

GAO

Report to the Ranking Minority
Member, Committee on Health,
Education, Labor and Pensions, U.S.
Senate

January 2007

**EMPLOYEE
BENEFITS SECURITY
ADMINISTRATION**

**Enforcement
Improvements Made
but Additional Actions
Could Further
Enhance Pension Plan
Oversight**





Highlights of [GAO-07-22](#), a report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate

Why GAO Did This Study

The Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) enforces the Employee Retirement Income Security Act of 1974 (ERISA), which sets certain minimum standards for private sector pension plans. On the basis of GAO's prior work, the Senate Committee on Health, Education, Labor and Pensions asked GAO to review EBSA's enforcement program. Specifically, this report assesses (1) the extent to which EBSA has improved its compliance activities since 2002; (2) how EBSA's enforcement practices compare to those of other agencies; and (3) what obstacles, if any, affect ERISA enforcement. To do this, we reviewed EBSA's enforcement strategy and operations, and interviewed officials at EBSA, the Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC), among others.

What GAO Recommends

GAO recommends that EBSA evaluate its enforcement strategy in light of other agencies' strategies, determine how ERISA's filing deadlines affect its investigators, increase coordination with SEC, and determine how attrition affects its operations. EBSA disagreed with our recommendation to evaluate their strategy in light of other agencies' strategies, but agreed with the remaining recommendations.

Congress should consider amending 502(l) of ERISA to give DOL greater discretion to waive the civil penalty, when appropriate.

www.gao.gov/cgi-bin/getrpt?GAO-07-22.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Barbara D. Bovbjerg at (202) 512-7215 or bovbjergb@gao.gov.

EMPLOYEE BENEFITS SECURITY ADMINISTRATION

Enforcement Improvements Made but Additional Actions Could Further Enhance Pension Plan Oversight

What GAO Found

In March 2002, we identified weaknesses in EBSA's enforcement program, despite the agency's actions to strengthen it. Since that time, EBSA has, among other things, promoted coordination among regional investigators and increased participation in its voluntary correction programs, as we recommended. EBSA also has recruited investigators with advanced skills in accounting, finance, banking, and law that officials believe are necessary due to ERISA's technicalities. Yet some weaknesses identified in 2002 remain. Specifically, EBSA still has not adequately assessed the nature and extent of ERISA noncompliance, even though it has taken steps to do so. Without these data, EBSA is not positioned to focus its resources on key areas of noncompliance nor have adequate measurable performance goals to evaluate its impact on improving industry compliance. We also found that while some regional offices did routinely attempt to confer with their respective regional office of the SEC—the agency that oversees many of the same pension service providers under the securities laws—for case leads or to consider trends in potential pension violations, others did not. Lastly, EBSA's overall attrition rates remain high, with many investigators leaving for employment outside the federal government, yet EBSA has taken limited steps to evaluate the effect such attrition has on its operations.

EBSA does not conduct routine compliance examinations and broad, ongoing risk assessments to focus its enforcement efforts like other agencies. Rather, investigators rely on various sources for case leads, such as participant complaints, agency referrals, and computer targeting. While such sources are important, this approach generally limits EBSA to leads discerned by participants and other government agencies or those disclosed by plan sponsors, and not those more complex or hidden. Further, EBSA also has not established a comprehensive risk assessment function. Instead of broad risk assessments, EBSA's annual risk evaluations are generally limited to a risk analysis of frontline investigators' case loads. In contrast, in addition to such activities, IRS and SEC incorporate routine compliance programs in an attempt to detect violations and identify emerging trends that may warrant enforcement action. Also, the SEC and Pension Benefit Guaranty Corporation have dedicated staff to regularly analyze information from various sources, such as investigations and academic research.

Certain statutory obstacles also limit EBSA's oversight of private sector pension plans. First, restrictive legal requirements have limited EBSA's ability to assess penalties against fiduciaries and can impede the restoration of plan assets. DOL officials said that the 502(l) penalty under ERISA discourages quick settlement and can reduce the amount of funds returned to pension plans. Second, EBSA investigators' access to timely information necessary for identifying potential violations is limited by ERISA's filing requirements. Even though EBSA is taking steps to address processing delays, in 2006, investigators were relying on information up to 3 years old to target new case leads in some cases.

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Abbreviations:

CPDF	Central Personnel Data File
DFVC	Delinquent Filer Voluntary Compliance
DOL	Department of Labor
EBSA	Employee Benefits Security Administration
EDS	ERISA Data System
EFAST	ERISA Filing Acceptance System
ERISA	Employee Retirement Income Security Act
FTE	full-time equivalent
IRS	Internal Revenue Service
OCIE	Office of Compliance Inspections and Examinations
OIG	Office of Inspector General
OPM	Office of Personnel Management
ORA	Office of Risk Assessment
PBGC	Pension Benefit Guaranty Corporation
SCEP	Student Career Experience Program
SEC	Securities and Exchange Commission
STEP	Student Temporary Employment Program
VFCP	Voluntary Fiduciary Correction Program

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United States Government Accountability Office
Washington, DC 20548

January 18, 2007

The Honorable Michael B. Enzi
Ranking Minority Member
Committee on Health, Education, Labor and Pensions
United States Senate

Pensions are a vital source of retirement income for millions of Americans. According to the Department of Labor (DOL), America's private sector pension and retirement savings system includes approximately 730,000 plans with assets totaling roughly \$4.9 trillion and covering over 100 million participants. The Department of Labor's Employee Benefits Security Administration (EBSA) is the primary agency responsible for protecting private pension plan participants and beneficiaries from the abuse or theft of their pension assets by enforcing the Employee Retirement Income Security Act of 1974 (ERISA), as amended, which sets certain standards for pension plans sponsored by private sector employers. Because private sector pensions are second only to Social Security in providing individuals' retirement income, effective oversight of the private pension industry's management of these assets is critical to ensure the economic security of workers, retirees, and their families.

In 2002, we reported on EBSA's enforcement program and concluded that certain changes could improve the program's management.¹ Subsequently, we testified before the committee that although EBSA had made progress in improving its enforcement program, significant challenges remained.² In light of prior GAO work, you asked us to review the actions that EBSA has taken to strengthen its enforcement program. Specifically, this report assesses (1) the extent to which EBSA has improved its ability in recent years to enforce and promote compliance with ERISA, (2) how EBSA's enforcement practices compare to those of other federal agencies with similar responsibilities, and (3) what obstacles, if any, affect EBSA's enforcement of ERISA.

¹GAO, *Pension and Welfare Benefits Administration: Opportunities Exist for Improving Management of the Enforcement Program*, [GAO-02-232](#) (Washington, D.C.: March 2002).

²GAO, *Employee Benefits Security Administration: Improvements Have Been Made to Pension Enforcement Program but Significant Challenges Remain*, [GAO-05-784T](#) (Washington, D.C.: June 9, 2005).

To complete our work, we collected and documented information on EBSA's enforcement strategy, operations, and human capital management practices. We reviewed EBSA's efforts to address recommendations from our prior work, focusing on the agency's management of its enforcement program. We interviewed officials from the Department of Labor's Office of the Solicitor and Office of Inspector General as well as EBSA's Office of Participant Assistance, Office of Enforcement, and the Office of the Chief Accountant. In addition, we visited 6 of EBSA's 10 regional offices in Atlanta, Boston, Chicago, Kansas City, Philadelphia, and San Francisco, and 2 of its 5 district offices in Seattle and Washington, D.C., where we interviewed field office management, regional solicitors, investigators, and other staff. We selected these offices to represent a diverse selection of geographic locations and types of investigations conducted in those offices. To assess the reliability of EBSA's enforcement results data, we spoke with agency officials about the data quality control procedures and reviewed relevant documentation. We determined the data were sufficiently reliable for the purposes of this report. We also interviewed officials and obtained information from the Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC) on the enforcement practices they use to regulate the pension and securities industries to determine whether these strategies or practices could be applicable to EBSA's enforcement program. We also collected information on the authorities and practices of the Pension Benefit Guaranty Corporation (PBGC), the agency responsible for insuring defined benefit pension plans. Finally, we met with representatives from professional organizations that represent plan participants and entities that conduct audits of pension plans that EBSA regulates.

We conducted our work between October 2005 and August 2006 in accordance with generally accepted government auditing standards. Appendix I discusses our scope and methodology in further detail.

Results in Brief

In 2002, we reported that while EBSA had taken actions to strengthen its enforcement program, weaknesses existed in EBSA's management of its enforcement strategy and overall human capital management policies, among other things, which limited its enforcement program's effectiveness. Since that review, EBSA has made several improvements to enforce and promote compliance, in part by increasing coordination among its regional investigators, instituting better quality controls, and increasing the return of plan assets to participants through improved participation of plan sponsors in its voluntary correction programs. In addition, EBSA has recruited investigators with advanced skills in

accounting, finance, banking, and law that EBSA officials believe are required because of the technical aspects of ERISA and the changing nature of benefit plans. Nevertheless, some weaknesses we identified in 2002 remain. Specifically, EBSA has not developed complete data to adequately assess the nature and extent of noncompliance that would allow the agency to better focus its resources on areas of vulnerability, such as pension plan mismanagement. Without these data, EBSA also relies on performance measures that field investigators said encourage them to focus on the most obvious cases—those that are easily corrected—rather than on complex and emerging violations where the outcome is less certain. In addition, we found that while some regional offices did routinely attempt to confer with their respective regional office of the SEC—the agency that oversees many of the same pension service providers under the securities laws—for case leads or to consider trends in potential pension violations, others did not. Last, while EBSA has developed strategies regarding its workforce needs, the agency’s overall attrition rates remain high, and it has taken limited steps to evaluate the effect such attrition has on its operations.

Unlike other federal enforcement agencies with similar responsibilities, EBSA does not conduct routine compliance examinations or broad risk assessments to inform its enforcement efforts. Regarding routine compliance examinations, EBSA officials said that such examinations would divert investigators from conducting investigations of alleged violations. Instead, EBSA investigators rely on several sources, such as outside complaints and informal targeting of pension plans, to focus their enforcement efforts. While these sources are important, such methods are generally reactive and may reveal only those violations that are sufficiently obvious for a plan participant to detect or those disclosed by plan sponsors in their pension plan documents, and not those violations that are possibly more complex or hidden. In contrast, IRS and SEC have dedicated compliance examination programs designed to regularly inspect a company’s operations and financial records for violations and emerging trends that may warrant further review by enforcement staff. EBSA also has not established a comprehensive risk assessment function to target enforcement. Instead of broad risk assessments, EBSA’s annual risk evaluations are generally limited to a risk analysis of frontline investigators’ case loads. Unlike EBSA, SEC and PBGC have dedicated staff to routinely analyze data from a variety of sources in order to assess risk within the securities and pension industries in an attempt to better focus agency resources on areas of greatest risk.

Certain statutory obstacles may limit EBSA's oversight of private sector pensions. First, the restrictive legal requirements of the 502(l) penalty under ERISA—a civil penalty assessed against a fiduciary for certain breaches of ERISA—have limited EBSA's ability to assess penalties and restore plan assets. According to EBSA officials, the penalty discourages parties from quickly settling claims of violations, thereby impeding the restoration of plan assets. Further, EBSA officials stated that, in some instances, the penalty reduces the amount of funds returned to pension plans when a plan sponsor is unwilling or cannot fully restore assets and also pay the penalty. Second, while EBSA has taken steps to require the electronic submission and processing of pension plan data, EBSA investigators' access to timely plan data for targeting new case leads is still limited by ERISA filing requirements and processing delays that are caused primarily by the existing paper-based system. As a result, in some cases, investigators were relying on data up to 3 years old to target potential violators.

We are making several recommendations to the Department of Labor that are intended to strengthen EBSA's enforcement program. We are also asking that Congress consider amending ERISA to give the Department of Labor greater discretion to waive the civil penalty assessed against fiduciaries or other persons who violate ERISA in instances where doing so will facilitate the restoration of plan assets. In response to our draft report, EBSA disagreed with our recommendation to evaluate the extent to which it could supplement its current enforcement practices with strategies used by similar enforcement agencies, such as conducting routine compliance examinations or dedicating staff for risk assessment. EBSA noted that because we did not evaluate the effectiveness of strategies used by the agencies highlighted in our report, they were concerned that a recommendation to copy one of the models would be premature given the diversion of investigative resources it would require. However, we do not suggest that EBSA copy the IRS, PBGC, or SEC models; rather, we suggest that EBSA consider incorporating enforcement strategies that are standard practice at these agencies as well as many other federal financial regulators. We recognize and would expect that EBSA's implementation of these standard practices could vary from that of other regulatory models, given the nature of its responsibilities. EBSA agreed with our recommendations to conduct a formal review of the effect that ERISA's filing deadlines have on its investigative staff; establish formal SEC coordination groups in its regional offices, where appropriate; and evaluate the factors affecting staff attrition and take appropriate steps as necessary. EBSA and SEC comments are reproduced in appendixes III and IV, respectively.

