA allowed regional offices the flexibility to pursue specific issues through regional initiatives and other regional activities. EBSA's regional enforcement initiatives and activities, however, also lacked clear goals with clearly defined, objectively measurable outcomes that relate to these goals and to EBSA's overall mission.

We believe the lack of clear project annual and long-term intended outcomes has caused differing priorities and management decisions in the regional offices.

Without clearly defined intended project outcomes, EBSA did not have a target against which to measure actual results. Therefore, EBSA could not demonstrate that it accomplished its intended outcomes.

According to EBSA management, EBSA considered many means of measuring outcomes and could not develop program outcome measurements with existing resources. They stated EBSA hired consultants and worked with OMB to develop existing output measures as indicators of performance and further stated OMB's acceptance of their current measures demonstrated OMB's approval of this approach.

OMB officials stated that they had accepted EBSA's performance measures but would prefer outcome measures. OMB has not disapproved output performance measures government-wide but recognizes they are not indicative of program performance. Instead, OMB continues to work with Federal agencies to better measure outcomes.

Furthermore, EBSA did conduct extensive data analysis on a continuing basis and held quarterly management meetings with regional directors to discuss priorities, results and future actions. Also, EBSA has used outside consultants to perform extensive data analysis on EBSA's enforcement results to determine the best sources for finding violations and to improve targeting of plans for investigation. EBSA management believed it has an in-depth understanding of it enforcement results.

Despite providing extensive data analysis and management attention to its projects, EBSA still relied on internal data to judge the effectiveness of its enforcement projects and the overall enforcement program. In the absence of more comprehensive outcome measures of its enforcement results, we do not believe EBSA can effectively judge whether it is improving plan compliance and increasing the safety of employee benefit plans.

GAO reported a similar viewpoint on EBSA's lack of a comprehensive outcome measure. In a 2007 report on EBSA's enforcement program, GAO stated:

> … EBSA has not systematically estimated the nature and extent of pension plans' noncompliance, a fact that limits the agency's ability to assess overall industry compliance with ERISA and measure the effectiveness of its enforcement program.

Furthermore, the regional directors interviewed generally did not find the current project benchmarks useful and some felt they actually hindered effective management. Several of the regional directors we spoke with said that the GPRA measure influenced project benchmarks affected the number and type of investigations their office initiated and that they must direct their staff to complete investigations that will help them obtain project benchmarks. This may mean doing easier cases, such as ECP cases where violations are plentiful, although monetary recoveries are small and any other benefits were not clearly defined.

In order to establish potential best practices in performance measurement, we interviewed IRS Employee Plan staff to discuss their ERISA-related enforcement measurement practices and reviewed published documents pertaining to the IRS employee plan enforcement function.

We found that the IRS had developed outcome measures for their enforcement program. The IRS segregated its employee benefit plan universe into market segments and performed baseline studies to identify non-compliance rates in each market segment. It also uses an overall Employee Plan Compliance rate which is the ratio of plans with no significant compliance issues to the total number of IRS approved private retirement plans:

**IRS Employee Plan Compliance Rate**

$$\text{EP Compliance Rate} = \frac{\text{Plans with no significant compliance issues}}{\text{Total number of IRS-approved private retirement plans}}$$

IRS estimates this rate through an ongoing research program, which uses audits of a random sample of plans to assess risks, by market segment. Because this rate is very costly to compute on a continual basis, the IRS is transitioning to validation of each market segment as an ongoing and continuous effort, based on the historical data.

According to EBSA management, they have continued to improve their measurement of enforcement success. Within the last three years, EBSA had changed the overall GPRA goal to specify closed fiduciary cases with corrections and had applied this measure to each of its National projects. Moreover, EBSA management conveyed that they had studied ways to better measure outcomes and had worked extensively with outside experts and OMB to develop better measures, to no avail. EBSA management also stated that the IRS plan universe is different than EBSA's and could not be compared.

We believe that EBSA needs to (1) more clearly establish annual and long-term goals and outcomes for its enforcement projects and, (2) establish outcome measures to demonstrate whether these goals are accomplished. This would enable EBSA to better judge the accomplishments of its project objectives and its overall mission and demonstrate these program accomplishments to Congress and the public.

## Finding 2 – EBSA could not clearly demonstrate it directed its resources to the areas with the most impact.

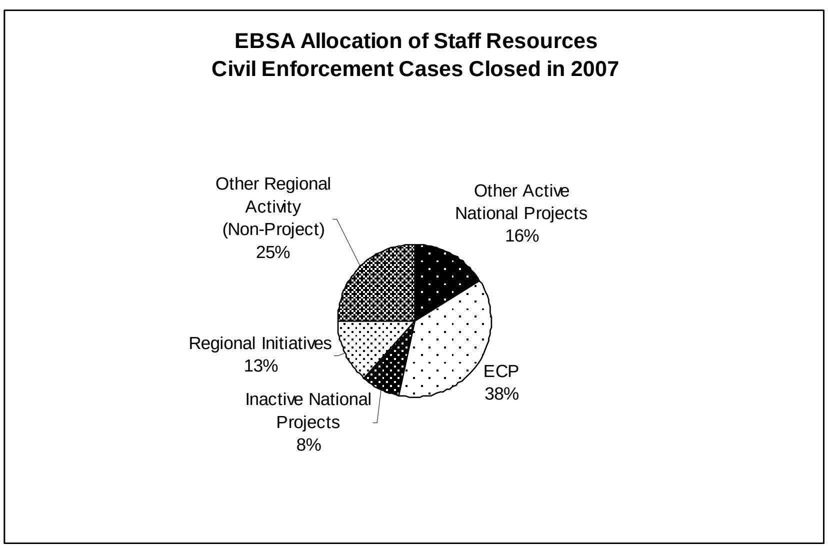
EBSA could not clearly demonstrate it was directing its resources to the enforcement areas with the most impact on its mission. The EBSA regional offices differed in their interpretation of program impact and desired outcomes, resulting in differing allocation of resources among the regional offices. This occurred because EBSA Headquarters did not provide clear guidance on intended enforcement outcomes. GPRA and Executive Order 13450 emphasize that agencies should apply taxpayer resources in a manner that maximizes the effectiveness of Government programs. Therefore, in as much as regional offices applied resources according to varying interpretations of intended outcomes, EBSA needs to demonstrate that it is directing resources to enforcement areas with the most impact.

