



Testimony before the Committee on
Health, Education, Labor, and Pensions,
U.S. Senate

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**EMPLOYEE BENEFITS
SECURITY
ADMINISTRATION**

**Improvements Have Been
Made to Pension
Enforcement Program but
Significant Challenges
Remain**

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Highlights of [GAO-05-784T](#), a testimony before the Committee on Health, Education, Labor, and Pensions, U.S. Senate

Why GAO Did This Study

Congress passed the Employee Retirement Income Security Act of 1974 (ERISA) to address public concerns over the mismanagement and abuse of private sector employee benefit plans by some plan sponsors and administrators. The Department of Labor's Employee Benefits Security Administration (EBSA) shares responsibility with the Internal Revenue Service and the Pension Benefit Guaranty Corporation for enforcing ERISA. EBSA works to safeguard the economic interest of more than 150 million people who participate in an estimated 6 million employee benefit plans with assets in excess of \$4.4 trillion. EBSA plays a primary role in ensuring that employee benefit plans operate in the interests of plan participants, and the effective management of its enforcement program is pivotal to ensuring the economic security of workers and retirees.

Recent scandals involving abuses by pension plan fiduciaries and service providers, as well as trading scandals in mutual funds that affected plan participants and other investors, highlight the importance of ensuring that EBSA has an effective and efficient enforcement program. Accordingly, this testimony focuses on describing EBSA's enforcement strategy, EBSA's efforts to address weaknesses in its enforcement program along with the challenges that remain.

www.gao.gov/cgi-bin/getrpt?GAO-05-784T.

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

EMPLOYEE BENEFITS SECURITY ADMINISTRATION

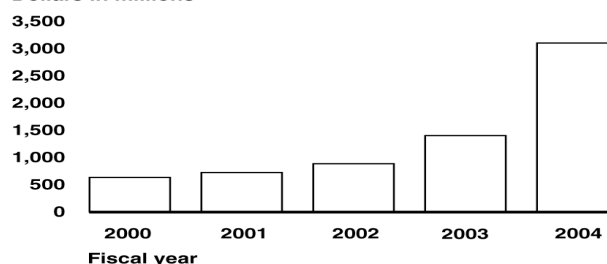
Improvements Have Been Made to Pension Enforcement Program but Significant Challenges Remain

What GAO Found

EBSA's enforcement strategy is a multifaceted approach of targeted plan investigations. To leverage its enforcement resources, EBSA provides education to plan participants and plan sponsors. EBSA allows its regional offices the flexibility to tailor their investigations to address the unique issues in the regions, within a framework established by EBSA's Office of Enforcement. The regional offices then have a significant degree of autonomy in developing and carrying out investigations using a mixture of approaches and techniques they deem most appropriate. Participant leads are still the major source of investigations. EBSA officials told us that they open about 4,000 investigations into actual and potential violations of ERISA annually. To supplement their investigations, the regions conduct outreach activities to educate both plan participants and sponsors. The purpose of these efforts is to gain participants' help in identifying potential violations and to educate sponsors in properly managing their plans and avoiding violations. Finally, EBSA maintains a Voluntary Fiduciary Correction Program through which plan officials can voluntarily report and correct some violations without penalty.

EBSA has taken steps to address many of the recommendations we have made over the years to improve its enforcement program, including assessing the level and types of noncompliance with ERISA, improving sharing of best investigative practices, and developing a human capital strategy to better respond changes in its workforce. EBSA reported a significant increase in enforcement results for fiscal year 2004, including \$3.1 billion in total monetary results and closing about 4,400 investigations, with nearly 70 percent of those cases resulting in corrections of ERISA violations. Despite this progress, EBSA continues to face a number of significant challenges to its enforcement program, including (1) the lack of timely and reliable plan information, which is highlighted by the fact that EBSA is currently using plan year 2002 and 2003 plan information for its computer targeting, (2) restrictive statutory requirements that limit its ability to assess certain penalties, and (3) the need to better coordinate enforcement strategies with the Securities and Exchange Commission, which is highlighted by recent scandals involving the trading practices and market timing in mutual funds and conflicts of interest by pension consultants.

Total Monetary Results from EBSA Enforcement Activities for Fiscal Years 2000-2004
Dollars in millions



Source: GAO analysis.

Mr. Chairman and Members of the Committee:

I am pleased to be here today to provide an overview of our past work reviewing the Department of Labor's Employee Benefits Security Administration (EBSA) enforcement program. EBSA works to safeguard the economic interest of more than 150 million people who participate in an estimated 6 million employee benefit plans with assets in excess of \$4.4 trillion. EBSA plays a primary role in ensuring that employee benefit plans operate in the interests of plan participants, and the effective management of its enforcement program is pivotal to ensuring the economic security of workers and retirees.