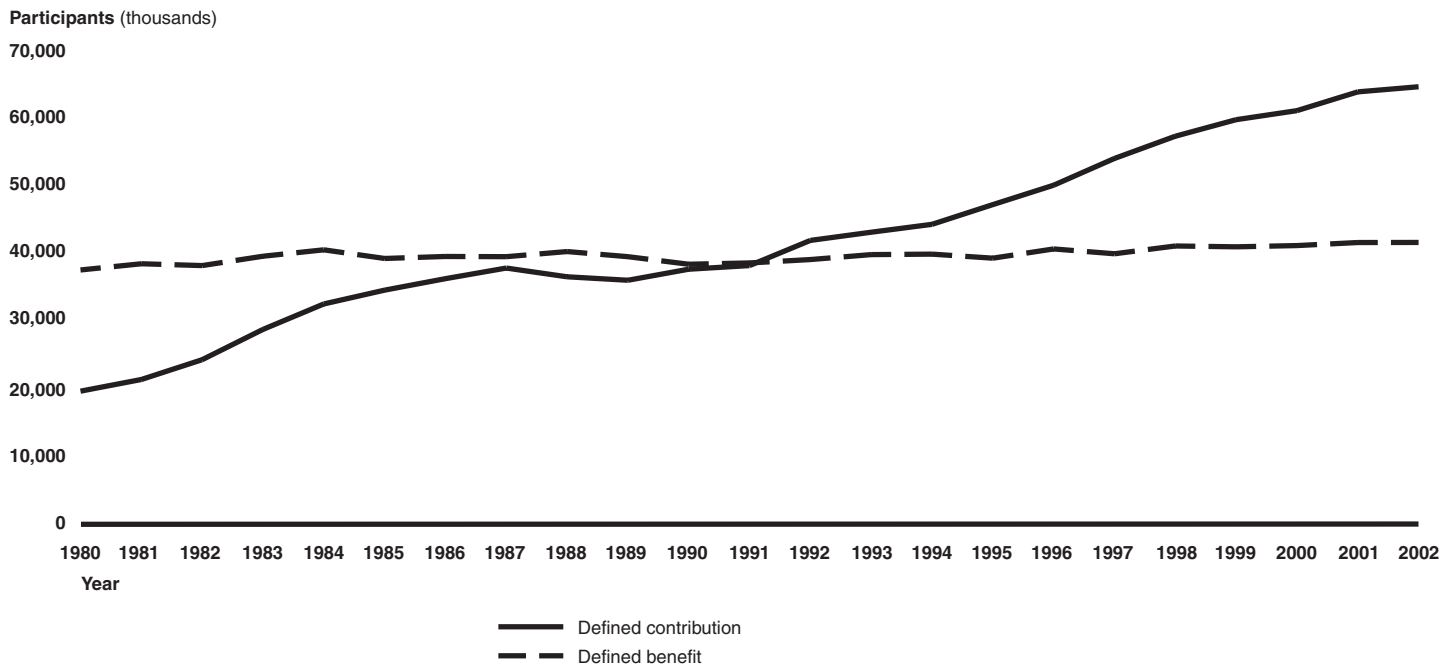
Background

In 1974, Congress passed ERISA to protect the rights and interests of participants and beneficiaries of private sector employee benefit plans. It outlines the responsibilities of employers and administrators who sponsor and manage these plans. ERISA also defines fiduciaries as persons who (1) exercise discretionary authority or control over the management of a private sector employee benefit plan or the plan's assets, (2) render investment advice for a fee or other compensation with respect to plan assets, or (3) have any discretionary authority or responsibility to administer the plan. Under ERISA, fiduciaries are required to act prudently and exclusively in the interest of plan participants and beneficiaries.

ERISA also describes the types of pension plans that private sector employers may sponsor, which include defined benefit and defined contribution plans.³ In 1980, defined benefit plans covered approximately 38 million participants, while some 20 million individuals participated in defined contribution plans. By 2002, the numbers had changed, with roughly 42 million participants covered by defined benefit plans and approximately 65 million participants in defined contribution plans. Figure 1 shows the shift in participation from defined benefit to defined contribution plans since 1980.

³Defined benefit pension plans commonly provide a guaranteed monthly benefit based on a formula that considers salary and years of service to a company. Under defined contribution plans, employees have individual accounts to which an employer, an employee, or both can make periodic contributions. Defined contribution plan benefits are based on contributions and investment returns (gains and losses).

Figure 1: Participants in Defined Benefit and Defined Contribution Plans, 1980-2002



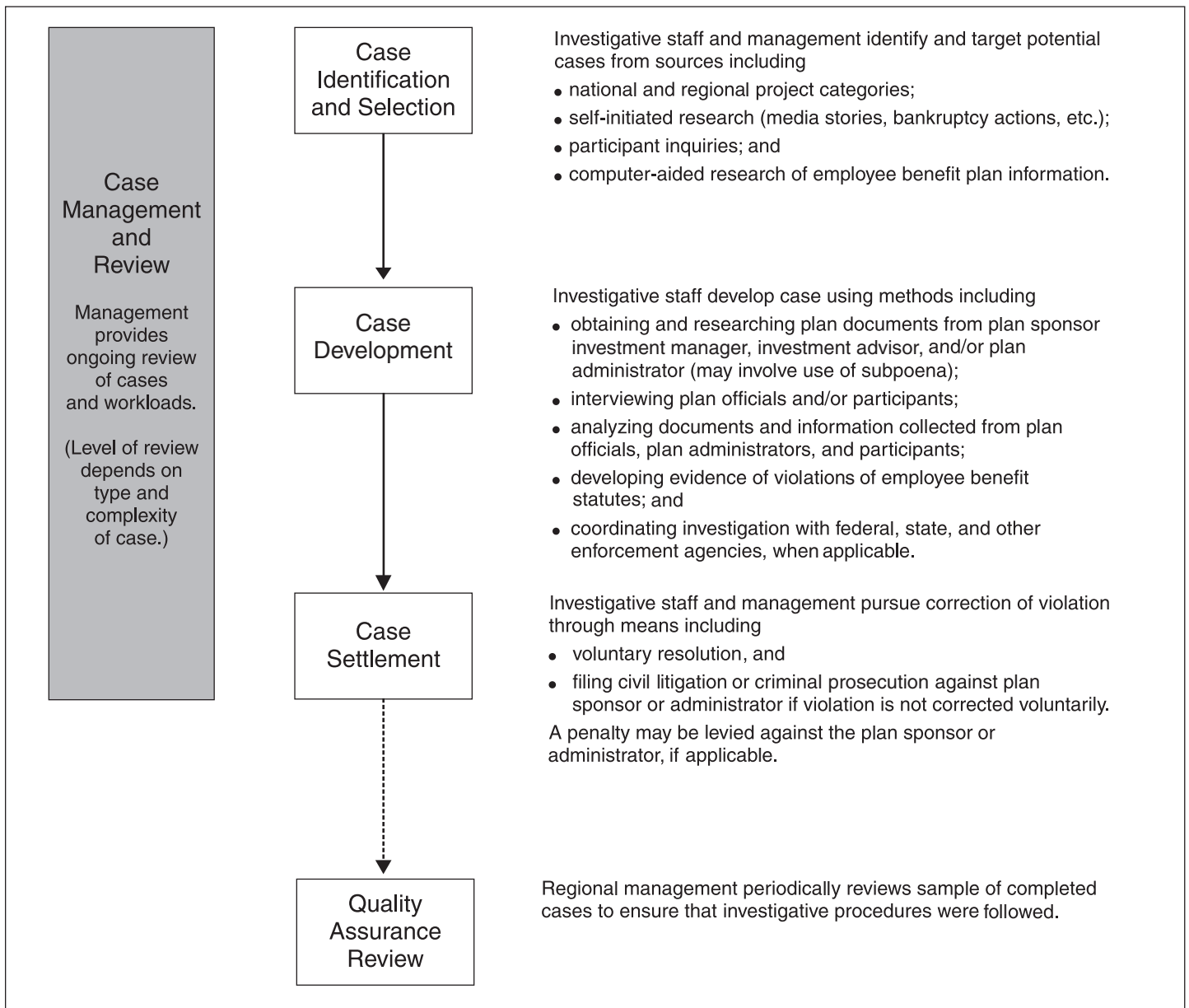
Source: *Private Pension Plan Bulletin: Abstract of 1999, 2000, 2001, and 2002 Form 5500 Annual Reports*, Department of Labor.

According to experts, the fact that more workers are now covered by defined contribution plans rather than defined benefit plans is significant because the risk associated with providing retirement income is shifting toward workers and away from employers. Under defined benefit plans, the employer is typically responsible for funding the plan to cover promised benefits—accounting for any shortfalls due to market fluctuations, poor investment decisions, or changing interest rates. In contrast, under a defined contribution plan, participants are generally responsible for ensuring that they have sufficiently saved for retirement and generally make their own investment decisions. As a result, much of the risk has moved from the employer to the plan participants. Today, with about one-fifth of Americans’ retirement wealth invested in mutual funds, pension and retirement savings plans have become more dependent on the investment services industry. These plans now include new investment vehicles and financial instruments that are more complex and require specialized knowledge and expertise for prudent decision making.

**EBSA Shares the
Responsibility for
Enforcing ERISA with
Other Agencies**

EBSA shares responsibility for enforcing ERISA with the IRS and PBGC. EBSA enforces Title I of ERISA, which specifies, among other standards, certain fiduciary and reporting and disclosure requirements, and seeks to ensure that fiduciaries operate their plans in the best interest of plan participants. EBSA conducts investigations of plan fiduciaries and service providers and seeks appropriate remedies to correct violations of the law, and pursues litigation when they determine necessary, as shown in figure 2.

Figure 2: Overview of EBSA's Investigative Process



Source: GAO analysis of EBSA's process.

IRS enforces Title II of ERISA, which provides, among other standards, tax benefits for plan sponsors and participants, including participant eligibility, vesting, and funding requirements.⁴ IRS audits plans to ensure compliance and can levy tax penalties or revoke tax benefits, as appropriate. In contrast, PBGC, under Title IV of ERISA, insures benefits for defined benefit pension plans when companies default on promised pension benefits. To do so, PBGC collects premiums from plan sponsors and administers payment of pension benefits in the event that these plans terminate without sufficient assets to pay all benefits accrued under the plan to date. Finally, while SEC does not draw authority from ERISA, it is responsible under securities laws for regulating and examining entities registered with SEC, such as investment advisers, managers, and investment companies that often provide services to plans. Additional information on selected agencies' authorities and enforcement practices is contained in appendix II.

According to 2002 data, EBSA's oversight authority covers approximately 3.2 million private sector pension and health benefit plans with assets over \$5 trillion and covering more than 150 million participants.⁵ Of the 3.2 million plans, EBSA reported that approximately 730,000 are pension plans with assets totaling roughly \$4.9 trillion and covering over 100 million participants. EBSA's 385 frontline investigators are primarily responsible for overseeing these employee benefit plans. In contrast, IRS and SEC have oversight responsibility for a smaller number of entities. Specifically, IRS's 389 agents conduct oversight for some 1.3 million pension, profit-sharing, and stock bonus plans,⁶ and the SEC's

⁴To achieve tax benefits, referred to as tax qualified status, plans must comply with a number of requirements in the Internal Revenue Code governing the provisions of contributions and benefits. ERISA also includes minimum standards for how employees become eligible to participate in pension plans (participation standards), how employees earn a nonforfeitable right to their benefits (vesting standards), and how the plans are to be funded (funding provisions).