EBSA's activities fall within DOL's strategic goal to "Strengthen Economic Protection" which states the goal is to:

> Protect and strengthen worker economic security through … securing pension and health benefits.

EBSA's civil enforcement mission is to "deter and correct ERISA violations". To accomplish this, EBSA administered its civil enforcement program through broad enforcement initiatives that are implemented through National and regional enforcement projects. However, with its existing performance measurements, EBSA could not clearly demonstrate that its resources were directed toward areas that had the most impact.

For example, in 2007, EBSA reported monetary results of $1.5 billion and 69% of closed cases had a fiduciary violation corrected. In accomplishing this, as shown in the following graph, EBSA directed 38 percent of its direct enforcement resources to its ECP project.




Source: EBSA EMS Database of Closed Cases, FYs 2006 - 2008. Staff resources include time charged in 2007 and previous years for each case.

However, it is unclear whether EBSA based this level of resource allocation on potential impact of the ECP project in deterring ERISA violations or enhancing employee benefit security. While using 38 percent of the civil enforcement staff resources in FY 2007, the ECP project only had $38 million in monetary benefits from closed cases or approximately 3 percent of the total. Clearly, it is not monetary impact that the ECP accomplishes. While the ECP project did have a corrected fiduciary violation rate of 82 percent, it is not known if overall ERISA violations related to delayed contributions increased or decreased or if participants were better off at all. EBSA could not clearly demonstrate how this allocation of resources served to accomplish its overall mission.

In contrast, the ESOP project produced almost $499 million in monetary recoveries in 2007, but EBSA only devoted 10 percent of its National project time to the ESOP project. EBSA could not clearly demonstrate the outcome of allocating this proportion of time to the project.

We recognize monetary recoveries are not the only indicator of a case's impact. According to EBSA management, other non-monetary impacts are important, including enjoining fiduciaries from plan management, ensuring bonding adequacy, correcting health law violations and improving disclosures to participants. However, as noted earlier, EBSA has not measured the overall impact of the ECP project on the issue of delayed contributions. Therefore, while significant resources have been devoted to the ECP, EBSA has not clearly shown this is an area of high impact.

The following table shows the number of civil enforcement cases with non-monetary (fiduciary and non-fiduciary) violations for each National project:

**Civil Enforcement Cases with Non-Monetary Violations**
**By National Project, FYs 2006 – 2008**

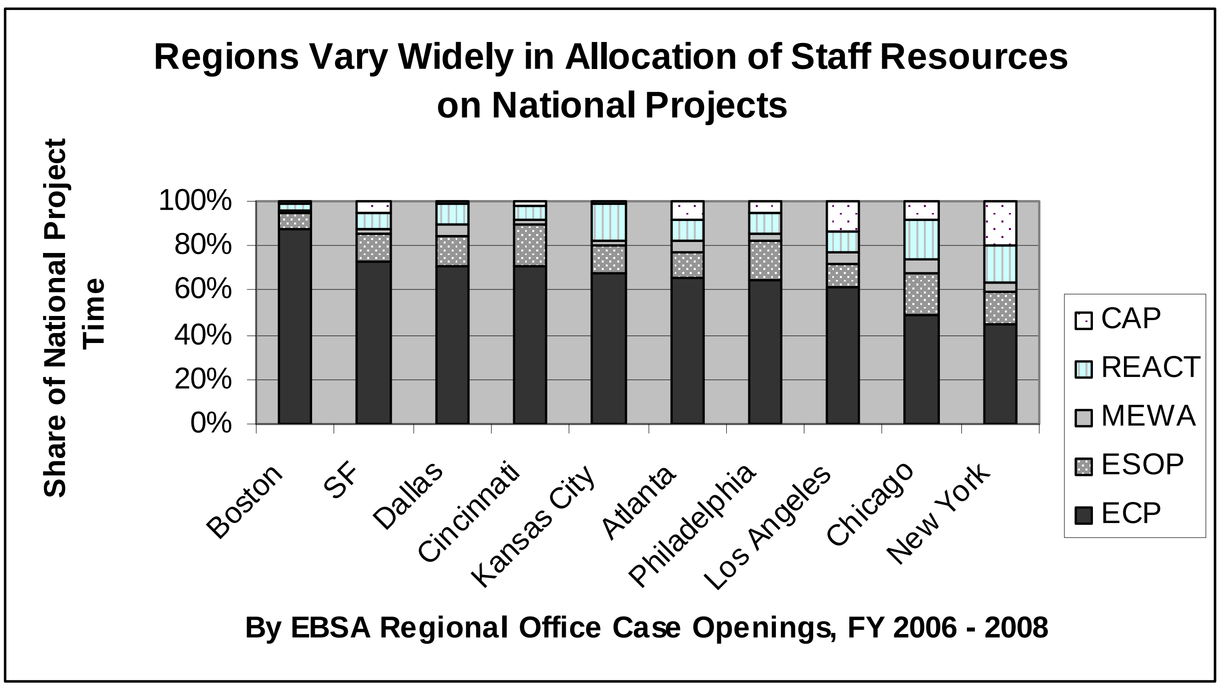
| National Project | Cases with One or More Non-Monetary Results | All Cases | Percentage of Cases with Non-Monetary Results within each project |
|---|---|---|---|
| Employee Contribution Project (ECP) | 1,649 | 3,951 | 42% |
| Employee Stock Ownership Plans (ESOP) | 245 | 548 | 45% |
| REACT | 185 | 518 | 36% |
| Health Fraud/MEWA | 63 | 119 | 53% |
| Consultant/Advisor Project (CAP) | 1 | 9 | 11% |
| Total | 2,143 | 5,145 | 42% |