Congress passed the Employee Retirement Income Security Act of 1974 (ERISA) to address public concerns over the mismanagement and abuse of private sector employee benefit plans by some plan sponsors and administrators. ERISA is designed to protect the rights and interests of participants and beneficiaries of employee benefit plans and outlines the responsibilities of the employers and administrators who sponsor and manage these plans. The recent bankruptcies of some large corporations and the effects on employees' retirement savings and the federal pension insurance program expose certain vulnerabilities in our private pension system. Such problems point out the need for comprehensive pension reform. Also, recent scandals involving abuses by pension plan fiduciaries and service providers, as well as trading scandals in mutual funds that affected plan participants and other investors highlight the importance of ensuring that EBSA has an effective and efficient enforcement program.

Today, I would like to discuss the evolution of EBSA's enforcement program and the challenges that remain. GAO has conducted several studies of ERISA enforcement issues, and my statement is largely based on that work.

In summary, EBSA's enforcement strategy is a multifaceted approach of targeted plan investigations supplemented by outreach and education. To leverage its enforcement resources to prevent and detect violations and promote overall compliance with ERISA, EBSA provides education to plan participants and sponsors and allows the voluntary self-correction of certain transactions without penalty. EBSA's education program for plan participants aims to increase their knowledge of their rights and benefits under ERISA. EBSA has taken steps to address many of the recommendations we have made over a number of years to improve its enforcement program, including assessing the level and types of noncompliance with ERISA, improving sharing of best investigative

practices, analyzing the sources of cases, and developing a human capital strategy to better respond changes in its workforce. EBSA reported a significant increase in enforcement results for fiscal year 2004, including \$3.1 billion in total monetary results and closing nearly 4,400 investigations, with nearly 70 percent of those cases resulting in corrections of ERISA violations. Despite this progress, EBSA continues to face a number of significant challenges to its enforcement program. Such challenges include lack of timely and reliable plan information, restrictive statutory requirements that limit its ability to assess certain penalties, and the need to better coordinate enforcement strategies with the Securities and Exchange Commission. As we have previously reported, legislative changes will be required to address some of these issues. Furthermore, the Congress should consider providing EBSA with additional enforcement tools, such as enhanced penalty authority, to meet these challenges. Finally, EBSA needs to continue to look for ways to better target investigations to leverage its limited resources.

Background

Three agencies share responsibility for enforcing ERISA: the Department of Labor (EBSA), the Department of the Treasury's Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC). EBSA enforces fiduciary standards for plan fiduciaries of privately sponsored employee benefit plans to ensure that plans are operated in the best interests of plan participants. EBSA also enforces reporting and disclosure requirements covering the type and extent of information provided to the federal government and plan participants, and seeks to ensure that specific transactions prohibited by ERISA are not conducted by plans.¹ Under Title I of ERISA, EBSA conducts investigations of plans and seeks appropriate remedies to correct violations of the law, including litigation when necessary.² IRS enforces the Internal Revenue Code (IRC) and provisions that must be met which give pension plans tax-qualified status, including participation, vesting, and funding requirements. The IRS also audits plans to ensure compliance and can levy tax penalties or revoke the tax-qualified status of a plan as appropriate. PBGC, under Title

¹ Certain transactions are prohibited under the law to prevent dealings with parties who may be in a position to exercise improper influence over the plan. In addition, fiduciaries are prohibited from engaging in self-dealing and must avoid conflicts of interest that could harm the plan.

² Prior to 1979, there was overlapping responsibility for administration of the parallel provisions of Title I of ERISA and the Internal Revenue Code (IRC) by the Department of Labor and IRS, respectively.

IV of ERISA, provides insurance for participants and beneficiaries of certain types of tax-qualified pension plans, called defined benefit plans, that terminate with insufficient assets to pay promised benefits. Recent terminations of large, underfunded plans have threatened the long-term solvency of PBGC. As a result, we placed PBGC's single-employer insurance program on our high-risk list of programs needing further attention and congressional action.³

ERISA and the IRC require plan administrators to file annual reports concerning, among other things, the financial condition and operation of plans. EBSA, IRS, and PBGC jointly developed the Form 5500 so that plan administrators can satisfy this annual reporting requirement. Additionally, ERISA and the IRC provide for the assessment or imposition of penalties for plan sponsors not submitting the required information when due.