⁵EBSA also has responsibility for also overseeing other welfare plans, such as those plans established to provide vacation benefits or child care services. However, welfare plans with fewer than 100 participants that are fully insured or otherwise unfunded (hold no assets in trust) are not required to file annual reports, so estimates must be made based on surveys. As of July 2006, EBSA could not provide GAO with an estimate of the total number of these plans, because it had not yet completed an updated survey of such plans. In past years, EBSA has estimated the number of health and other welfare plans at 6 million plans.

⁶IRS's responsibility centers on plans covered by Internal Revenue Code Section 401(a). EBSA shares some responsibility for the same plans; focusing on fiduciary responsibility and prohibited transactions.

1,953 investigators and examiners oversee 17,337 registrants, such as investment advisers and investment companies. Table 1 shows the ratio of investigators, examiners, or agents to the number of plans and entities that EBSA, IRS, and SEC regulate.

Table 1: Ratio of Investigators, Examiners, or Agents to Regulated Employee Benefit Plans and Securities Entities

Agency	Investigators, examiners, or agents	Employee benefit plans/securities entities	Ratio of personnel to regulated plans or entities
EBSA	385	3.2 million ^a pension (0.7 million) and health benefit plans (2.5 million)	1 : 8,000 ^a
IRS	389	1.3 million pension plans: 5500 filers (0.7 million), 5500 EZ filers (0.2 million), and non-5500 filers (0.4 million)— Form 5500s include basic plan information.	1 : 3,000
SEC	1,953 includes 851 examiners and 1,102 investigators	17,337 ^b includes investment advisers (9,022), investment companies (1,002), broker dealers (6,900), transfer agents (400), self- regulatory organizations (11), and clearing agencies (2)	1 : 9

Source: EBSA, IRS, and SEC.

^aBecause of data limitations, not all other welfare plans under EBSA's oversight are included.

^bSEC is also responsible for enforcing certain provisions of the federal securities laws, such as provisions pertaining to fraud, that apply to entities and individuals that are not subject to broad regulation under the laws. For fiscal year 2005, cases primarily classified as involving regulated entities accounted for 32.5 percent of SEC's total actions.

EBSA's field offices conduct investigations to detect and correct violations of Title I of ERISA and related criminal laws. In fiscal year 2005, EBSA had roughly 7,800 ongoing investigations, of which approximately 3,400 were newly opened as a result of various source leads, such as participant complaints, computer targeting, and other agency referrals. EBSA closed about 4,000 investigations during that year.

EBSA's Participant Assistance staff supplements EBSA's enforcement activities by helping plan participants obtain retirement and health benefits that have been improperly denied.⁷ In fiscal year 2005, this office conducted roughly 2,000 outreach events to educate participants,

⁷As of January 31, 2006, EBSA reported that it employed 108 benefits advisers in the field and the National Office of Participant Assistance. These positions are generally responsible for responding to participant complaints and inquiries as well as providing education and outreach to participants and the regulated community.

beneficiaries, plan sponsors, and members of Congress about pension plan rights and obligations, among other topics. In addition, during the same time, the office reported that its benefits advisers closed about 160,000 inquiries and complaints, some of which resulted in monetary recoveries.⁸ In those instances where a complaint was not informally resolved, EBSA officials said that it was referred to the enforcement staff in the field offices for possible investigation. As a result of such referrals, EBSA data showed that its investigators closed almost 1,200 investigations in fiscal year 2005 with monetary results of \$130.24 million.

Additionally, EBSA’s Office of the Chief Accountant is concerned with employee benefit plans’ annual reporting and audit requirements and enforces those provisions through civil penalties under ERISA.⁹ Through their combined efforts, EBSA data indicate that the agency reviewed over 36,000 private sector pension plans in fiscal year 2005. Table 2 shows the number of plans investigated or contacted by each office.

Table 2: Number of Pension Plans EBSA Reviewed in Fiscal Year 2005

EBSA	Total number of plans reviewed
Enforcement	7,752
Participant Assistance	19,522
Office of the Chief Accountant	9,208
Total	36,482

Source: EBSA

Note: According to EBSA, this information includes all plans subjected to some type of review by EBSA—not all plans were given a full review—which included investigations and inquiries into plan activities. For example, EBSA estimated that about 19,500 plans were reviewed, in part, based on responses to about 160,000 participant inquiries. Multiple complaints could be filed for a single plan. Also, according to EBSA, a number of these reviews targeted service providers, a fact that may have a further impact on additional plans serviced by these providers.

DOL’s Office of the Solicitor supports EBSA regional offices by litigating civil cases and providing legal support. In fiscal year 2005, the office litigated 178 of the 258 civil cases referred to it by EBSA. In addition, EBSA conducts criminal investigations in consultation with the U.S.

⁸We did not independently verify whether the amount reported as a recovery by EBSA was actually restored to the respective employee benefit plans and participants.

⁹The Office of the Chief Accountant comprises three divisions: the Division of Accounting Services, the Division of Reporting and Compliance, and the Division of Federal Employees’ Retirement Income Security Act of 1986 Compliance.

Attorneys' offices and in many cases, conducts joint enforcement actions with other federal, state, and local law enforcement agencies. EBSA conducted about 200 criminal investigations in fiscal year 2005. As a result, over 100 plan officials, corporate officers, and pension plan service providers were indicted.

EBSA Has Made Improvements to Its Enforcement Program, but Challenges Remain

In 2002, we identified several weaknesses in EBSA's management of its enforcement program, including the lack of a centrally coordinated quality review process, better coordination needed among its investigators, the lack of data to assess the nature and extent of noncompliance, and limited attention to its human capital management, despite the agency's actions to strengthen the program in prior years. Since our 2002 review, EBSA has improved its enforcement program. However, several challenges remain. The agency has promoted coordination among regional investigators, implemented quality controls, and developed strategies to address its workforce needs. To promote compliance, EBSA has increased its educational outreach to plan participants, sponsors, and service providers, and increased participation in its voluntary correction programs. However, the agency has not fully addressed concerns from our prior reviews. Specifically, EBSA still has not (1) developed complete data on the nature and extent of plans' noncompliance, (2) established a formal coordination protocol with SEC within its regional offices, and (3) formally evaluated the factors affecting staff attrition.

EBSA Has Made Some Progress in Improving Its Enforcement Program

In recent years, EBSA has addressed many of the concerns we raised in our 2002 review. As shown in table 3, such improvements include promoting coordination among regional investigators, implementing quality controls, and developing strategies to meet its workforce needs.

Table 3: EBSA Actions Taken in Response to GAO Recommendations from 2002 Review

GAO observation	GAO recommendation to EBSA	Examples of EBSA actions to address recommendation
<p>Certain requirements, such as notifying plan participants of potential violations and levying excise taxes on prohibited transactions, may hinder participation in the Voluntary Fiduciary Correction Program (VFCP).</p>	<p>Analyze barriers to participation in the VFCP and explore ways to reduce them.</p>	<p>EBSA has simplified and expanded the original VFCP regulation published in 2002, which describes how to apply for voluntary correction, the 19 categories of transactions covered, acceptable methods for correcting violations, and examples of potential violations and corrective actions. Applications received for voluntary corrections increased from 55 in fiscal year 2002 to 985 in fiscal year 2005.</p>
<p>EBSA had not adequately estimated the nature of employee benefit plans' noncompliance with ERISA provisions.</p>	<p>Develop a cost-effective strategy for assessing the level and type of ERISA noncompliance among employee benefit plans.</p>	<p>In fiscal year 2001, EBSA conducted a national compliance study of group health plans' compliance with the new health care laws in ERISA. In 2003, EBSA conducted a compliance study focusing on large multi-employer health plans. Currently, the agency is conducting a baseline study to determine the level of compliance with ERISA requirements on timely transmission of employee contributions to pension plans.</p>
<p>EBSA gave limited attention to human capital management despite anticipated workforce and enforcement workload changes. For example, the agency had not considered succession planning and workforce retention, which could undermine the continuity and effectiveness of its enforcement program.</p>	<p>Conduct a comprehensive review of the agency's future human capital needs, including the size of its workforce, the skills and abilities needed, succession planning challenges, and staff deployment issues.</p>	<p>EBSA conducted an employee workforce analysis and an employee training needs assessment. In 2003, DOL issued its Human Capital Strategic Management Plan, which provided DOL's strategies for addressing current and projected skills shortages, anticipated future staffing needs, and competency requirements to ensure that employees possess or acquire the critical skills needed to accomplish program mission and functions.</p>
<p>EBSA lacked a centrally coordinated quality review process to ensure that its investigations are conducted in accordance with its investigative procedures.</p>	<p>Develop a closed case quality review process that ensures the independence of reviewers and sufficiently focuses on substantive technical case issues.</p>	<p>In fiscal year 2003, an EBSA team composed of Office of Enforcement and field managers developed a closed case quality review program. The program focuses on substantive technical issues, and findings are reported centrally to the national office. Although regional office officials administering the program reviewed their own office's cases for quality, the program includes procedures to ensure the independence of the case reviewer.</p>
<p>EBSA had not routinely analyzed the full range of cases investigated to determine which sources were the most effective in terms of detecting and correcting violations.</p>	<p>Conduct regular reviews of the sources of cases that lead to investigations.</p>	<p>EBSA conducted analysis on cases closed in fiscal years 2001, 2002, 2003, and 2004. The agency agreed to perform reviews of the sources of cases that lead to investigations on an annual basis as long as resources permit.</p>
<p>EBSA did not coordinate the sharing of best practices information among its regions regarding case selection and investigative techniques.</p>	<p>Coordinate the sharing of best practices information among regions relating to the optimum and most productive techniques for selecting and conducting investigations.</p>	<p>EBSA established a Best Practices Sharing Team composed of enforcement staff and regional representatives. The agency also developed an intranet site to allow its investigators to share best practices, such as investigative plans, subpoenas, letters, and investigative guides.</p>

Source: GAO analysis.

As part of its workforce efforts, EBSA has recruited investigators with advanced skills in accounting, finance, banking, and law that EBSA believes are required because of the technical aspects of ERISA and the changing nature of benefit plans. As of September 2005, EBSA employees were among some of the highest educated within DOL, and EBSA staff data indicated that investigators have wide-ranging skills and backgrounds similar to those investigators at IRS and SEC. For example, EBSA reported that 46 percent of its investigators hold law degrees, with some of these staff also holding additional degrees or certificates in accounting or business administration as well as other subject areas. Also, EBSA reported that 27 percent of its investigators or auditors had undergraduate degrees in accounting, with several also having skills in forensic accounting or fraud examination. Several investigators and auditors had other advanced degrees, such as master's degrees in business administration, law, and public policy, as well as backgrounds in securities, taxation, banking, insurance, and employee benefits. Recognizing a need for fraud examination skills, EBSA now includes a course on forensic accounting in its basic training of newly hired investigators, and EBSA data showed that the agency also sent many of its investigators to the Federal Law Enforcement Training Center over the last several years to take courses in fraud examination as well as money laundering and health care fraud.

Since 2002, EBSA has also used several initiatives to recruit its staff. EBSA recruiters attend a variety of job fairs, college campuses, and other events to identify and contact applicants with necessary skills. Further, to provide national office directors and regional directors additional tools to recruit for all occupations, authority has been delegated to approve certain human capital flexibilities, such as advances in pay and payment of travel expenses for employment interviews.

In addition to attending recruitment events, EBSA uses three principal programs to recruit students from law schools, business schools, and other specialized disciplines. These programs are the

-
- **Student Career Experience Program (SCEP):** designed for students to work in positions related to their academic field of study while enrolled in school.¹⁰ Upon graduation, interns may convert to full-time career employees. Since 2002, EBSA has employed roughly 100 SCEP participants. As of July 2006, EBSA reported that 28 students were participating in the program.
 - **Student Temporary Employment Program (STEP):** designed for the temporary employment of students ranging from a summer internship to a period generally not to exceed 1 year. According to officials, some STEP interns join the SCEP program after the summer internship ends. Since 2002, EBSA has employed 115 interns in the STEP program. As of July 2006, EBSA reported that it had 4 participants.
 - **Federal Career Intern Program:** a 2-year internship program that can result in conversion to career employment. EBSA just recently began using this program to recruit full-time employees who have recently obtained an undergraduate or graduate degree. According to EBSA, the program, which allows the agency to recruit students outside of the normal hiring process, is much faster and more streamlined, enabling EBSA to better target candidates. As of July 2006, EBSA reported that 24 students were participating in EBSA's program and were not yet eligible for conversion.