Source: EBSA EMS Database, FYs 2006 -2008 closed cases

As can be seen above, the percentage of non-monetary or non-fiduciary results within ECP cases overall (42%) is lower that for ESOP (45%) and MEWA (53%). Further, as noted earlier, ECP cases, on average, yield low monetary results. Based on these factors, it is not clear why EBSA allocated such a high share of its resources to ECP. EBSA explained that the ECP project covered 401(k) plans, which are the most numerous type of pension plan, high rate of fiduciary violations, and that EBSA allocated its resources accordingly. However, this does not relate the results of the ECP project to EBSA's overall mission. Specifically, EBSA could not demonstrate that the ECP project furthered EBSA's mission to deter ERISA violations and enhance the security of employee plan benefits.

Furthermore, the Regions viewed the risk and benefit of the various projects and enforcement areas differently. In the case of the ECP project, regional offices varied widely in their perspective of ECP results and resulting allocation of resources. In our interviews with regional directors and staff, we found that all generally considered the issue of delayed contributions to be a problem but opinions varied on the potential impact. Some considered the impact significant in that real money was returned to participants. Others considered the violations involved to be minor in relation to other enforcement areas and felt either benefit advisors or voluntary correction could handle the issues. These differing views have resulted in varying efforts by the regions.

The following graph shows the level of effort by each region on National project cases opened in FYs 2006 through 2008:




As can be seen, although delayed contributions is described as a nationwide problem and past ECP results showed 68 percent non-compliance, individual Regions devoted widely varying levels of effort to opening cases in this area— ranging from less than 50% to more than 80% of National project activity. EBSA could not clearly demonstrate that the ECP problem was less severe in New York and Chicago, for example, where it devoted the lowest resource allocations to opening cases, than it was in Boston where it allotted the largest share of resources for new cases opened.

Overall, with its current goals and performance measurement processes, EBSA could not clearly demonstrate that it directed its resources to enforcement areas that have the most impact in terms of its mission – deterring and correcting ERISA violations. This occurred because EBSA has not provided clear guidance on intended outcomes. We believe these are necessary steps for EBSA to demonstrate that it allocates its resources appropriately. This is critical in how OMB, Congress and the American public view the agency.

## Recommendations

We recommend that EBSA:

1. Clearly define the objective of each of its civil enforcement projects.

2. Establish a performance measure(s) that evaluate(s) each civil enforcement project's outcomes versus the stated objective

3. Develop guidance for allocating enforcement resources based on intended enforcement outcomes and actual performance results.

## EBSA Response

In its response, EBSA explained the design, management, and operation of EBSA's enforcement program. EBSA also described its efforts, and difficulties, in developing meaningful GPRA goals and referred to other Federal agencies EBSA stated were similar in enforcement responsibilities that also used output measures rather than outcome measures. Overall, EBSA stated its civil enforcement GPRA measure was an acceptable surrogate outcome performance measure.

As to Recommendation 1, EBSA agreed that the objective of each of the national enforcement projects could be clearer. EBSA stated it would expand its public description of the national enforcement projects to include a specific objective of "finding and correcting violations of ERISA." EBSA further stated that putting the public on notice of its investigative emphases contributed to the goal of deterring violations of ERISA.

EBSA disagreed with Recommendation 2. EBSA stated it had spent an enormous amount of time trying to develop a meaningful and useful performance measure to evaluate the civil enforcement program based on outcomes. Because this has proven fruitless to date, EBSA uses a surrogate measure that it believes is widely recognized as an acceptable alternative by experts in the performance management arena. EBSA stated it had discovered early on that there is no practical outcome measure available, and this infeasibility had been acknowledged repeatedly by external reviewers. EBSA further noted that the OIG's draft report did not recommend an alternative outcome-based performance measure for EBSA.

EBSA also disagreed with Recommendation 3. EBSA stated that the internal program development guidelines provided to EBSA's regional directors clearly stated that EBSA's enforcement program is mission-driven, a mission that is well known to each regional director. EBSA further stated that all national enforcement projects are implemented with the objective of furthering EBSA's mission to deter and correct violations of ERISA and that these projects are developed and continually evaluated by EBSA management.

See Appendix D for EBSA's entire response to our Draft report.

**OIG Conclusion**

While EBSA agreed with Recommendation 1 and proposed corrective action, we believe EBSA needs to take further action. The addition of "finding and correcting ERISA violations" only recognizes part of EBSA's mission. It leaves out the deterring of ERISA violations. With EBSA's large universe of employee benefit plans and small number of enforcement personnel, deterrence is a critical part of the mission and EBSA should recognize it. This is a key element when determining how to measure the success of a project. Also, "finding and correcting ERISA violations" may not be appropriate for projects such as the REACT project where correction of a violation may not be the primary objective.