About one-fifth of Americans' retirement wealth is invested in mutual funds, which are regulated by the Securities and Exchange Commission (SEC), primarily under the Investment Company Act of 1940. The primary mission of the SEC is to protect investors, including pension plan participants investing in securities markets, and maintain the integrity of the securities markets through extensive disclosure, enforcement, and education. In addition, some pension plans use investment managers to oversee plan assets, and these managers may be subject to other securities laws.

EBSA Uses a Multifaceted Enforcement Strategy

EBSA's enforcement strategy is a multifaceted approach of targeted plan investigations supplemented by providing education to plan participants and plan sponsors. EBSA allows its regions the flexibility to tailor their investigations to address the unique issues in their regions, within a framework established by EBSA's Office of Enforcement. The regional offices then have a significant degree of autonomy in developing and carrying out investigations using a mixture of approaches and techniques they deem most appropriate. Participant leads are still the major source of investigations. To supplement their investigations, the regions conduct outreach activities to educate both plan participants and sponsors. The purpose of these efforts is to gain participants' help in identifying potential

³See GAO, *Pension Benefit Guaranty Corporation Single-Employer Program: Long-Term Vulnerabilities Warrant High-Risk Designation*, [GAO-03-1050SP](#) (Washington, D.C.: Jul. 23, 2003).

violations and to educate sponsors in properly managing their plans and avoiding violations. The regions also process applications for the Voluntary Fiduciary Correction Program (VFCP) through which plan officials can voluntarily report and correct some violations without penalty.

EBSA Enforces ERISA Primarily Through Targeted Investigations

EBSA attempts to maximize the effectiveness of its enforcement efforts to detect and correct ERISA violations by targeting specific cases for review. In doing so, the Office of Enforcement provides assistance to the regional offices in the form of broad program policy guidance, program oversight, and technical support. The regional offices then focus their investigative workloads to address the needs specific to their region. Investigative staff also have some responsibility for selecting cases.

The Office of Enforcement identifies national priorities—areas critical to the well-being of employee benefit plan participants and beneficiaries nationwide—in which all regions must target a portion of their investigative efforts. Currently, EBSA’s national priorities involve, among other things, investigating defined contribution pension plan and health plan fraud. Officials in the Office of Enforcement said that national priorities are periodically re-evaluated and are changed to reflect trends in the area of pensions and other benefits.

On the basis of its national investigative priorities, the Office of Enforcement has established a number of national projects. Currently, there are five national projects pertaining to a variety of issues including employee contributions to defined contribution plans, employee stock ownership plans (ESOP), and health plan fraud. EBSA’s increasing emphasis on defined contribution pension plans reflects the rapid growth of this segment of the pension plan universe. In fiscal year 2004, EBSA had monetary results of over \$31 million and obtained 10 criminal indictments under its employee contributions project. EBSA’s most recent national enforcement project involves investigating violations pertaining to ESOPs, such as the incorrect valuation of employer securities and the failure to provide participants with the specific benefits required or allowed under ESOPs, such as voting rights, the ability to diversify their account balances

at certain times, and the right to sell their shares of stock.⁴ Likewise, more attention is being given to health plan fraud, such as fraudulent multiple employer welfare arrangements (MEWAs).⁵ In this instance, EBSA's emphasis is on abusive and fraudulent MEWAs created by promoters that attempt to evade state insurance regulations and sell the promise of inexpensive health benefit insurance but typically default on their benefit obligations.⁶

EBSA regional offices determine the focus of their investigative workloads based on their evaluation of the employee benefit plans in their jurisdiction and guidance from the Office of Enforcement. For example, each region is expected to conduct investigations that cover their entire geographic jurisdiction and attain a balance among the different types and sizes of plans investigated. In addition, each regional office is expected to dedicate some percentage of its staff resources to national and to regional projects—those developed within their own region that focus on local concerns. In developing regional projects, each regional office uses its knowledge of the unique activities and types of plans in its jurisdiction. For example, a region that has a heavy banking industry concentration may develop a project aimed at a particular type of transaction commonly performed by banks. We previously reported that the regional offices spend an average of about 40 percent of their investigative time conducting investigations in support of national projects and almost 25 percentage of their investigative time on regional projects.

⁴In 2002, we reported that the financial collapse of the Enron Corporation and other large firms and the effects on workers and retirees had raised questions about retirement funds being invested in employer securities and the laws governing such investments. We recommended that the Congress consider amending ERISA to require plan sponsors to provide defined contribution plan participants with an investment education notice that includes information on the risks of certain investments such as employer securities and the benefits of diversification. See GAO, *Private Pensions: Participants Need Information on the Risks of Investing in Employer Securities and the Benefits of Diversification*, GAO-02-943 (Washington, DC: Sept. 6, 2002).