Furthermore, DOL offers an agencywide Masters of Business Administration Fellows Program, which is used to recruit business school graduates. This is a 2-year rotational program, at the end of which fellows may be converted to career employees. As of 2006, 76 fellows had taken part in the program across all DOL agencies, including EBSA.

In addition to addressing our prior concerns on the management of the enforcement program, EBSA has established formal criminal coordinator positions for each regional office and increased funds returned to participants through its assistance. With regard to its criminal coordinators, EBSA created a new position in each regional office,

¹⁰To be eligible for the SCEP, students must be enrolled or accepted for enrollment in a program of study leading to a degree, diploma, or certificate at an accredited high school, technical or vocational school, 2- or 4-year college or university, or graduate or professional school.

modeled after its national office coordinator position, to facilitate relationships with law enforcement agencies at the regional level. The position works with law enforcement agencies and prosecutors at all levels to improve the likelihood that criminal violations will be recognized and appropriately investigated. Regional office officials believe that the position expands their opportunities for criminal prosecutions. For example, one regional official said that if the U.S. Attorney's office did not believe it was cost-effective to prosecute an alleged violation, the regional coordinator would refer cases to the local district attorney's office for prosecution. Additionally, several regional office officials believed that the new position would help them better coordinate their criminal investigations, ultimately increasing criminal prosecutions.

EBSA also continues to provide education to plan participants, sponsors, and service providers to promote compliance. EBSA's education program is designed to increase plan participants' knowledge of their rights and benefits under ERISA. For example, EBSA anticipates that through education, participants will become more likely to recognize potential problems and notify EBSA when issues arise. The agency also conducts outreach to plan sponsors and service providers, in part, about fiduciary responsibilities and obligations under ERISA. For example, EBSA's benefit advisers speak at conferences and seminars sponsored by trade and professional groups and participate in outreach and educational efforts in conjunction with other federal or state agencies. Some outreach activities include

- briefings to congressional offices, state insurance commissioners, and other federal, state, and community organizations;
- fiduciary compliance assistance seminars for employers, plan sponsors, and practitioners; and
- on-site assistance to dislocated workers facing job loss as a result of plant closure or layoffs.

EBSA has also increased funds returned to participants through its assistance. For example, for fiscal year 2002, the Office of Participant Assistance reported that it had recovered approximately \$49 million on behalf of participants. As of fiscal year 2005, the office reported that it had increased that amount to about \$88 million.

At the same time, EBSA has increased its enforcement results since 2002. According to EBSA data, in fiscal year 2002, for every dollar invested in EBSA, the agency's investigators produced about \$7.50 in financial benefits, or roughly \$830 million in total monetary recoveries. As of fiscal

year 2005, they were producing just over \$12 for every dollar—a total of \$1.6 billion. EBSA officials said that the agency has achieved these results, in part, because of recent program improvements and with relatively small increases in staff. Full-time equivalent (FTE) authorized staff levels increased from 850 in fiscal year 2001 to 875 FTEs in fiscal year 2006. As of August 2006, 385 of the 875 FTEs were frontline field investigators.

In addition, EBSA has increased compliance through its Voluntary Fiduciary Correction Program (VFCP) and its Delinquent Filer Voluntary Compliance (DFVC) Program. The VFCP allows plan officials to disclose and correct certain violations without penalty. The program is designed to protect the financial security of workers by encouraging employers and plan officials to voluntarily comply with ERISA and allows those potentially liable for some fiduciary violations under to ERISA to apply for relief from enforcement actions and certain penalties, provided they meet specified criteria and follow program procedures. Specifically, plan officials can correct 19 types of transactions, such as the remittance of delinquent participant contributions and participant loan repayments to pension plans. If the regional office determines that the applicant has met the program's terms, it will issue a "no action" letter to the applicant—avoiding a potential civil investigation and penalty assessment. As a result of the program, in fiscal year 2005, EBSA reported that \$7.4 million was voluntarily restored to employee benefit plans. Furthermore, the DFVC program is designed to encourage plan administrators to comply with ERISA's filing requirements. According to EBSA data, the program has increased the number of unfiled annual reports received from about 3,000 in fiscal year 2002 to over 13,000 in fiscal year 2005.

EBSA Still Does Not Estimate Overall Industry Compliance, Regularly Confer With SEC Staff on Industry Trends, and Address Retention of Investigators

Despite improvements in its enforcement efforts, EBSA has not completely addressed several weaknesses we previously identified. Specifically, 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. In 2002, we recommended that EBSA take steps to develop a cost-effective strategy for assessing the level and type of noncompliance among employee benefit plans. In response, EBSA stated that it had established its ERISA Compliance Assessment Committee and had embarked on a statistical study to gauge health plans' noncompliance with the provisions of Part 7 of ERISA, dealing with group

health plan requirements.¹¹ Although EBSA has conducted and continues to generate some statistical studies to measure noncompliance in the pension and health care industries, its pension compliance data remain limited, focusing on information such as the timeliness and full remittance of employee contributions to defined contribution plans. However, as of June 2006, EBSA officials could not provide an estimated time frame for results of its timeliness and remittance study. Although EBSA has taken steps, the agency still did not know the nature and extent of noncompliance within the pension industry, and its ERISA Compliance Assessment Committee had not yet planned any additional pension compliance baseline studies.

EBSA's limited noncompliance information may also prevent EBSA from effectively measuring the overall performance of its enforcement program. The Government Performance and Results Act of 1993 requires that executive agencies demonstrate effectiveness through measurable result-oriented goals. According to the Office of Management and Budget,¹² DOL has selected output measures as proxies to compensate for the difficulty in measuring overall performance. Since our 2002 review, EBSA's enforcement program continues to use performance measures that generally focus on how well the agency is managing and using its resources—such as the number of specific investigations closed with results—rather than on its overall impact on the security of employee benefits. Some regional office officials we visited raised concerns that the current measures and expected increases to EBSA's performance goals in the coming years would likely result in an inability to review and conduct more complex cases, given each office's limited resources and the need to close cases with results. For example, one of EBSA's performance goals is to close 69 percent of its civil investigations with results in 2006, with planned increases to that goal of 3 percent per year until 2008—to 75 percent. Some regional officials stated that meeting the revised performance goal encourages a focus on cases that are more obvious and easily corrected, such as those involving employee defined contribution

¹¹Part 7 of ERISA includes requirements on group health plan portability, access, and renewability, including limitations on the use of preexisting condition exclusions based on health status.

¹²The U.S. Office of Management and Budget assists the President in overseeing the preparation of the federal budget and supervising its administration of executive branch agencies. Furthermore, the agency evaluates the effectiveness of agency programs, policies, and procedures; assesses competing funding demands among agencies; and sets funding priorities.

plans, rather than on investigations of complex and emerging violations where the outcome is less certain and may take longer to attain. Without data to assess the extent and nature of noncompliance, as we recommended in 2002, EBSA will continue not to have effective measures for assessing the overall effectiveness of its enforcement program.

In a 2005 testimony, we also noted that EBSA needed to better coordinate with the SEC on issues related to the securities and pension industries.¹³ Although the two agencies periodically share information, we found that EBSA has not yet established a systematic procedure by which its investigators in all its regional offices can regularly confer with their respective SEC regional office. Under the securities laws, SEC is subject to confidentiality restrictions with respect to information it can disclose to EBSA pertaining to an ongoing investigation, even if the information pertains to possible violations of ERISA.¹⁴ For example, if SEC investigates a securities trading firm and has reason to believe that information discovered during the investigation might be of interest to EBSA investigators, SEC may alert EBSA to their findings. Likewise, EBSA investigators can alert SEC to information that is discovered during an ERISA investigation that might be of interest to SEC. However, unlike EBSA, SEC may not share documentation associated with its findings unless EBSA submits a written request for information which, if approved, allows access to any evidence that SEC has obtained during the course of its investigation.

In an attempt to expedite the information-sharing process, certain EBSA regional offices, but not all, have established informal working groups of investigators that regularly meet with SEC investigators to exchange information. For example, one region has established an “SEC Group,” which regularly meets with SEC investigators to develop case information and potential leads. In contrast, another region stated that it has very little contact with SEC and only learns about SEC investigations through the media. While not all EBSA regional and district offices may have the same need to interact with SEC because of the nature of the private sector companies within their jurisdiction, EBSA may not have knowledge of an SEC investigation involving the same entity in those offices where no

¹³GAO-05-784T.

¹⁴SEC personnel are prohibited from disclosing information obtained as a result of an examination or investigation without the approval of senior management at the SEC acting pursuant to delegated authority of the SEC.

working group exists unless such knowledge is disclosed to the public, therefore limiting its awareness of potential violations.

Further, EBSA has not developed initiatives to ensure retention of its investigative staff, despite its improvements in human capital management. In 2002, we reported that EBSA had one of the highest attrition rates within DOL. Since our review, we found that EBSA’s overall attrition rate remained high, and in recent years, attrition rates for EBSA’s investigators appear to have risen. Table 4 shows the attrition rates of EBSA investigators including students that occupy investigator positions in the GS-1801 series, as compared to the attrition rates of similar groups.

Table 4: Overall Attrition Rates (Percentages) for EBSA Investigators, Other EBSA Employees, DOL, and Other Federal Agencies, Fiscal Years 2001-2005

Fiscal year	EBSA investigators ^a	EBSA agencywide	All other DOL employees	All other federal investigators ^a
2001	7.1	9.4	9.1	5.2
2002	3.3	8.4	8.7	4.3
2003	3.4	7.2	6.7	6.3
2004	5.6	8.9	6.1	5.4
2005	11.2	10.8	8.8	5.2

Source: GAO analysis of OPM’s Central Personnel Data File.

^aInvestigators represent all designated GS-1801 investigative positions, including those employed under the student temporary employment program. EBSA investigators in training (students—GS-1899 series) are not included in the attrition rate calculations—attrition for 1899 classification is: 62 percent ('01), 83 percent ('02), 63 percent ('03), 54 percent ('04), and 45 percent ('05). EBSA also hires auditors—classified as a GS-511—which are a part of the investigative staff. 511 auditors are not included in the table. We determined the overall attrition rates for this classification as follows: 10.4 percent ('01), 2.3 percent ('02), 8.6 percent ('03), 9.7 percent ('04), and 7.7 percent ('05).

Specifically, data suggest that EBSA’s attrition rates for investigators have climbed since 2002, and as of 2005, EBSA investigators were leaving at twice the rate of other federal investigators. In fact, as of fiscal year 2005, EBSA had lost 102 investigators since fiscal year 2002 for various reasons, such as resignations and retirement. For example, in fiscal year 2005, EBSA lost 52 investigators, of which 34 left for employment outside of the federal government.¹⁵ While this may be due in part to EBSA employing

¹⁵In prior fiscal years, the following number of investigators left EBSA for various reasons including retirement, resignations, and terminations: 45 ('00) 26 ('01), 13 ('02), 14 ('03), and 23 ('04).

temporary students as entry-level investigators, between fiscal year 2002 and fiscal year 2005, 58 investigators had left EBSA for employment outside of the federal government.

According to regional office officials in several offices we visited, particularly in major urban areas, they had difficulties retaining newly hired investigators because of insufficient compensation, and some believed that these staff used EBSA as a training ground for the private sector employee benefit plan industry where they could earn higher salaries. For example, in the San Francisco regional office, officials reported that the investigator attrition rate has averaged about 13 percent per year, and as of April 2006, officials reported that 50 percent of their staff had less than 3 years of experience. While other agencies may face similar attrition problems in such urban areas, EBSA has taken limited steps to evaluate the impact such attrition has on its operations.

Officials from EBSA's Office of Program Planning, Evaluation and Management reported that the agency dropped earlier considerations for retention strategies, such as student loan repayment and retention bonuses, in view of data that suggest investigators are usually leaving for much higher salaries elsewhere. Although EBSA has employed exit surveys, the agency has limited processes to evaluate why its investigators are leaving the agency, nor has the agency evaluated the extent to which other retention initiatives may be useful. While EBSA may be able to recruit new investigators and to fill vacant positions, the continued turnover requires additional resources for training new staff. Further, the relative inexperience of new staff may have an adverse effect on EBSA's enforcement program's efforts.