As to recommendations 2 and 3, we did not recommend EBSA revise its overall GPRA measuring and reporting processes.  Rather, we recommend implementing clearer objectives for its individual civil enforcement projects and then measuring the accomplishment of those objectives. The current processes do not accomplish this, and the use of duplicate GPRA measures as benchmarks for each project may be hampering project accomplishments.

For example, if the intended goal of the ECP project is to reduce the number of delayed employee contributions, EBSA should measure whether this is accomplished. This could include use of a baseline for ECP or other methods. Under the present processes and measurements, EBSA cannot demonstrate the project has had a positive impact.

We continue to believe EBSA should measure the outcomes of these projects in relation to a clearly stated project objectives and use these outcomes to direct enforcement resources.

Elliot P. Lewis

Elliot P. Lewis

# Exhibits

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**Exhibit 1**

## EBSA Civil Investigation GPRA Goal and Outcome
## FYs 2003 – 2008

| Performance Goal 06-2.2C (EBSA) Secure Pension, Health, and Welfare Benefits Civil Investigation GPRA Goal | | | |
|---|---|---|---|
| **Fiscal Year** | **Civil Investigation GPRA Goal** | **Civil Investigation GPRA Goal Results** | **Did EBSA Meet Their Civil Investigation GPRA Goal?** |
| 2003 | 50% | 69% | Yes |
| 2004 | 50% | 69% | Yes |
| 2005 | 66% | 76% | Yes |
| 2006 | 69% | 74% | Yes |
| 2007 | 61% | 69% | Yes |
| 2008 | 64% | 70% | Yes |

Note: In FYs 2003 – 2006, this performance measure was the ratio of Civil Cases With Corrected Violations To All Civil Closed Cases.

In FY 2007, this performance measure changed to the ratio of Civil Cases With Corrected **Fiduciary** Violations To All Civil Closed Cases

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**Exhibit 2**

## Time Charged to Civil Enforcement Projects
## Cases Opened FYs 2006 – 2008

| | National Enforcement Projects | | | | | Project Days Charged to All National Enforcement Projects | Project Days Charged to All Other Enforcement Projects | Total Project Days Charged |
|---|---|---|---|---|---|---|---|---|
| | CAP | ESOP | ECP | MEWA | REACT | | | |
| | Days Charged | Days Charged | Days Charged | Days Charged | Days Charged | | | |
| Region | Percent of Total Days Charged | Percent of Total Days Charged | Percent of Total Days Charged | Percent of Total Days Charged | Percent of Total Days Charged | Percent of Total Days Charged to National Enforcement Projects | Percent of Total Days Charged to All Other Enforcement Projects | |
| Philadelphia | 241 | 806 | 2,922 | 161 | 401 | 4,531 | 3,891 | 8,422 |
| | 3% | 9% | 35% | 2% | 5% | 54% | 46% | 100% |
| New York | 771 | 541 | 1,712 | 165 | 627 | 3,816 | 6,216 | 10,032 |
| | 8% | 5% | 17% | 2% | 6% | 38% | 62% | 100% |
| Boston | 62 | 595 | 7,078 | 47 | 296 | 8,078 | 6,674 | 14,752 |
| | <1% | 4% | 48% | <1% | 2% | 55% | 45% | 100% |
| Atlanta | 609 | 891 | 4,925 | 414 | 713 | 7,552 | 7,773 | 15,325 |
| | 4% | 6% | 32% | 3% | 4% | 49% | 51% | 100% |
| Cincinnati | 159 | 1,186 | 4,561 | 118 | 399 | 6,423 | 5,576 | 11,999 |
| | 1% | 10% | 38% | 1% | 3% | 53% | 47% | 100% |
| Chicago | 517 | 1,117 | 2,953 | 381 | 1,035 | 6,003 | 4,054 | 10,057 |
| | 5% | 11% | 29% | 4% | 10% | 59% | 41% | 100% |
| Kansas City | 61 | 1,026 | 5,663 | 136 | 1,456 | 8,342 | 6,774 | 15,116 |
| | <1% | 7% | 37% | 1% | 10% | 55% | 45% | 100% |
| Dallas | 49 | 902 | 4,762 | 321 | 660 | 6,694 | 5,305 | 11,999 |
| | <1% | 7% | 40% | 3% | 6% | 56% | 44% | 100% |
| San Francisco | 420 | 921 | 5,733 | 229 | 528 | 7,831 | 5,836 | 13,667 |
| | 3% | 7% | 42% | 1% | 4% | 57% | 43% | 100% |
| Los Angeles | 598 | 461 | 2,760 | 255 | 419 | 4,493 | 2,725 | 7,218 |
| | 8% | 6% | 38% | 4% | 6% | 62% | 38% | 100% |

Note: Percentages have been rounded.

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# Appendices

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**Appendix A**

## Background

The Employee Retirement Income Security Act of 1974 (ERISA) was enacted to protect pension, health, and other employee benefit plans of American workers. Currently, there are more than 6 million plans, involving 150 million workers and $6 trillion in assets.

Administration of ERISA is divided among EBSA, the Internal Revenue Service of the Department of the Treasury (IRS), and the Pension Benefit Guaranty Corporation (PBGC). EBSA is responsible for enforcing the fiduciary, reporting, and disclosure provisions of ERISA. The IRS assures that pension, profit-sharing, and stock-bonus plans meet requirements for established tax benefits. The PBGC provides insurance coverage for defined benefit pension plans.