⁵A MEWA is a welfare benefit plan or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing a welfare benefit to employees of two or more employers. Typically, such arrangements often involve small employers that are either unable to find or cannot afford the cost of health care coverage for their employees.

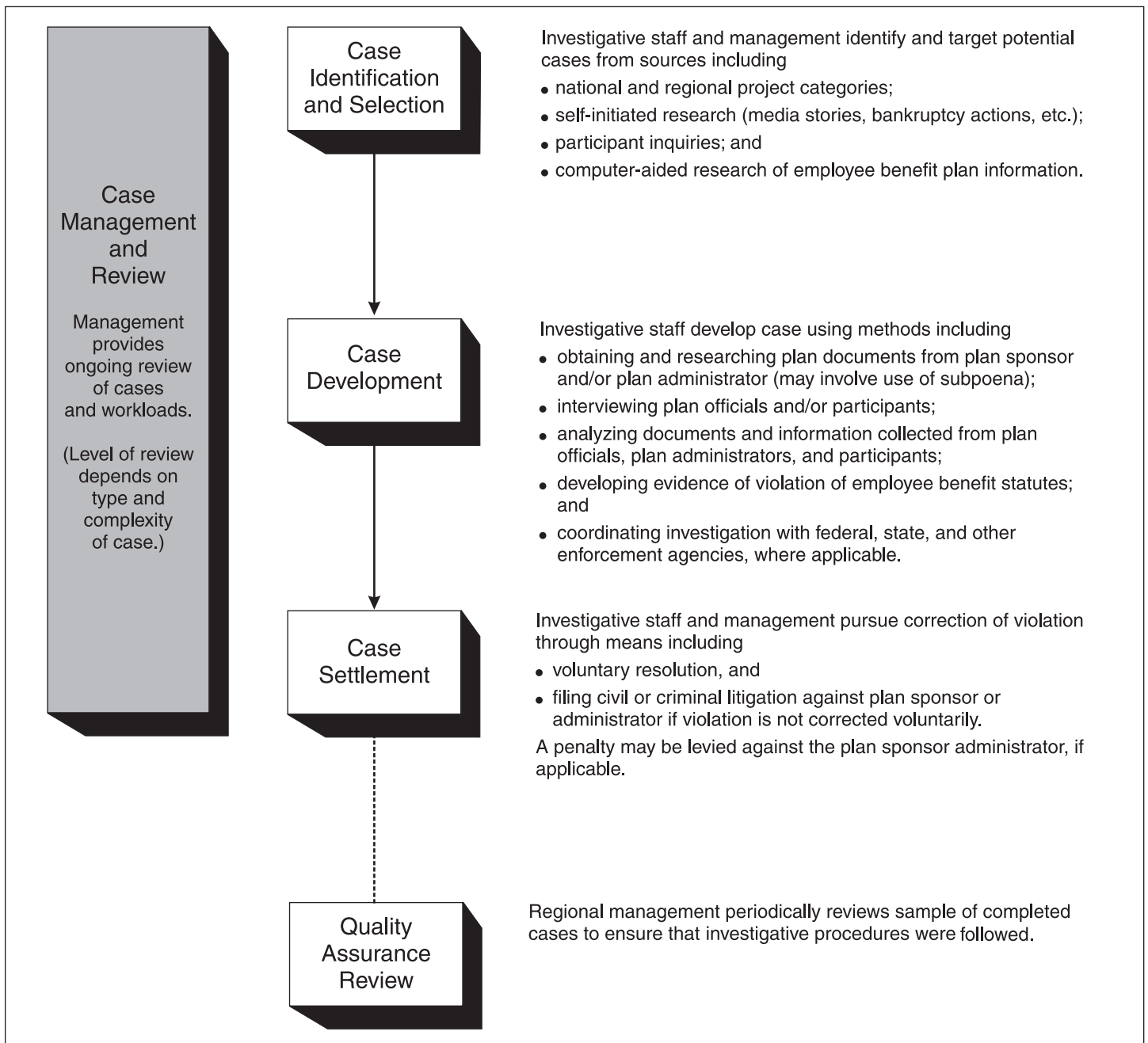
⁶See GAO, *Employee Benefits: States Need Labor's Help Regulating Multiple Employer Welfare Arrangements*, GAO/HRD-92-40 (Washington, D.C.: Mar. 10, 1992).