Unlike Other Agencies, EBSA Does Not Conduct Routine Compliance Examinations or Comprehensive Risk Assessments

Although EBSA regularly targets violations, it does not conduct routine compliance examinations or comprehensive risk assessments to direct its enforcement practices, as do other federal agencies that share similar responsibilities. Rather, the agency relies on various sources for case leads, such as outside complaints and informal targeting of plans, to focus its enforcement efforts. While these leads are important, in addition to undertaking such activities, agencies such as IRS and SEC have developed routine compliance programs to detect violations and identify emerging trends that may warrant further examination by enforcement staff. Moreover, SEC and PBGC have dedicated staff to perform broad risk assessments by analyzing information from multiple sources in order to anticipate, identify, and manage risks to investors and to the pension insurance system.

EBSA Does Not Conduct Routine Compliance Examinations

EBSA does not conduct routine compliance examinations—evaluations of a company’s books, records, and internal controls—limiting its ability to detect and deter violations. Rather than conduct such examinations, EBSA relies on several sources for case leads. For example, EBSA uses participant complaints and other agency referrals as sources of investigative leads and to detect potential violations. Moreover, EBSA identifies leads, in part, through informal targeting efforts by investigators, primarily using data reported by plan sponsors on their Form 5500 annual returns. While these sources are important, such methods are generally reactive and may reveal only those violations that are sufficiently obvious for a plan participant to detect or those disclosed by plan sponsors on their Form 5500s,¹⁶ and not those violations that are possibly more complex or hidden. Nevertheless, EBSA officials raised concerns that conducting such examinations would divert resources from EBSA’s current enforcement practices.

In contrast, IRS and SEC use such examinations in an effort to detect violations or identify weaknesses that could lead to violations. IRS’s Office of Employee Plans administers a compliance examination program to detect violations of tax laws related to pension plans. According to agency officials, IRS dedicates eight staff members for selecting entities for examinations, and IRS uses a risk-based process for selecting and scoping such examinations. If a violation is detected during an examination, IRS can subsequently levy penalties and excise taxes on the violators.¹⁷ In fiscal year 2005, the Office of Employee Plans closed 8,230 examinations. Similarly, SEC’s Office of Compliance Inspections and Examinations (OCIE) detects violations of securities laws through its examination

¹⁶ERISA requires that most pension plan sponsors file an annual report called the Form 5500, which is a major source of information about the plan and provides a key compliance tool for identifying and targeting potential violations. The 5500 is the primary source of detailed pension plan information and is used by EBSA, IRS, and PBGC for compliance, research, and public disclosure purposes. Information collected on the form includes basic plan identifying information as well as detailed plan information, including assets, liabilities, insurance and financial transactions, audited financial statements, and for defined benefit plans, an actuarial statement.

¹⁷An excise tax applies to certain types of distributions from qualified plans. According to IRS, about 16,000 plans owed excise taxes totaling roughly \$129 million for various violations, including failure to meet certain funding standards, excess fringe benefits, and failure to protect liquidity shortfalls between December 2004 and November 2005.

program.¹⁸ OCIE examines advisers, investment companies, broker-dealers, and other registered entities to evaluate their compliance with the federal securities laws, to determine if they are operating in accordance with disclosures made to investors, and to assess the effectiveness of their compliance control systems. SEC conducted 2,056 examinations of investment advisers and investment companies in fiscal year 2005.

IRS also uses examinations in an attempt to identify emerging areas of noncompliance and analyze compliance risk levels among specific types of pension plans. IRS plans to use this information in its risk-based examination selection process, similar to recommendations that we made to EBSA in 2002. As part of this effort, IRS, which has a similar resource level to EBSA, is in the process of conducting examinations to develop compliance baselines for 79 market segments it identified based on business sector and plan type. For example, IRS is developing separate baseline compliance levels for 401(k) plans, defined benefit plans, employee stock ownership plans,¹⁹ and profit-sharing plans in the construction industry. IRS officials expect the baselines to be completed by the end of fiscal year 2007. Likewise, SEC, which has fewer entities to oversee and more resources than EBSA, attempts to use its examination program to identify emerging trends. In addition to its other examination types, SEC conducts sweep examinations—compliance examinations that focus on specific industry issues among a number of registrants—to remain informed of securities industry developments. For example, SEC initiated a sweep examination of several pension plan service providers to identify conflicts of interest between the providers and the plan sponsors.²⁰

Furthermore, because of the number of EBSA investigators relative to employee benefit plans, EBSA's presence in the pension industry is limited, therefore decreasing the possibility that a plan may be

¹⁸SEC's examination program includes three main types of examinations—cause, routine, and sweep. Cause examinations are initiated for a specific reason, such as an investor complaint of an alleged violation. Routine examinations, compliance examinations initiated on a risk-based cycle, are the most common. SEC conducts sweep examinations, which focus on specific industry issues rather than a specific registrant, to examine specific risk areas.

¹⁹An employee stock ownership plan is a retirement plan into which the company contributes its stock for the benefit of the company's employees. With such plans, employees do not buy or hold the stock directly.

²⁰U.S. Securities and Exchange Commission. *Staff Report Concerning Examinations of Select Pension Consultants* (Washington, D.C.: May 16, 2005).

investigated. A compliance examination program, in part, is designed to establish a presence by regularly reviewing entities' operations, thereby likely creating a deterrent to noncompliance. For example, IRS officials said that they believe that their program deters violations from occurring because they select many plans for review each year based on established risk criteria. Because fiduciaries are unsure when IRS's agents may review their activities, IRS officials believe that the agency has created an environment that encourages compliance. Likewise, EBSA officials believe that their voluntary compliance programs are also successful at deterring violations, because employers and fiduciaries want to disclose and correct violations instead of being investigated and prosecuted. However, given the ratio of employee benefit plans to investigators, EBSA's limited presence may create an incentive for fiduciaries or plan sponsors to take compliance lightly, even though EBSA attempts to deter violations through its correction programs and publicizing its enforcement results.

EBSA Has Not Dedicated Staff to Formalized Risk Assessment

Although EBSA's enforcement strategy emphasizes targeting violations and protecting plan participants at risk, EBSA has no staff dedicated to conduct broad risk assessments of multiple sources of information, including, but not limited to, investigations, academic research, compliance studies, and other market data. While the agency attempts to identify areas of risk through its efforts in establishing its national priorities and projects, this effort ultimately relies on regional investigators to identify developing problems—generally in the course of their existing investigations. EBSA's Strategic Enforcement Plan directs EBSA to establish national investigative priorities to ensure that its enforcement program focuses on areas critical to the well-being of employee benefit plans. On the basis of these priorities, EBSA annually develops national and regional projects based on unique or problematic issues identified within a region's geographic jurisdiction in accordance with its strategic plan. Depending on the prevalence of a specific problem across regions, it can be elevated to a national project. For example, EBSA has recently implemented a national project focusing on pension consulting services, called the Consultant/Advisor Project, which is aimed at identifying plan service providers, particularly investment advisers, who may have a conflict of interest that could affect the objectivity of the advice they provide their pension plan clients. However, because EBSA relies primarily on identifying risk through its investigations and targeting, which offer no systematic, analytic process for anticipating new types of violations before they become pervasive, its risk assessment approach may be limited.

Unlike EBSA, some federal agencies, such as SEC and PBGC, have dedicated staff to analyzing information from multiple sources to assess external risk within their regulated industries. Once risks are identified, the agencies develop and focus their enforcement strategies to mitigate and manage them. In 2004, SEC established the Office of Risk Assessment (ORA) to coordinate the SEC's risk management program. While relatively small, ORA serves as the agency's risk management resource and works with other SEC departments to identify and manage risks. According to ORA officials, the office's five staff identify and assess areas of concern through expert analysis, such as new and resurgent forms of fraud and illegal activities. For instance, ORA worked in conjunction with OCIE to develop a database to collect and catalog such issues within the securities industry in order to evaluate risk to investors. OCIE then uses this database to select cases for its examination program. Also, PBGC has dedicated one employee—supported by staff in various departments—for risk assessment within its Department of Insurance Supervision and Compliance. PBGC officials believe this has strengthened its operational capability to identify and monitor risks to its pension insurance program, including macroeconomic factors, industry-specific risks, and matters relating to specific plan sponsors. PBGC officials also stated that these efforts play a role in PBGC's financial reporting processes, including valuing its benefit liabilities and determining whether liabilities associated with distressed plans should be classified as liabilities in PBGC's financial statements, as required by generally accepted accounting principles.

Statutory Obstacles May Limit EBSA's Ability to Oversee Pension Plans Effectively

Certain statutory obstacles may limit EBSA's effectiveness in overseeing private sector pension plans. First, the restrictive legal requirements of the 502(l) penalty under ERISA have limited EBSA's ability to assess penalties and restore plan assets. According to EBSA officials, the penalty discourages parties from quickly settling claims of violations, thereby impeding the restoration of plan assets. Further, EBSA officials stated that in some instances, the penalty can also reduce the amount of money restored to plan participants when a plan sponsor is unwilling to or cannot fully restore assets and pay the penalty. Second, investigators' access to timely plan data for targeting new case leads is limited by ERISA filing deadlines. As a result, the data can be several years old. In fact, in some cases, investigators were relying on data up to 3 years old to target potential violators. While EBSA is constrained by ERISA's filing requirements, the agency has taken steps to address processing delays in an effort to provide more timely data to investigators and to improve its targeting efforts.

Restrictive Statutory Requirements Can Impede the Restoration of Plan Assets

Restrictive legal requirements have limited EBSA's ability to assess penalties against fiduciaries or other persons who knowingly participate in a fiduciary breach, and the penalty provision under Section 502(l) of ERISA has delayed and in certain instances prevented the restoration of funds to pension plans. Under ERISA, EBSA must assess penalties based on monetary damages, or more specifically, the restoration of plan assets.²¹ Section 502(l) of ERISA requires EBSA to assess a 20 percent penalty against a fiduciary who breaches a fiduciary duty under, or commits a violation of, Part 4 of Title I of ERISA or against any other person who knowingly participates in such a breach or violation, and the penalty is 20 percent of (1) the "applicable recovery amount," (2) the amount of any settlement agreed upon by the Secretary, or (3) the amount ordered by a court to be paid in a judicial proceeding instituted by the Secretary. However, the penalty can only be assessed against fiduciaries or knowing participants in a breach by court order or settlement agreement. Therefore, if there is no settlement agreement, or court order, or if someone other than the fiduciary or knowing participant returns plan assets, EBSA cannot assess the penalty.

In those instances where EBSA does pursue formal settlement, officials stated that the penalty can discourage parties from quickly settling claims of violations, because violators almost always insist on resolving all of EBSA's claims in one settlement package, including both the amount to be paid to the plan and the amount paid in the form of a penalty. In many of these cases, violators have contested the penalty, in turn delaying settlement and impeding restoration of plan assets.

In addition, officials stated that the penalty can, in some instances, reduce the amount of money restored to the plan participant when a plan sponsor is unwilling to or cannot fully restore assets and pay the penalty. Currently, EBSA has limited discretion to waive or reduce the 20 percent penalty in situations where it reduces the funds returned to the plan.²² Because ERISA requires the penalty to be paid to the U.S. Department of the Treasury, if insufficient funds exist to restore plan assets and pay the penalty, plan assets may not be completely restored. For example, if a plan sponsor is found to have breached its fiduciary duty and the amount

²¹EBSA can also seek removal of a fiduciary for breaches of fiduciary duty or seek other sanctions.

²²The Secretary of Labor may waive or reduce the penalty if: (1) the fiduciary or other person acted reasonably and in good faith, or (2) because of severe financial hardship.

involved is \$1,000,000 and the sponsor has only \$900,000 left in its possession, the amount returned to the plan participants will be \$720,000 (80 percent), and a penalty of \$180,000 (20 percent) will be paid to the U.S. Treasury.

Investigators' Access to Timely Data Limited by ERISA Filing Deadlines

Under ERISA, plan sponsors have up to 285 days to file their annual Form 5500 reports,²³ limiting EBSA investigators' access to timely information necessary for targeting new case leads. In addition, as we reported in 2005, processing delays and the time necessary to correct errors can result in a further delay of up to 120 days after a plan's year end—increasing the potential delay to over 400 days.²⁴ As a result, in 2006, EBSA investigators were generally relying on information from 2003 and 2004 to target violations. Because of these delays, fiduciaries may have more time to misappropriate plan assets, causing harm to participants for long periods before violations are identified.