In pursuing its mission, EBSA uses a combination of compliance assistance, voluntary compliance, and enforcement. Enforcement actions, both civil and criminal, are intended to deter and correct violations of ERISA and ensure workers receive promised benefits. EBSA's approximately 400 investigators rely on participant complaints, computer analyses, published news reports, and referrals from other government agencies to identify and initiate cases. Areas of emphasis are established through a series of national and regional projects contained in annual Program Operating Plans. Each region determines the distribution of its enforcement resources among these projects. With more than 8,000 plans under its authority for every 1 investigator, it is critical that EBSA direct its limited resources at areas with the most impact.

Congress enacted the Government Performance and Results Act of 1993 (GPRA) to assist Federal managers in improving program effectiveness and efficiency.) GPRA requires Federal agencies to develop and implement performance measures to demonstrate program outcomes. GPRA defines an outcome measure as a quantitative or qualitative "assessment of the results of a program activity compared to its intended purpose. OMB Circular A-11 adds that an outcome measure "define[s] an event or condition that is external to the program or activity and that is of direct importance to the intended beneficiaries and/or the public."

EBSA's current performance measure for its civil enforcement program calculates the percentage of closed cases that correct a fiduciary violation of ERISA. In FYs 2006 - 2008, EBSA closed 10,277 civil enforcement cases involving more than 166,000 staff days, and resulting in $3.72 billion in plan assets being recovered or safeguarded against loss. It reported that 69 percent and 70 percent of these cases involved an ERISA fiduciary violation in FY 2007 and FY 2008, respectively.[2]

[2] EBSA established new performance measures in 2007 to incorporate fiduciary corrections and thus data for 2006 is not comparably reportable.

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**Appendix B**

## Objective Scope, Methodology, and Criteria

### Objective

Our audit was designed to address the following question:

Is EBSA effectively evaluating its civil enforcement project results and directing its resources to enforcement issues that have a significant impact on American workers' health, pension and other employee benefits?

### Scope

We examined the current process of identifying and selecting enforcement cases in EBSA's National headquarters and regional and district offices. We reviewed the resources expended and the results identified in EBSA's civil enforcement cases either opened or closed in FYs 2006, 2007 and 2008. We examined how these results were used to direct future enforcement efforts.

We conducted our fieldwork at EBSA's headquarters and the following regional offices:

Atlanta, Georgia
Boston, Massachusetts
Chicago, Illinois
Cincinnati, Ohio
Dallas, Texas
Kansas City, Missouri
Los Angeles, California
San Francisco, California
New York, New York
Washington, DC

We also visited district offices located in:

Miami, Florida
St. Louis, Missouri
Seattle, Washington

A performance audit includes an understanding of internal controls considered significant to the audit objectives and testing compliance with significant laws, regulations, and other requirements. Our work on internal controls included obtaining and reviewing policies and procedures, and interviewing key personnel. We gained an understanding of the EBSA's processes relative to our audit objectives and documented a description of the controls. Our testing of internal controls focused only on the controls related to our objectives of assessing compliance with significant laws, regulations, and policies and procedures. We did not intend to form an opinion on the adequacy of internal controls overall, and we do not render such an opinion.

We conducted this performance audit in accordance with government auditing standards. Those standards require that we plan and perform the audits to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provided a reasonable basis for our findings and conclusions based on our audit objectives.

**Methodology**

We interviewed (a) EBSA enforcement management personnel in their National headquarters, (b) regional offices, (c) districts, and (d) selected senior investigators regarding their roles in identifying, selecting, and conducting civil enforcement cases. We met with Office of Management and Budget (OMB) staff and the DOL Performance Officer to discuss their expectations and perceptions regarding GPRA and EBSA's compliance. We also interviewed IRS Employee Plan staff to discuss their ERISA related enforcement measurement practices and compared their applicability to EBSA.

In addition to interviews, we reviewed key EBSA documents including its (a) Enforcement Manual; (b) Strategic Enforcement Plan of 2000 (STeP); (c) Program Operating Plan directive (POP) issued in 2008; (d) the POPs submitted by EBSA's ten regional offices; (e) Case Opening and Results Analysis (CORA) for 2005 and (f) Enforcement Results reports for 2007.

We also requested and received EBSA's Enforcement Management System (EMS) database of civil enforcement cases opened or closed in FYs 2006, 2007 and 2008. We conducted quantitative and trend analyses of number of cases by enforcement activity, regional office, monetary and non-monetary results, and other case characteristics.

To achieve our objectives we relied on computer-generated data contained in EBSA's EMS system. We assessed controls and conducted sufficient tests of the data and found them to be adequate. Based on these tests, we concluded the data was sufficiently reliable to be used in meeting the audit objectives.

**Criteria**

We used the following criteria to accomplish our audit:

- Government Performance and Results Act of 1993
- Executive Order 13450
- OMB Circular A-11
- Government Auditing Standards (Yellow Book), July 2007 Revision

**Appendix C**

## Acronyms and Abbreviations

| | |
|---|---|
| CAP | Consultant Advisor Project |
| DOL | Department of Labor |
| ECP | Employee Contribution Project |
| EBSA | Employee Benefits Security Administration |
| ERISA | Employee Retirement Income Security Act of 1974 |
| ESOP | Employee Stock Ownership Plan |
| GPRA | Government Performance and Results Act of 1993 |
| IRS | Internal Revenue Service |
| MEWA | Multiple Employer Welfare Arrangement |
| OIG | Office of Inspector General |
| OMB | Office of Management and Budget |
| PBGC | Pension Benefit Guaranty Corporation |
| REACT | Rapid ERISA Action Team |

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**Appendix D**

## EBSA Response to Draft Report

**U.S. Department of Labor**

Employee Benefits Security Administration
Washington, D.C. 20210

DATE: MAR 2 6 2009

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: ALAN D. LEBOWITZ
Deputy Assistant Secretary for Program Operations

SUBJECT: EBSA Response to OIG Performance Audit
Report Number 05-09-003-12-001

Thank you for the opportunity to comment on the recommendations in your performance audit of the Employee Benefits Security Administration's evaluation of enforcement project results.