EBSA officials said that their most effective source of leads on violations of ERISA is from complaints from plan participants. Case openings also originate from news articles or other publications on a particular industry or company as well as tips from colleagues in other enforcement agencies. Computer searches and targeting of Form 5500 information on specific types of plans account for only 25 percent of case openings. In 1994, we reported that EBSA had done little to test the effectiveness of the computerized targeting runs it was using to select cases. Since then, EBSA has scaled down both the number of computerized runs available to staff and its reliance on these runs as a means of selecting cases.⁷ Investigative staff are also responsible for identifying a portion of their cases on their own to complete their workloads and address other potentially vulnerable areas.

As shown in figure 1, EBSA's investigative process generally follows a pattern of selecting, developing, resolving, and reviewing cases. EBSA officials told us that they open about 4,000 investigations into actual and potential violations of ERISA annually. According to EBSA, its primary goal in resolving a case is to ensure that a plan's assets, and therefore its participants and beneficiaries, are protected. EBSA's decision to litigate a case is made jointly with the Department of Labor's Regional Solicitors' Offices. Although EBSA settles most cases without going to court, both the agency and the Solicitor's Office recognize the need to litigate some cases for their deterrent effect on other providers.

⁷See GAO, *Pension Plans: Stronger Labor ERISA Enforcement Should Better Protect Plan Participants*, [GAO/HEHS-94-157](#) (Washington, D.C.: August 8, 1994).

Figure 1: Overview of EBSA's Investigative Process



Source: GAO analysis.

As part of its enforcement program, EBSA also detects and investigates criminal violations of ERISA. From fiscal years 2000 through 2004, criminal investigations resulted in an average of 54 cases closed with convictions or guilty pleas annually. Part of EBSA's enforcement strategy includes routinely publicizing the results of its litigation efforts in both the civil and criminal areas as a deterrent factor.

EBSA Uses Education, Outreach, and a Voluntary Fiduciary Correction Program to Supplement Its Investigations

To further leverage its enforcement resources, EBSA provides education to plan participants, sponsors, and service providers and allows the voluntary self-correction of certain transactions without penalty. EBSA's education program for plan participants aims to increase their knowledge of their rights and benefits under ERISA. For example, EBSA anticipates that educating participants will establish an environment in which individuals can help protect their own benefits by recognizing potential problems and notifying EBSA when issues arise. The agency also conducts outreach to plan sponsors and service providers about their ongoing fiduciary responsibilities and obligations under ERISA.

At the national level, EBSA's Office of Participant Assistance develops, implements, and evaluates agency-wide participant assistance and outreach programs. It also provides policies and guidance to other EBSA national and regional offices involved in outreach activities. EBSA's nationwide education campaigns include a fiduciary education campaign, launched in May 2004, to educate plan sponsors and service providers about their fiduciary responsibilities under ERISA. This campaign also includes educational material on understanding fees and selecting an auditor.

EBSA's regional offices also assist in implementing national education initiatives and conduct their own outreach to address local concerns. The regional offices' benefit advisers provide written and telephone responses to participants. Benefit advisers and investigative staff also 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. At the national level, several EBSA offices direct specialized outreach activities. As with EBSA's participant-directed outreach activities, its efforts to educate plan sponsors and service providers also rely upon Office of Enforcement staff and the regional offices for implementation. For example, these staff make presentations to employer groups and service provider organizations about their ERISA obligations and any new requirements under the law, such as reporting and disclosure provisions.

To supplement its investigative programs, EBSA is promoting the self-disclosure and self-correction of possible ERISA violations by plan officials through its Voluntary Fiduciary Correction Program.⁸ The purpose of the VFCP is to protect the financial security of workers by encouraging plan officials to identify and correct ERISA violations on their own. Specifically, the VFCP allows plan officials to identify and correct 18 transactions, such as delinquent participant contributions and participant loan repayments to pension plans. Under the VFCP, plan officials follow a process whereby they (1) correct the violation using EBSA's written guidance; (2) restore any losses or profits to the plan; (3) notify participants and beneficiaries of the correction; and (4) file a VFCP application, which includes evidence of the corrected transaction, with the EBSA regional office in whose jurisdiction it resides. If the regional office determines that the plan has met the program's terms, it will issue a "no action" letter to the applicant and will not initiate a civil investigation of the violation, which could have resulted in a penalty being assessed against the plan.