Unlike IRS, which supplements its 5500 reviews with risk-based compliance examinations, EBSA relies primarily on the 5500 data maintained in its ERISA Data System (EDS) for performing its targeting efforts. According to officials, EDS provides EBSA investigators with about 30 pre-designed, standard programs as well as an ad hoc query capability to target pension plans that are perceived to have an increased likelihood of violations. For example, investigators stated that, historically, some construction contractors have established pensions for workers involved with a particular project and then abandoned the plan at the project's completion without fully funding the plan. In this scenario, investigators can use EDS ad hoc query capability to obtain data on such plans. However, because of untimely information, plans could already be abandoned before EBSA investigators identified these types of violations.

While EBSA is constrained by ERISA's filing requirements, the agency has taken steps to address processing delays in an effort to obtain more timely information to improve its targeting efforts. In its fiscal year 2007 appropriation request, DOL requested funding for an updated electronic filing system—known as EFAST2—with the goal of expediting the Form

²³A plan has 210 days from the end of the plan year to file the 5500, and plans may apply for an extension of an additional 2½ months.

²⁴GAO, *Private Pensions: Government Actions Could Improve the Timeliness and Content of Form 5500 Pension Information*, [GAO-05-491](#) (Washington, D.C.: June 2005).

5500 filing process in two ways. First, EFAST2 is designed so that it will not accept Form 5500 data submissions unless they pass a series of edit checks. EBSA officials stated that the change should reduce errors and processing times. Second, EFAST2 should capture data from prior year filings in a manner that officials believe will be more conducive to analysis than the current ERISA Filing Acceptance System (EFAST). This new system is intended to replace the current process, where approximately 98 percent of Form 5500s are filed using paper forms, with the remainder filed electronically through EFAST. EBSA officials stated that the current paper filings take more than three times longer to process than electronic filings and have nearly twice as many errors. To address these issues, EBSA recently issued a regulation requiring the electronic filing of all Form 5500s for plan years beginning on or after January 1, 2008. EBSA officials believe that the new requirements and system features will provide EBSA with more timely data.

Conclusions

EBSA is a relatively small agency facing the daunting challenge of safeguarding the retirement assets of millions of American workers, retirees, and their families. Since our 2002 review, EBSA has taken a number of steps to strengthen its enforcement program and leverage its resources in an effort to implement its enforcement strategy. The agency has directed the majority of its resources toward enforcement and has decentralized its investigative authority to the regions, allowing its investigators more flexibility to focus on issues pertinent to their region. Yet despite these improvements, EBSA's ability to protect plan participants against the misuse of pension plan assets is still limited, because its enforcement approach is not as comprehensive as those of other federal agencies, and generally focuses only on what it derives from its investigations.

While it has employed some proactive measures, such as computerized targeting of pension plan documents, EBSA remains largely reactive in its enforcement approach, thus potentially missing opportunities to address problems before trends of noncompliance are well established. Currently, EBSA does not have the institutional capacity to comprehensively identify and evaluate evidence of potential risk to participants before emerging violations become pervasive. Although EBSA evaluates risk through the development of its annual national and regional projects, the agency does not conduct routine compliance examinations, which could add a key piece to the foundation on which to base its broad risk analyses. Further, the agency does not systematically draw on outside sources of information, such as academic studies and industry experts, nor does it

formally assess risk on an ongoing basis, as similar agencies do. As a result, EBSA is restricted in its ability to detect new and emerging trends or weaknesses that may occur throughout the entire pension industry. However, even if EBSA were to conduct such examinations and collect additional information, it would not be in a position to identify overarching problems from these data, because it does not have a dedicated workforce for such efforts.

We understand that dedicating staff for the purpose of identifying risks may require trade-offs among EBSA's competing priorities. Given that EBSA investigators are tasked with the responsibility for overseeing roughly 3.2 million private pension and health benefit plans, such trade-offs must be considered carefully, and may involve the inclusion of other offices within the agency. Nevertheless, a formal risk assessment function can be conducted with modest staff allocations, as demonstrated by the PBGC and SEC risk assessment functions. Furthermore, if EBSA officials believe that these trade-offs would adversely affect its enforcement operations, the agency has the option of seeking additional resources from Congress, if necessary. However, such a request should only occur after the agency has explored and achieved all available efficiencies within its existing resource allocations. Whatever approach is ultimately taken, it is critical that EBSA take steps to employ a more assertive enforcement approach, or a portion of the pension industry will, in essence, continue to lack effective oversight.

While EBSA is considering such options, it is vital that the agency further explore opportunities to strengthen its existing enforcement program. Although EBSA and SEC periodically coordinate efforts on multiple issues, the agencies must explore opportunities to identify questionable activities through a more systematic coordination effort throughout their regional offices. While we recognize that not all EBSA regional and district offices may have the same need to interact with SEC, access to information that SEC has obtained about potential violations could save investigative resources for both agencies and may also expedite the prosecution of fiduciaries who are violating the law. EBSA must also explore all possibilities to retain skilled staff so that it does not have to spend its limited resources on training new staff, and minimize the loss of institutional experience. Additionally, even though EBSA has taken steps to address the Form 5500 processing delays, EBSA investigators' access to timely plan information necessary for targeting new case leads is still limited by ERISA's filing deadline. Moreover, opportunities to expedite settlements and restore funds to pension plans may be lost by the fact that EBSA has little authority, under current law, to waive a mandatory penalty

when it prevents fully restoring assets to participants. At a time when the retirement of millions of Americans is imminent, it is more important than ever to take all possible measures to protect their pension assets.

Matter for Congressional Consideration

To strengthen DOL's ability to protect pension plan assets, Congress should consider amending section 502(1) of ERISA to give DOL greater discretion to waive the civil penalty assessed against a fiduciary or other person who breaches or violates ERISA in instances where doing so would facilitate the restoration of plan assets.

Recommendations for Executive Action

To improve overall compliance and oversight, we recommend that the Secretary of Labor direct the Assistant Secretary of Labor, EBSA, to

- evaluate the extent to which EBSA could supplement its current enforcement practices with strategies used by similar enforcement agencies, such as routine compliance examinations and dedicating staff for risk assessment, and
- conduct a formal review to determine the effect that ERISA's statutory filing deadlines have on investigators' access to timely information and the likely impact if these deadlines were shortened.

Direct the Office of Enforcement to

- establish, where appropriate, formal SEC coordination groups in the regional offices, similar to those already in place in some EBSA regions.

Direct the Office of Program Planning, Evaluation and Management to

- evaluate the factors affecting staff attrition and take appropriate steps, as necessary. Such an effort might include a market-based study to assess comparable private sector compensation within specific geographic locations and include recommendations for modifying pay structures, if appropriate.

Agency Comments and Our Evaluation

We obtained written comments on a draft of this report from the Acting Assistant Secretary for the Employee Benefits Security Administration, Department of Labor, and from the Director of Enforcement, for the Securities and Exchange Commission. EBSA and SEC's comments are reproduced in appendix III and appendix IV, respectively. EBSA and SEC,

as well as IRS and PBGC, also provided technical comments, which were incorporated in the report where appropriate.

EBSA agreed with three of the four recommendations we made to the Secretary of Labor to strengthen EBSA's enforcement program. EBSA disagreed with our recommendation to evaluate the extent to which the agency could supplement its current enforcement practices with other enforcement strategies, such as conducting routine compliance examinations and dedicating staff for risk assessment. While EBSA agreed that it should continue to evaluate its enforcement practices on an on-going basis, the agency stated that it would be premature to emulate the SEC and IRS models because GAO did not assess the effectiveness of these models. However, our report does not suggest that EBSA copy the IRS, PBGC, or SEC models; rather, we suggest that EBSA consider incorporating enforcement strategies that are standard practice at many federal financial regulators, such as the federal banking regulators that constitute the Federal Financial Institutions Examination Council as well as at IRS and SEC. Further, we have highlighted the potential benefit of these enforcement strategies in prior GAO work. We recognize and would expect that EBSA's implementation of these standard practices could vary from other regulatory models, given the nature of its responsibilities. We continue to believe that these practices could have merit for EBSA and therefore deserve further consideration.

In addition, EBSA commented that our recommendation to evaluate the extent to which it could supplement its investigations with routine compliance examinations appeared to be premised on the assumption that "some number of completely random investigations would have a significant deterrent effect and could better enable [EBSA] to identify emerging areas of noncompliance." We do not believe that completely random investigations are appropriate, nor do we recommend that EBSA conduct them. Rather, EBSA should consider developing a compliance examination program that uses risk-based criteria to target larger or higher-risk pension plans with the goal of examining these plans more frequently. Based on these criteria, EBSA could select a sample of plans to review each year which may identify emerging areas of noncompliance with modest resource allocations.

EBSA noted that it has conducted routine compliance examinations in the past as part of its investigative process, an action that it concluded resulted in a low number of cases with violations. We believe that examinations and investigations are two distinct enforcement practices. Specifically, compliance examinations should not only detect potential

violations and deter noncompliance, but also identify mismanagement or questionable practices that may warrant additional scrutiny by investigators. Investigations are generally conducted in response to possible violations, which can be identified through compliance examinations and other sources. We believe that when used together, routine compliance examinations and investigations can provide a better enforcement capability than investigations alone.

EBSA commented that the process it uses to identify risk has many of the same characteristics as the risk assessment process described in our report, and that EBSA investigators gather valuable information from employee benefit professionals. Our report recognizes that EBSA evaluates risk through its efforts in annually establishing its national priorities and projects by reviewing its investigations. However, we believe that EBSA's risk assessment efforts fall short of practices used by other agencies because the agency lacks staff dedicated to continuously monitoring the private sector pension industry and bases its current risk assessment approach primarily on its investigative findings. According to GAO's *Standards for Internal Controls*,²⁵ agencies should establish an assessment of the risks the agency faces from both internal and external sources. For example, agencies should have mechanisms in place to anticipate, identify, and react to risks presented by changes, including economic, industry, and regulatory changes, that can affect the achievement of agency goals and objectives. Although EBSA has taken some steps to do this, certain patterns of risk may go undetected because EBSA does not have staff dedicated to evaluating risk across the entire industry, even though such an effort would not require extensive resources as our report highlights. If EBSA were to supplement its existing enforcement efforts with staff dedicated to continuously reviewing information from multiple sources, such as its investigators' interviews with employee benefits professionals, findings by other agencies, compliance studies, and academic research, the agency could better anticipate, identify, and react to risk as it emerges, rather than after established patterns of risk are detected during its annual planning process. We continue to believe that by relying primarily upon the identification of risks through its investigations and the existing targeting process, some emerging trends or abuse could go undetected.

²⁵GAO. *Internal Control Management and Evaluation Tool*. GAO-01-1008G (Washington, D.C.: August 2001).

As we agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after its issue date. At that time, we will send copies of this report to the Secretary of Labor, the Commissioner of the IRS, the Chairman of the SEC, and other interested parties. We will also make copies available to others on request. If you or your staff have any questions concerning this report, please call me at (202) 512-7215. Key contributors are listed in appendix V.

Sincerely yours,

A handwritten signature in black ink that reads "Barbara D. Bovbjerg". The signature is written in a cursive style with a large, stylized initial "B".

Barbara D. Bovbjerg
Director, Education, Workforce, and
Income Security Issues

Appendix I: Scope and Methodology

To determine the steps that the Employee Benefits Security Administration (EBSA) has taken in recent years to enforce and promote Employee Retirement Income Security Act of 1974 (ERISA) compliance, we collected and documented information on EBSA's enforcement strategy, operations, and human capital management practices. We reviewed EBSA's efforts to address recommendations from our prior work, focusing on the agency's management of its enforcement program. To document the management of EBSA's enforcement program, we collected and reviewed EBSA's policies, such as its Strategic Enforcement Plan, Enforcement Manual, and regional Program Operating Plans. In addition, we obtained EBSA's enforcement results for fiscal years 2001-2005. EBSA maintains these results in its Enforcement Management System. This system was designed to support not only strategic policy decisions, but also day-to-day management of investigator inventories and activities. To verify the reliability of EBSA's enforcement results data, we interviewed officials from EBSA's Office of Technology and Information Services and corroborated the data with system documentation and the systems that produced the data. We reviewed the data for obvious inconsistency errors and completeness. From this review, we determined that the EBSA-supplied data were sufficiently reliable for the purposes of this report and account for EBSA's enforcement results. We also used data from the 2002 and 2004 waves of the Health and Retirement Study to examine retirement income by source at the median because of the presence of extreme outliers. The rank order of Social Security and pensions and annuities is the same when evaluated at the mean or median.