The Employee Benefits Security Administration (EBSA) is responsible for the administration and enforcement of the civil and criminal provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) as well as related provisions of other Federal laws (e.g., Title 18 USC federal criminal statutes). EBSA oversees approximately 3.2 million private sector pension and health plans, and similar numbers of other welfare benefit plans, such as those providing life or disability insurance. The employee benefit plans under our jurisdiction hold approximately $4.7 trillion in assets and cover approximately 150 million Americans.

An important part of EBSA's mission is to deter and correct violations of ERISA through a strong enforcement program to ensure workers receive promised benefits. Your audit was designed to determine if EBSA is effectively evaluating its civil enforcement project results and directing its resources to enforcement issues that have a significant impact on American workers' health, pension, and other employee benefits.

Before addressing each of your recommendations, we would like to explain the design, management, and operation of EBSA's enforcement program.

**EBSA's Enforcement Program**

Given the size of the plan universe that EBSA oversees relative to its number of investigators, EBSA has focused its available resources on investigations that we believe will most likely result in the deterrence, detection, and correction of ERISA fiduciary violations. Our enforcement program is driven by this mission, and, by design, retains a flexibility that permits dynamic policy considerations to be strategically incorporated. The enforcement program is fully integrated with EBSA's customer service functions. In FY 2008, 871 investigations were opened based on referrals from EBSA's Benefits Advisors.

Our regional directors are required to establish an annual, specific operating plan that creates a visible EBSA presence throughout their geographic regions, pursuant to national priorities, regional priorities, and individually selected cases. On the national level, we identify broad topic areas where we believe plan participants and beneficiaries are most susceptible to actual loss of benefits. Long-term policy goals are articulated in the Strategic Enforcement Plan (StEP); the three current investigative priorities, designed to protect at-risk populations, are plan service providers, health care plans, and defined contribution pension plans. Once the broad framework has been established, EBSA develops initiatives to support these priorities. There are two types of initiatives: national enforcement projects, which are directly based on the StEP goals; and regional projects, which are localized investigative projects undertaken by individual EBSA regional offices. Our internal program development guidelines state that regions should conduct investigations covering many criteria. Pursuant to these guidelines, regions should:

- Maintain an appropriate number of case openings;
- Achieve an appropriate balance among the types of plans investigated;
- Investigate all types of plans (both large and small plans, both pension and welfare plans);
- Demonstrate an adequate enforcement presence in all states within their geographic jurisdictions;
- Conduct a robust criminal enforcement program; and
- Devote adequate resources to national enforcement projects as well as regional enforcement projects.

EBSA establishes its national enforcement projects in order to focus its enforcement resources on areas that have the greatest impact on the protection of plan assets and participants' benefits, and regional offices are expected to place particular investigative emphasis in these areas. The regional enforcement projects may focus on a narrower part of an existing StEP goal or may explore a new area where benefit plans may be at risk. In addition, regions conduct investigations that are not part of an existing national or regional enforcement project, based on annual internal program development guidelines issued by the Office of Enforcement.

As can be seen from the internal program development guidelines, EBSA strives for a well-balanced enforcement program. This means that all sizes and types of plans should be investigated in pursuit of the goal to detect and correct ERISA violations. The OIG report noted that EBSA conducted only 548 ESOP investigations in the time period reviewed as compared to 3,951 Employee Contribution Project cases, implying that this difference in resource allocation was questionable. However, in 2006, there were only 7,128 ESOPs compared to 465,653 401(k) plans. As these numbers illustrate, placing EBSA's investigations in the context of the plan universe is important in understanding resource allocation.[1]

Merely because each region is not conducting the exact same proportion of types of investigations is not an indication of poor resource management. On the contrary, it is evidence of an enforcement program that is designed to take into consideration the varied conditions

[1] We would like to correct a misperception. On page 5, the OIG report stated that ESOP cases are time consuming. As we indicated during the audit, ESOP and ECP cases took roughly the same amount of time to conduct (15.5 vs. 17.4 staff days).

2

among regions. Regional directors are expected to assess current enforcement activities, trends, and areas of noncompliance within the region's jurisdiction and ensure that areas of potential risk are targeted for investigation. Because areas of potential risk vary from region to region, different priorities and management decisions will occur among regions in order to most effectively address these risks.

Under the Government Performance and Results Act (GPRA), EBSA, in consultation with the Department and OMB, established a civil enforcement goal based on the following ratio:

$$\frac{\text{Closed Civil Investigations with Fiduciary Corrections}^{2}}{\text{Total Closed Civil Investigations}}$$

EBSA uses its civil enforcement GPRA measure to help evaluate its civil enforcement program. However, EBSA's evaluation of its enforcement program, including its national enforcement projects, encompasses more than the GPRA measure, and includes an assessment of whether our mission, the detection, correction, and deterrence of ERISA violations, is being met. The enforcement program, including every national enforcement project, is thoroughly evaluated at least twice a year. EBSA uses many factors to determine whether a national enforcement project is successful including, but not limited to:

- The frequency with which violations are detected;
- The ability to obtain meaningful corrections to violations;
- The amount of investigative time being spent to achieve the corrections;
- The appropriateness of using other methods of achieving compliance (for example, the "Orphan Plan" national enforcement project was discontinued once the new Abandoned Plan Program was available);
- Whether criminal violations are being detected;
- Whether policy considerations are implicated, including public interest.