EBSA Has Taken Steps to Address Weaknesses in Its Enforcement Program, but Significant Challenges Remain

EBSA has taken steps to address many of the recommendations we have made over a number of years to improve its enforcement program, including assessing the level and types of noncompliance with ERISA, improving sharing of best investigative practices, and developing a human capital strategy to better respond changes in its workforce. EBSA reported a significant increase in enforcement results for fiscal year 2004, including \$3.1 billion in total monetary results and closing nearly 4,400 investigations, with nearly 70 percent of those cases resulting in corrections of ERISA violations. Despite this progress, EBSA continues to face a number of significant challenges to its enforcement program, including the lack of timely and reliable plan information, restrictive statutory requirements that limit its ability to assess certain penalties, and the need to better coordinate enforcement strategies with the SEC.

EBSA Has Made Progress in Improving Its Enforcement Program

EBSA has taken a number of steps, including addressing recommendations from our prior reports that have improved its enforcement efforts across a number of areas. For example, EBSA has continued to refine its enforcement strategy to meet changing priorities

⁸In April 2005, the Department of labor published in the *Federal Register* a revised VFCP that according to EBSA, simplified and expanded the original program.

and provided additional flexibility to its regional office to target areas of investigations. More recently, EBSA implemented a series of recommendations from our 2002 enforcement report that helped it strategically manage its enforcement program, including conducting studies to determine the level of and type of noncompliance with ERISA and developing a Human Capital Strategic Management Plan (see table 1).⁹

⁹ See GAO, *Pension and Welfare Benefits Administration: Opportunities Exist for Improving Management of the Enforcement Program*, [GAO-02-232](#) (Washington, DC: March 15, 2002).

Table 1: Examples of EBSA's Actions in Response to GAO Recommendations to Improve its Enforcement Program

GAO Observation	GAO Recommendation to EBSA	Examples of EBSA Actions
EBSA had not adequately estimated the nature of employee benefit plans' noncompliance with ERISA provisions.	Develop a cost-effective strategy for assessing the level and type of ERISA noncompliance among employee benefit plans.	In fiscal year 2001 conducted national compliance study of group health plans' compliance with new health care laws in ERISA. In 2003 conducted compliance study focusing on large multiemployer health plans. Currently conducting baseline study to determine the level of compliance with ERISA requirements on timely transmission of employee contributions to pension plans.
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.	Conduct regular reviews of the sources of cases that lead to investigations.	Conducted analysis on cases closed in fiscal years 2001, 2002, and 2003. Agreed to perform reviews of the sources of cases that lead to investigations on an annual basis as long as resources permit.
EBSA did not coordinate the sharing of best practices information among its regions regarding case selection and investigative techniques.	Coordinate the sharing of best practices information among regions relating to the optimum and most productive techniques for selecting and conducting investigations.	Established a Best Practices Sharing Team composed of enforcement staff and regional representatives. Developed an intranet site to allow EBSA investigators to share best practices, such as investigative plans, subpoenas, letters, and investigative guides.
EBSA lacked a centrally coordinated quality review process to ensure that its investigations are conducted in accordance with its investigative procedures.	Develop a closed case quality review process that ensures the independence of reviewers and sufficiently focuses on substantive technical case issues.	In fiscal year 2003, an EBSA team composed of Office of Enforcement and field managers developed a closed case quality review program that focuses on substantive technical issues and is reported centrally. The program also includes procedures to ensure the independence of the case reviewer.
Certain requirements, such as notifying plan participants of potential violations and levying excise taxes on prohibited transactions, may hinder participation in the VFCP.	Analyze barriers to participation in the VFCP and explore ways to reduce them.	EBSA modified key features of the program, eliminating notice requirements to participants, and provided a limited excise tax exemption for those who participate in the program.
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.	Conduct a comprehensive review of its future human capital needs, including the size of its workforce; the skills and abilities needed; succession planning challenges; and staff deployment issues.	EBSA conducted an employee workforce analysis and an employee training needs assessment. In 2003, EBSA issued its Human Capital Strategic Management Plan. The plan identified strategies that address current and project skills shortages, anticipated future staffing needs, competency requirements to ensure that employees possess or acquire the critical skills needed to accomplish program mission and functions, and the recognition and reward of quality performance.

Source: GAO summary and analysis of EBSA documents.

EBSA has reported a substantial increase in results from its enforcement efforts since our last review. For fiscal year 2004, EBSA closed 4,399 civil investigations and reported \$3.1 billion in total results, including \$2.53 billion in prohibited transactions corrected and plan assets protected, up from \$566 million in fiscal year 2002. Likewise, the percentage of civil investigations closed with results rose from 58 percent to 69 percent. Also, applications received for the VFCP increased from 55 in fiscal year 2002 to 474 in 2004. EBSA has been able to achieve such results with relatively small recent increases in staff. Full-time equivalent (FTE) authorized staff levels increased from 850 in fiscal year 2001 to 887 FTEs in fiscal year 2005. The President's budget for fiscal year 2006 requests no additional FTEs.