We also interviewed officials from the Department of Labor's (DOL) Office of the Solicitor, and Office of Inspector General, as well as EBSA's Office of Enforcement, Office of Participant Assistance, and Office of the Chief Accountant. In addition, we selected and visited EBSA's regional and district offices in Atlanta, Boston, Chicago, Kansas City, Philadelphia, San Francisco, Seattle, and Washington, D.C., where we interviewed EBSA field office management, regional solicitors, staff, and investigators. We selected these offices based on geographic location and the number and types of investigations conducted. Further, we met with representatives from professional organizations that represent entities regulated by EBSA and plan participants and conduct audits of pension plans.

In addition, we collected and examined information on EBSA enforcement initiatives, the results of its prior internal reviews, and studies performed by the DOL Office of Inspector General (OIG). To determine the statutory restrictions that limit the sharing of information between EBSA and the Securities and Exchange Commission (SEC), we interviewed EBSA

investigators, managers, and attorneys. We also interviewed officials at SEC and reviewed the applicable securities laws that govern the sharing of information related to SEC investigations. Finally, we reviewed past GAO work on SEC and consulted the teams within GAO that regularly review SEC operations.

Moreover, to verify claims by regional offices that offices were experiencing high rates of attrition, we analyzed data from the Office of Personnel Management's Central Personnel Data File (CPDF). Using these data, we identified the newly hired investigators and followed them over time to see how many left EBSA. We identified all new hires for fiscal years 2000 through 2005 by using personal action codes for accessions and career conditional positions. Next, we determined whether these individuals had personnel activity indicating they had separated from EBSA. Separations (attritions) included resignations, retirements, terminations, and deaths. For more on the reliability of the CPDF, see GAO's report on the topic.¹

To determine the overall attrition rates for EBSA investigators (not just new hires), we analyzed data from the CPDF for fiscal years 2000 to 2005. For each fiscal year, we counted the number of employees with personnel actions indicating they had separated from EBSA. We did include investigators in training, who are classified as GS-1801 investigators, because these individuals draw down on EBSA's overall full-time equivalents and play an important part of its hiring process. We divided the total number of separations for each fiscal year by the average of the number of permanent employees in the CPDF as of the last pay period of the fiscal year before the fiscal year of the separations and the number of permanent employees in the CPDF as of the last pay period of the fiscal year of separations. To place the attrition rates for EBSA investigators in context, we compared EBSA's attrition rates to those for employees in other occupations and agencies (EBSA employees, all other DOL, and all other employees in the executive branch of the federal government.)

To identify how EBSA practices compare to those of other agencies, we interviewed officials from SEC, the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation. We selected these agencies given their responsibilities in regulating different segments of the private

¹GAO, *OPM's Central Personnel Data File: Data Appear Sufficiently Reliable to Meet Most Customer Needs*, GAO/GGD-98199 (Washington, D.C.: Sep. 30, 1995).

sector pension industry. To identify the types of authorities and practices that these agencies used, we collected and reviewed documentation from ERISA, the Securities Exchange Act of 1934, the Investment Advisors Act of 1940, and the Investment Company Act of 1940, as well as prior GAO reports. However, we did not evaluate the effectiveness of these agencies' compliance examination, enforcement, or risk assessment programs. From this review, we conducted a comparative analysis to identify what types of authorities and practices other agencies might have that EBSA did not—a detailed comparison can be found in appendix II.

Furthermore, we identified statutory obstacles within ERISA that limit EBSA's ability to enforce ERISA—the inefficient nature of Section 502(l) of ERISA and the lack of timely information for investigators resulting from annual reporting deadlines. To identify these obstacles, we interviewed several former and current EBSA investigators, reviewed past GAO and DOL OIG reports on ERISA enforcement, and collected and reviewed various documents to corroborate the testimonial evidence obtained. Specifically, to determine EBSA's authority to waive a penalty that, in certain situations, reduces the amount of assets returned to plan participants, we interviewed EBSA investigators and other officials that assess and collect the penalty. We also reviewed the relevant section of ERISA, which requires the Secretary of Labor to assess the penalty under Section 502(l). We obtained and reviewed information regarding the number of times the penalty was assessed and the total amount collected as a result of the penalty. Finally, we obtained and reviewed court decisions that involved the assessment of the 502(l) penalty. Furthermore, to determine the timeliness of the information—provided on the Form 5500—that EBSA investigators use for targeting purposes, we interviewed EBSA investigators and management to identify the ways in which 5500 data are used to identify potential violations. We also reviewed a past GAO report that thoroughly reviewed the Form 5500 and the processes that contribute to the length of time between a plan's year end and the time when the information is available for use by investigators. Additionally, we obtained and reviewed system documentation on the ERISA Data System (EDS)—the system that EBSA uses to store and query the 5500 information. Finally, we interviewed EBSA personnel that are involved in developing EFAST2, a new electronic filing system that will purportedly enable all 5500s to be filed electronically for reporting years beginning on or after January 1, 2008.

Appendix II: Comparison of Selected Federal Agencies' Authorities, Enforcement Practices, Results, and Resources

The Employee Benefits Security Administration, the Internal Revenue Service, and the Securities and Exchange Commission are responsible for enforcing laws designed to protect pension plan participants and other securities investors. A comparison of the agencies' authorities, responsibilities, and enforcement practices shows that EBSA lacks certain authorities compared to those of other agencies and uses different practices.

Authorities and Penalties

Title I of ERISA provides the Secretary of Labor, through EBSA, the authority to investigate and enforce the requirements and standards of Title I. Civil penalties of up to \$1,100 per day may be assessed for certain violations of reporting and disclosure obligations and a 20 percent penalty on an applicable recovery amount may be assessed related to a fiduciary breach. There are a number of fairly particularized penalties under ERISA that EBSA can impose. Unlike IRS and SEC, EBSA does not have the enforcement authority to disband, suspend, or take any effective action against a plan auditor for substandard audits of employee benefit plan, because plan auditors are not considered fiduciaries under ERISA.

Title II of ERISA, which amended the Internal Revenue Code (the Code) to parallel many of the Title I rules, is administered by IRS. The principal responsibility under the Code for IRS is to determine that plans meet certain tax qualification requirements as specified in the Code. IRS has broad authority to revoke certain tax benefits to plan sponsors if they do not meet these requirements. IRS can also assess certain penalties for failure to file or furnish certain information required to be filed with the agency pertaining to plans.

SEC, under federal securities laws, has broad authority to enforce and regulate the sale of securities and disclosure of information concerning these securities. SEC has authority, under its regulations, to maintain fair and orderly securities markets and requires specified disclosures of corporate financial statements. SEC, through civil penalties and fines, may enforce the securities laws to ensure compliance and may impose penalties ranging from \$5,000 to \$500,000 per violation, or in some cases the amount of pecuniary gain to the defendant as a result of the violation. Also, if SEC finds substandard audit work, it has the authority to bar, censure, or suspend auditors responsible for such work.

Appendix II: Comparison of Selected Federal Agencies' Authorities, Enforcement Practices, Results, and Resources

	EBSA	IRS	SEC
Regulated industry	Total employee benefit plans: 3.2 million Pension plans: 733,000 Health plans: 2.5 million	Total pension plans: 1.3 million plans 724,000 (5500 filers) 221,000 (5500 EZ filers) 353,000 (non-5500 filers)	Total registered securities entities: 17,337 Investment advisers: 9,022 Investment companies: 1,002 Broker/dealers: 6,900 Transfer agents: 400 Self-regulatory organizations: 11 Clearing agencies: 2
Offices with enforcement related responsibilities	Office of Enforcement (OE) Office of Participant Assistance (OPA) Office of the Chief Accountant (OCA)	Office of Employee Plans (EP) • Examinations • Rulings and Agreements (R&A) • Employee Plans Compliance Unit (EPCU)	Division of Enforcement Office of Compliance Inspections and Examinations (OCIE) Office of Risk Assessment (ORA)
Practices	Responding to participant complaints (OPA) Investigations (OE) Voluntary compliance programs (OE, OCA) Reporting and disclosure audits (OCA)	Establish compliance baselines for risk assessment (Examinations) Centralized case selection process (Examinations) Compliance examinations (Examinations) "Soft contact" compliance programs (EPCU) Voluntary compliance programs (R&A) Determinations (R&A)	Investigations (Enforcement) Compliance examination programs (OCIE) Formalized risk assessment (ORA)
Strategic goals	Enhance pension and health benefit security	Enhance enforcement of the tax law	Enforce compliance with federal securities laws
Performance measures	Ratio of closed civil cases with corrected violations to closed civil cases Ratio of criminal cases referred for prosecution to total criminal cases Applications to voluntary compliance programs Customer satisfaction index	Timeliness Examination quality Examination cases closed EPCU compliance contacts Customer satisfaction	Investment advisers and investment companies examined Percentage of first enforcement cases filed within 2 years Enforcement cases successfully resolved

Appendix II: Comparison of Selected Federal Agencies' Authorities, Enforcement Practices, Results, and Resources

	EBSA	IRS	SEC
Fiscal year 2005 results	Plans investigated: 7,752 ^a Civil and criminal investigations closed: 3,978 Closed civil cases with corrected violations: 76% Referred criminal cases: 45% Plans reviewed for violations by OPA: 19,522 Voluntary compliance applications received: 985 Plans reviewed for completeness by OCA: 9,208 Customer satisfaction index: 67%	Examinations closed: 8,230 EPCU compliance contacts: 145 ^b Determinations made: 39,864 ^b Voluntary compliance applications: 1,707 ^b Customer satisfaction for determinations: 61% ^b Customer satisfaction for examinations: 70% ^b	Investment advisers examined: 1,530 Investment companies examined: 527 Percentage of first enforcement cases filed within 2 years: 65% Enforcement cases successfully resolved: 99%
Fiscal year 2005 resources	2005 appropriation for ERISA enforcement activities: \$131,000,000 Number of investigators: 385 Number of benefits advisors: 108	2005 appropriation for Office of Employee Plans: \$91,230,910 Number of agents for compliance examinations: 389	2005 appropriation for Division of Enforcement: \$316,000,000 Number of investigators: 1,102 2005 appropriation for Office of Compliance Inspections and Examinations: \$210,000,000 Number of examiners for investment advisers and investment companies: 489 Number of examiners for broker-sealers and self regulatory organizations: 362

Source: EBSA, IRS, and SEC.

^aThis includes health and pension plans

^bThis is as of August 2005

Appendix III: Comments from Employee Benefits Security Administration

U.S. Department of Labor

Assistant Secretary for
Employee Benefits Security Administration
Washington, D.C. 20210



December 19, 2006

Barbara D. Bovbjerg
Director, Education, Workforce, and
Income Security Issues
United States Government Accountability Office
Washington, DC 20548

Dear Ms. Bovbjerg:

We have reviewed the Government Accountability Office's (GAO) draft report entitled "Employee Benefits Security Administration: Enforcement Improvements Made but Additional Actions Could Further Enhance Pension Plan Oversight" (GAO-07-22). This letter provides our general comments concerning the draft report; we already have provided technical comments directly to your staff.

Agency Actions Since the 2002 GAO Report

We appreciate GAO's recognition of the actions that we have taken since your last review in 2002 with respect to increasing coordination among our regional investigators,¹ obtaining increased participation in our voluntary correction programs, and recruiting investigators with advanced skills. As noted in your report, these steps have enabled EBSA to increase its enforcement results from \$830 million in fiscal year 2002 to \$1.6 billion in fiscal year 2005. In fact, fiscal year 2003 through fiscal year 2006 enforcement results are the highest in the Agency's history, averaging 171% higher than the preceding four year period from fiscal year 1999 through fiscal year 2002.

While we recognize that overall management and oversight can always be improved, EBSA has worked diligently to develop an enforcement program that strives to maximize results obtained with available resources. As GAO recommended in 2002, our Agency carefully reviews and analyzes the sources of cases that lead to investigations. This has enabled us to more effectively select as investigative targets those plans or other entities that are likely to have engaged in violations of ERISA. We also have shared "best practices" among the regions, enabling the regions to identify the most productive techniques for selecting and conducting investigations. We have conducted baseline studies on the level of compliance with ERISA Title I, Part 7, and with our regulation on the timely deposit of employee contributions to 401(k) plans. Changes in the Voluntary Fiduciary Correction Program (VFCP) have removed or lessened barriers to participation, and voluntary corrections have increased dramatically. Therefore, our investigative staff is able to focus on more complex issues and on those fiduciaries who are less willing to correct violations.