We have concluded that it is not appropriate to use the GPRA goal, or similarly constructed measure, to evaluate regional enforcement projects. Regional enforcement projects are often used as "laboratories" to assess risks within a geographic area or to determine whether there is a need for a national enforcement project. After testing a regional enforcement project, EBSA may determine that the violations are not as widespread as anticipated, that a different enforcement approach should be used, or that the project does not contribute to fulfilling the mission of the agency. Placing a GPRA measure on this type of activity would unduly constrain the regions and prevent them from being innovative, hampering the development of new, but untried, methods of deterring and correcting violations of ERISA.

[2] The OIG's draft report asserts that EBSA does not measure non-monetary results. This is incorrect. The GPRA goal numerator includes both monetary and non-monetary fiduciary corrections. EBSA considers non-monetary fiduciary results valuable contributions to our mission. For example, removing breaching fiduciaries from positions of control is a significant way to deter future violations of ERISA. Preventing millions of dollars in unpaid claims from being incurred by removing a fraudulent MEWA operator may be just as valuable as recovering money to get claims paid.

3

**EBSA's Civil Enforcement GPRA Goal**

EBSA has spent over ten years developing a GPRA goal and has come to fully recognize, through its years of experience in developing performance measures, that there is no quantifiable, pure outcome measure for the law enforcement work undertaken by EBSA's enforcement program. This conclusion has been acknowledged repeatedly by external reviewers and performance management experts in the field. In 2003, the then-EBSA Assistant Secretary met with officials from the Office of Management and Budget (OMB) to discuss the ongoing issue of EBSA's GPRA performance measures. After this meeting of OMB, DOL, and EBSA leadership, the parties agreed that it was extremely difficult to measure outcomes for an enforcement program that address the compliance of pension, health and welfare plans, and a range of service providers with a complex federal statute. Based on consultation with outside experts, we did adopt a series of surrogate measures that, we believe, when taken together with other underlying management data, indicate the level of success of the enforcement program. The current GPRA measure is such a surrogate, and has been used and reported on by the Department for a number of years in their integrated performance.

As we pointed out to the OIG audit team, developing GPRA goals that measure program outcome is difficult for other law enforcement agencies as well as for EBSA. In fact, we are unaware of any similarly-situated law enforcement agency that has been able to develop a valid outcome measure. For example, the DOL OIG has adopted performance measures that are purely output measures. Other regulatory agencies have also had difficulty establishing outcome-related goals.

The Federal Deposit Insurance Commission's (FDIC) supervision program is similar to EBSA's enforcement program. Part of the FDIC's goal is to promote the safety and soundness of FDIC-supervised insured depository institutions. However, unlike EBSA, the FDIC is responsible for a limited number of banks, all of which are somewhat similar.[3] Even with the limited number of regulated entities, FDIC's performance goals used to evaluate this strategic goal are almost all output oriented. Indicators include:

- Percentage of required examinations conducted in accordance with statutory requirements and FDIC policy, and
- Percentage of follow-up examinations of problem institutions conducted within required time frames.

FDIC officials have looked for opportunities to establish outcome-related goals but continue to "struggle" with the validity of such measures because there are factors beyond the control of the FDIC that influence achievement of the outcomes.[4]

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[3] The FDIC is the primary federal regulator for 5,197 state-chartered banks, while EBSA is responsible for millions of private sector pension, health, and welfare plans, as well as an unquantifiable number of service providers. FDIC figures from the FDIC 2008 Annual Performance Plan.

[4] Evaluation of the FDIC's Use of Performance Measures, May 2007, Report No. EVAL-07-002, Office of Inspector General, page 3.

4

Some of the Securities and Exchange Commission's performance goals for compliance with securities laws appear to be output-oriented, although they are identified as outcome-oriented.[5]

> Measure: The percentage of exams that resulted in deficiency letters requiring the registrant to take corrective action. [Explanation: Deficiency letters promote compliance with federal securities laws and self regulated organization rules.]

This is very similar to EBSA's measure of the percentage of investigations that resulted in corrective action.

> Measure: Percentage of firms receiving deficiency letters that stated they took or would take corrective action in response to all exam findings. (New measure, added February 2008.)

Although worded differently, this is also similar to EBSA's measure of corrective action taken.

The IRS uses an Employee Plans Compliance rate as one GPRA measure, which is defined as the ratio of plans with no significant compliance issues to the total number of IRS approved private retirement plans. The rate is estimated through an ongoing research program which uses audits of a random sample of plans to assess risks and compliance rates by market segment. The IRS divided its return unit customer population into market segments based on plan type and principal business activities. The baseline studies for these groups were still ongoing at the end of FY 2008. Although the IRS's performance measure identifies improved compliance as an outcome goal, using this study only a preliminary baseline had been developed by FY 2006 and baseline studies for only 18 out of 78 groups had been completed by July 2008. This appears to bring into question the effectiveness of a measure that could take so many years to complete.

In EBSA's continuing effort to measure compliance where feasible, EBSA has conducted discrete, baseline studies of compliance with selected aspects of ERISA, including audit plan quality, Part 7 compliance, and the Employee Contribution Project baseline study, as well as certain follow-up studies. Although these baseline studies provide valuable information, we are not convinced that they are an accurate measure of the effectiveness of EBSA's enforcement program. There are many other factors that influence compliance with ERISA. For example, if a future ECP baseline study indicates that compliance rates have not increased, this may not have any relevance to measuring the effectiveness of EBSA's enforcement program. One of the most-offered reasons why employers do not contribute employee contributions on a timely basis is that other company bills needed to be paid first. This is a factor directly related to the economic environment, not necessarily to the effectiveness of EBSA's enforcement program.