Untimely and Incomplete Plan Information Continues to Hinder Enforcement Efforts

Previously, we and others have reported that ERISA enforcement was hindered by incomplete, inaccurate, and untimely plan data.¹⁰ We recently reported that the lack of timely and complete of Form 5500 data affects EBSA's use of the information for enforcement purposes, such as computer targeting and identifying troubled plans.¹¹ EBSA uses Form 5500 information as a compliance tool to identify actual and potential violations of ERISA. Although EBSA has access to Form 5500 information sooner than the general public, the agency is affected by the statutory filing deadlines, which can be up to 285 days after plan year end, and long processing times for paper filings submitted to the ERISA Filing Acceptance System. EBSA receives processed Form 5500 information on individual filings on a regular basis once a form is completely processed. However, agency officials told us that as they still have to wait for a sufficiently complete universe of plan filings from any given plan year to be processed in order to begin their compliance targeting programs. As a result, EBSA officials told us that they are currently using plan year 2002 and 2003 Form 5500 information for computer targeting. They also said that in some cases untimely Form 5500 information affects their ability to identify financially troubled plans whose sponsors may be on the verge of going out of business and abandoning their pension plans, because these

¹⁰See, GAO, *Employee Benefit Plans: Efforts to Streamline Reporting Requirements and Improve Processing of Annual Plan Data*, [GAO/HEHS-98-45R](#) (Washington, DC: Nov. 14, 1997).

¹¹See GAO, *Private Pensions: Government Actions Could Improve the Timeliness and Content of Form 5500 Pension Information*, [GAO-05-491](#) (Washington, DC: June 3, 2005).

plans may no longer exist by the time that Labor receives the processed filing or is able to determine that no Form 5500 was filed by those sponsors.

The Form 5500 also lacks key information that could better assist EBSA, IRS, and PBGC in monitoring plans and ensuring that they are in compliance with ERISA. EBSA, IRS and PBGC officials said that they have experienced difficulties when relying on Form 5500 information to identify and track all plans across years. Although EBSA has a process in place to identify and track plans filing a Form 5500 from year to year, problems still arise when plans change employer identification numbers (EIN) and/or plan numbers. Identifying plans is further complicated when plan sponsors are acquired, sold, or merged. In these cases, agency officials said that there is an increased possibility of mismatching of EINs, plans, and their identifying information. As result, EBSA officials said they are unable to (1) verify if all required employers are meeting the statutory requirement to file a Form 5500 annually, (2) identify all late filers, and (3) assess and collect penalties from all plans that fail to file or are late. Likewise, PBGC officials said that must spend additional time each year trying to identify and track certain defined benefit plans so that they can conduct compliance and research activities. EBSA officials said they are considering measures to better track and identify plans but have not reached any conclusions. Our recent report makes a number of recommendations aimed at improving the timeliness and content of Form 5500 that will likely assist EBSA's enforcement efforts.¹²

In addition to problems with Form 5500 information, concerns remain about the quality of annual audits of plans' financial statements by independent public accountants. For many years, we, as well as the Department of Labor's Office of Inspector General (OIG), have reported that a significant number of these audits have not met ERISA requirements. For example, in 1992 we found that over a third of the 25 plan audits we reviewed had audit weaknesses so serious that their reliability and usefulness were questionable. We recommended that the Congress amend ERISA to require full-scope audits of employee benefit plans and to require plan administrators and independent public accountants to report on how effective an employee benefit plan's internal

¹² See [GAO-05-491](#).

controls are in protecting plan assets.¹³ Although such changes were subsequently proposed, they were not enacted. In 2004, Labor’s OIG reported that although EBSA had reviewed a significant number of employee benefit plan audits and made efforts to correct substandard audits, a significant number of substandard audits remain uncorrected. Furthermore, plan auditors performing substandard work generally continue to audit employee benefit plans without being required to improve the quality of the audits.¹⁴ As a result, these audits have not provided participants and beneficiaries the protections envisioned by Congress. Labor’s OIG recommended, among other things, that EBSA propose changes to ERISA so that EBSA has greater enforcement authority over employee benefit plan auditors.