¹ Whenever the term "investigators" is used, it also includes GS-511 auditors who perform the same functions.

Recommendation No. 1: Evaluate the extent to which EBSA could supplement its current enforcement practices with strategies used by similar enforcement agencies, such as routine compliance examinations and dedicating staff for risk assessment.

Given the size of the plan universe that the Agency 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. Your recommendation that we evaluate the usefulness of conducting "routine compliance examinations" appears to be premised on the assumption that some number of completely random investigations would have a significant deterrent effect and could better enable us to identify emerging areas of noncompliance.

Detering violations

We agree that deterring violations is critical; it is so important that it forms part of our agency's mission statement. However, we disagree with the premise that investigating randomly-selected plans would have a greater deterrent effect than our current efforts. Given the size of the plan universe, and the remote likelihood that a particular plan would be randomly selected for investigation, a program of routine compliance examinations could well have the opposite effect. Plan fiduciaries might take more risks with plan assets, knowing that, under a random selection, their plan was unlikely to be investigated.

Instead of trying to create a deterrent effect through routine compliance examinations, we try to create that effect through strategic deployment of our available investigative resources. Our regional directors are required, as part of our strategic plan, to establish an enforcement program that creates a visible EBSA presence throughout each region, pursuant to national priorities, regional priorities, and individually selected cases. We also try to create a deterrent effect by publicizing the results of investigations that are resolved through litigation. In addition, we try to prevent violations through the compliance assistance components of our outreach, education, and assistance program.

Identifying emerging areas of noncompliance

Your report suggests that routine compliance examinations could enable EBSA to identify emerging areas of noncompliance. In past years, we conducted routine compliance examinations as a regular part of our investigative program. However, this "resulted in a low percentage of cases with violations found and corrected," with no discernable deterrent effect. Therefore, we began to target plans or other entities with a high likelihood of having violated ERISA.

Targeting is done through a variety of techniques, many of which you identified in your report. Investigations are now opened mainly as a result of different targeting methods, including specified projects (both regional and national), analyses of Form 5500s, referrals from other agencies, and participant complaints. We believe that these methods of selecting cases have been very successful, and have enabled us to fully meet the GPRA goals by which the Department and OMB measure the success of our enforcement

program. The percentage of investigations with violations corrected has steadily increased over the years. In fiscal year 2005, over 75% of our civil cases closed resulted in corrected violations and approximately 45% of our criminal cases were referred for prosecution.

It should be noted that all investigations include a review of general records, such as the plan document, financial statements, claims procedures (for health plans), timing of contributions (when there are participant contributions), and the like. Therefore, even if an investigation initially focuses on a specific issue, every plan investigated does get an overall review. This approach enables us to identify emerging areas of noncompliance and is aimed at achieving our goal of protecting the pensions of workers' and their families.

You correctly identified participant complaints as a significant source of investigations, and they certainly assist us in our risk assessment activities. As participants become more computer savvy, and their pension and health insurance information becomes more available electronically, participants are able to identify problems such as delinquent contributions almost immediately. We also receive valuable information from employee benefits professionals. Investigators, supervisors, and managers, both in the field and in the national office, regularly attend industry events. This gives EBSA staff the opportunity to speak with professionals, and these professionals will often identify potential problems within their particular field. In fact, many of our employees' performance standards require that they keep abreast of changes in the industry. In addition, when we conduct our annual evaluation of our enforcement strategy, we incorporate information concerning trends in the economy, such as the rate of employer bankruptcies; findings by other agencies, such as the SEC's Pension Consultant Project; and Departmental policy concerns.

Dedicating staff to risk assessment

While we have not formally labeled it as a "risk assessment program," EBSA has a process in place for administering our enforcement program which has many of the same characteristics as the specific risk assessment process described in the draft report.

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, initiatives are developed to support these priorities. There are two types of initiatives: national projects, which are directly based on the StEP goals; and regional projects, which are localized investigative projects undertaken by individual EBSA regional offices. These regional initiatives 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 initiative, based on case selection guidance issued by the Office of Enforcement. This

guidance directs the regions to target cases throughout their geographic areas, to concentrate on larger plans, and to target a variety of ERISA issues. In this manner, EBSA systematically draws upon the talents of its investigators and managers to evaluate and analyze areas of risk in the employee benefits field, integrating their professional judgment and considerable experience into our enforcement program planning and management process.

In each annual planning cycle, the information developed through investigations is analyzed at both the regional and national levels, and is used to develop new initiatives and/or investigative priorities. If a region finds enough cases with a similar compliance problem, the region may decide to conduct a regional initiative on that issue. Similarly, if more than one region finds a high rate of noncompliance in similar regional initiatives, or if a single regional initiative finds a high rate of noncompliance on an issue that is likely to affect plans nationwide, the Agency may decide to develop a new national initiative. In addition, information developed through the enforcement program has pointed out the need for new regulations. It is also used to help prioritize the development of compliance assistance workshops and publications. In short, the enforcement program has a systematic and integrated approach toward identifying at-risk populations, developing initiatives to address those risks at both the national and regional levels, providing a structured way for investigators and field managers to identify new and emerging risks, and incorporating these findings into not only the strategic plans for the enforcement program, but also the strategic plans for the whole Agency.

We agree that we should continue to evaluate our enforcement practices on an ongoing basis. Identifying successful practices used by similar enforcement agencies would, of course, be helpful. However, although you recommended conducting routine compliance examinations and dedicating staff for risk assessment, as is done in certain other agencies, we note that GAO “. . . did not evaluate the effectiveness of these agencies’ compliance examination, enforcement, or risk assessment programs.” (Page 32) The draft report mentions that (1) the IRS will not complete its first round of benchmark assessments until 2007, (2) the SEC program also is fairly new, and (3) while “IRS officials said that they believe that their [routine compliance examinations] program deters violations from occurring . . .”, no evidence of such a deterrent value is presented. (Page 22) As these programs have not been fully evaluated and their effectiveness has not been determined, we are concerned that a recommendation to copy one of these models is premature, given the diversion of investigative resources it would require.

However, we will work to identify successful, proven risk assessment practices in other enforcement agencies and determine if they can be integrated into EBSA’s enforcement program.

Recommendation No. 2: Conduct a formal review to determine the effect that ERISA’s statutory filing deadlines have on investigators’ access to timely information and the likely impact if these deadlines were shortened.

As you noted, ERISA's filing deadlines are established by statute. Congress has amended ERISA many times since 1974 and has not changed these deadlines. Most recently, in enacting the Pension Protection Act of 2006, Congress made some changes to filing requirements but left the basic deadlines as they were. You noted in the report GAO-05-491, Private Pensions, that the "current statutory filing requirements are . . . intertwined with other statutory deadlines relating to private pension plans," including the date that final contributions for minimum funding purposes (defined benefit plans) can be made, which is 30 days before the final date the 5500 can be filed. (Pages 21-22) GAO spoke with service providers and plans sponsor representatives who expressed their view that the current statutory time frame (210 days after the end of the plan year) is necessary.

As noted in your report, EBSA is working on decreasing the time to process Form 5500s. We have requested funding for an updated electronic filing system—known as EFAST2—which would greatly reduce the processing time. In addition, EBSA will require the electronic filing of Form 5500 beginning with the 2008 filing cycle. We believe these new requirements and system features will provide our investigators with more timely data.

We will adopt your recommendation and undertake a review of a sample of cases opened on Form 5500 information. We will attempt to determine whether the outcome of these cases would have been impacted by an earlier filing of the Form 5500.

Recommendation No. 3: Establish, where appropriate, formal SEC coordination groups in the regional offices, similar to those already in place in some EBSA regions.

All EBSA field offices have contact with the SEC. As we understand it, the securities laws limit the ability of the SEC to disclose investigative information to other enforcement agencies, including EBSA. However, we have worked with the SEC staff to put in place a formal system under which they can disclose and we can obtain information from the SEC's investigative files. We have effective coordination with the SEC at the national level. For example, EBSA and the SEC jointly issued the compliance assistance tool, "Selecting and Monitoring Pension Consultants - Tips for Plan Fiduciaries." We also coordinated with the SEC regarding their findings under the Pension Consultants Project. The SEC shared their investigative files to assist us with our investigations of selected pension consultants. Over the years, the SEC has provided us with a number of leads, some of which have led to investigations and monetary results.

EBSA has formed successful relationships with several other governmental agencies, such as the federal financial institutions regulatory agencies, state insurance commissioners, and local prosecutors. We fully recognize the importance of establishing effective working relationships with other agencies, and will continue to do so. Accordingly, we agree with the recommendation and will continue to work with our colleagues at the SEC to put into place regional coordination groups.

Recommendation No. 4: Evaluate the factors affecting staff attrition and take appropriate steps, as necessary. Such an effort might include a market-based study to assess comparable private sector compensation within specific geographic locations and include recommendations for modifying pay structures, if appropriate.

EBSA employees are among the most highly educated within DOL. Our investigators have wide-ranging skills and backgrounds, which are needed for the diverse plans we investigate. Although we would like to retain all of our highly skilled staff, some attrition is inevitable given the wages private sector employers offer for these specialized skills. EBSA's attrition rates for 2001-2004 are generally lower than the comparative groups. We do agree that there has been an increase in the rates for the past two years. Because we would like to retain our highly-qualified investigators, the EBSA Office of Program Planning, Evaluation and Management will further evaluate staff attrition in the enforcement program to identify trends and potentially contributing factors.

We have implemented a number of recruiting initiatives, such as offering both undergraduate and graduate students the opportunity to work for EBSA while attending school. This program is successful in helping us find talented new employees. However, the inclusion of these persons hired under the student temporary employment program in Table 4 on page 19 makes our overall attrition rate appear higher than is the case for our career employees. In addition, the tables do not include the GS-511 auditors, who have the same function as our investigators. If these figures were revised, we believe the numbers would show a lower and more accurate attrition rate.

Conclusion

The Employee Benefits Security Administration is dedicated to protecting the employer-provided benefits of American workers, retirees, and their families. We will continue to improve our enforcement program to deter, detect and correct violations of ERISA. We appreciate having had the opportunity to review and comment on this draft report. Please do not hesitate to contact us if you have questions concerning this response or if we can be of further assistance.

Sincerely,



Bradford P. Campbell
Acting Assistant Secretary

Appendix IV: Comments from Securities and Exchange Commission



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

Division of Enforcement

December 13, 2006

Linda Chatman Thomsen
Director
(202) 551-4894
(202) 772-9279 (fax)
thomsenl@sec.gov

Barbara D. Bovbjerg
Director
Education, Workforce, and Income Security Issues
U.S. Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Re: GAO Report Entitled "Employee Benefits Security Administration:
Enforcement Improvements Made but Additional Actions Could Further
Enhance Pension Plan Oversight" (GAO-07-22), dated January 2007

Dear Ms. Bovbjerg:

Thank you for sharing with us a copy of the Government Accountability Office's report entitled "Employee Benefits Security Administration: Enforcement Improvements Made but Additional Actions Could Further Enhance Pension Plan Oversight" (GAO-07-22), dated January 2007. We were glad to assist GAO by meeting with your staff and providing information in connection with the preparation of the report.

While none of the recommendations in the report apply directly to the SEC, GAO recommends that the Secretary of Labor direct the Assistant Secretary of Labor, Employee Benefits Security Administration (EBSA), to direct EBSA's Office of Enforcement to establish, where appropriate, formal SEC coordination groups in the regional offices, similar to those already in place in some EBSA regions. We have enjoyed a collegial and cooperative relationship with EBSA in the past, and look forward to continuing and developing that relationship through the establishment of these groups.

If I can be of any further assistance, please contact me or have your staff contact Joan McKown, Chief Counsel, who can be reached at 202-551-4933.

Sincerely,

A handwritten signature in black ink, appearing to be "Linda Chatman Thomsen", written over a horizontal line.

Appendix V: GAO Contacts and Acknowledgments

GAO Contact

Barbara D. Bovbjerg, (202) 512-7215

Acknowledgments

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