[5] http://www.whitehouse.gov/omb/expectmore/detail/10004456.2005.html#performanceMeasures

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**OIG's RECOMMENDATIONS**

**Recommendation 1: EBSA should clearly define the objective of each of its civil enforcement projects.**

We agree that the objective of each of our national enforcement projects could be clearer. EBSA will expand its public description of the national enforcement projects to include a specific objective of "finding and correcting violations of ERISA." We believe that putting the public on notice of our investigative emphases contributes to the goal of deterring violations of ERISA.

**Recommendation 2: EBSA should establish a performance measure(s) that evaluate(s) each civil enforcement project's outcomes versus the stated objective.**

We disagree with this recommendation. As previously discussed, EBSA has spent an enormous amount of time trying to develop a meaningful and useful performance measure to evaluate our civil enforcement program based on outcomes. Because this has proven fruitless to date, EBSA uses a surrogate measure which is widely recognized as an acceptable alternative by experts in the performance management arena. We discovered early on that there is no practical outcome measure available, and this infeasibility has been acknowledged repeatedly by external reviewers. We note that the OIG's draft report does not recommend an alternative outcome-based performance measure for EBSA.

**Recommendation 3: EBSA should develop guidance for allocating enforcement resources based on intended enforcement outcomes and actual performance results.**

As previously explained, the internal program development guidelines provided to EBSA's regional directors clearly state that EBSA's enforcement program is mission-driven, a mission that is well known to each regional director. All national enforcement projects are implemented with the objective of furthering EBSA's mission to deter and correct violations of ERISA. These projects are developed and continually evaluated by EBSA management.

The OIG report implies that EBSA should focus its resources disproportionately on potential high-dollar results that affect large numbers of participants. EBSA has resisted this formula for resource allocation for many years, as we believe such a measure would interfere with our mission to deter and correct violations of ERISA. Our mission is not limited to correcting only large dollar violations or to protecting only participants and beneficiaries of large plans. Nor do we believe that using pure dollar amounts captures the full impact of our investigations. EBSA has long had a policy to address all participant complaints. Over the years, the process of addressing these complaints has changed, but when EBSA determines that a fiduciary is unwilling to correct a violation, EBSA believes it is important to take appropriate action even if the number of participants or dollars involved is small. Over 80% of 401(k) plans have fewer than 100 participants; half of all 401(k) plans have between 2-24 participants[6]. As our case files reveal, such cases include a review of general records, such as the plan document, financial statements, plan bonds, and other issues. At the close of an ECP case, plan fiduciaries are likely better informed of their obligations under ERISA, including the timelier remittance of

[6] Private Pension Plan Bulletin, December 2008, U.S. DOL, page 42, http://www.dol.gov/ebsa/PDF/2006pensionplanbulletin.PDF

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contributions. We believe this plays a role (albeit not measurable) in deterring future violations and strengthening the security of pension plans. In fact, because we do pursue valid participant complaints, and have a correction ratio of over 80%, we believe we are clearly accomplishing our mission to correct violations of ERISA.

The OIG report stated that EBSA regions differed in their allocations of resources because EBSA headquarters did not provide clear guidance on intended enforcement outcomes. As previously explained, because each region addresses different risks, the regions *should* differ in their allocation of resources. We would not expect a regional office with only a few well-managed ESOPs in its jurisdiction to allocate the same amount of time to the ESOP project as a region in which there are many noncompliant ESOPs. EBSA expects each region to conduct investigations on a full range of plans, service providers, and issues, and to take into account the demographic make-up of its geographic jurisdiction. Furthermore, when a situation such as the collapse of Enron or the uncovering of a massive Ponzi scheme such as that run by Bernard Madoff suddenly arises, regions must have the flexibility to immediately focus on these cases. In our view, each region needs to retain the ability to address the risks within its own jurisdiction.

**CONCLUSION**

EBSA is proud of its civil enforcement program. We protect one of the most important assets in the country today--employee benefits. Although EBSA is highly leveraged, with a comparatively small investigative staff, we allocate these resources in a manner that has allowed us to close nearly 23,000 investigations during the past six fiscal years with fiduciary violations corrected in almost 75% of these investigations. Each of these years produced over $1 billion in monetary results. Most of these corrections have been achieved through voluntary actions; only about 7% have needed to be referred for litigation. Although the OIG report focuses on the civil enforcement program, EBSA investigations have also resulted in over 680 individuals indicted and more than 400 guilty pleas or convictions. Applications under our Voluntary Fiduciary Correction Program have increased from 240 in FY 2003 to more than 1,600 in FY 2008. The new Abandoned Plan Program is receiving more applications to terminate abandoned plans. If not for these two alternative enforcement programs, more investigative resources would have had to be used to conduct investigations.

This success would not have occurred if EBSA had not been developing civil enforcement projects that support its mission of deterring and correcting violations of ERISA, and thoroughly evaluating the success of the projects on an annual basis. EBSA's enforcement program needs to remain flexible enough to accommodate policy considerations and unforeseen occurrences that require quick investigative action. Adopting a rigid mathematical formula against which the enforcement program would be measured does not provide the kind of flexibility demanded by today's economic realities, a situation in which policy choices and decisions must be made in the face of quickly changing circumstances.

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