Restrictive Statutory Requirements Limit Assessment of Fiduciary Penalties

As we have previously reported, restrictive legal requirements have limited EBSA’s ability to assess penalties against fiduciaries or other persons who knowingly participate in a fiduciary breach.¹⁵ Unlike the SEC, which has the authority to impose a penalty without first assessing and then securing monetary damages, EBSA does not have such statutory authority and must assess penalties based on damages or, more specifically, the restoration of plan assets.¹⁶ Under Section 502(1), ERISA provides for a mandatory penalty against (1) a fiduciary who breaches a fiduciary duty under, or commits a violation of, Part 4 of Title I of ERISA or (2) against any other person who knowingly participates in such a breach or violation. This penalty is equal to 20 percent of the “applicable recovery amount,” or any settlement agreed upon by the Secretary or ordered by a court to be paid in a judicial proceeding instituted by the Secretary. However, the applicable recovery amount cannot be determined if damages have not been valued. This penalty can be assessed only against fiduciaries or

¹³Under ERISA, investments held by certain regulated institutions, such as banks and insurance companies, may be excluded from the scope of a plan audit. The resulting lack of audit work can result in an auditor disclaiming an opinion on the plan’s financial statements. See GAO, *Employee Benefits: Improved Plan Reporting and CPA Audits Can Increase Protection under ERISA*, [GAO/AFMD-92-14](#) (Washington, D.C.: April 9, 1992) and *Employee Benefits: Limited Scope Audit Exemption Should Be Repealed*, [GAO/T-AIMD-98-75](#) (Washington, D.C.: February 12, 1998).

¹⁴See U.S. Department of Labor Office of Inspector General–Office of Audit, *EBSA Needs Additional Authority to Improve the Quality of Employee Benefit Plan Audits*. (Washington, D.C.: Sept. 30, 2004).

¹⁵See [GAO/HEHS-94-157](#).

¹⁶EBSA can also seek removal of a fiduciary for breaches of fiduciary duty or seek other sanctions.

knowing participants in a breach who, by court order or settlement agreement, restore plan assets. Therefore, if (1) there is no settlement agreement or court order or (2) someone other than a fiduciary or knowing participant returns plan assets, the penalty may not be assessed. For example, last year we reported that ERISA presented legal challenges when developing cases related to proxy voting by plan fiduciaries, particularly with regards to valuing monetary damages.¹⁷ As a result, because EBSA has never found a violation that resulted in monetary damages, it has never assessed a penalty or removed a fiduciary because of a proxy voting investigation. Given the restrictive legal requirements that have limited the use of penalties for violations of ERISA's fiduciary requirements, we recommended that Congress consider amending ERISA to give the Secretary of Labor additional authority with respect to assessing monetary penalties against fiduciaries. We also recommended other changes to ERISA to better protect plan participants and increase the transparency of proxy voting practices by plan fiduciaries.

Recent Scandals Highlight the Need for Better Coordination with SEC

Recent events such as the abusive trading practices of late trading and market timing in mutual funds and new revelations of conflicts of interest by pension consultants highlight the need for EBSA to better coordinate enforcement strategies with SEC. Last year we reported that SEC and EBSA had separately taken steps to address abusive trading practices in mutual funds.¹⁸ At the time we issued our report, SEC had taken a number of actions to address the abuses including:

- charging some fund companies with defrauding investors by not enforcing their stated policies on market timing,
- fining some institutions hundreds of millions of dollars (some of this money was to be returned to long-term shareholders who lost money due to abusive practices),
- permanently barring some individuals from future work with investment companies, and

¹⁷See GAO, *Pension Plans: Additional Transparency and Other Actions Needed in Connection with Proxy Voting*, [GAO-04-749](#) (Washington, D.C.: August 10, 2004).

¹⁸See GAO, *Mutual Funds: SEC Should Modify Proposed Regulations to Address Some Pension Plan Concerns*, [GAO-04-799](#) (Washington, D.C.: July 9, 2004).

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- proposing new regulations addressing late trading and market timing.

Separate from SEC activities, EBSA began investigating possible fiduciary violations at some large investment companies, including those that sponsor mutual funds, and violations by plan fiduciaries. EBSA also issued guidance suggesting that plan fiduciaries review their relationships with mutual funds and other investment companies to ensure they are meeting their responsibilities of acting reasonably, prudently, and solely in the interest of plan participants. Although SEC's proposed regulations on late trading and market timing could have more adversely affected some plan participants than other mutual fund investors, EBSA was not involved in drafting the regulations because it does not regulate mutual funds.

In another example of how EBSA and SEC enforcement responsibilities can intersect, SEC recently found that potential conflicts of interest may affect the objectivity of advice pension consultants are providing to their pension plan clients.¹⁹ The report also raised important issues for plan fiduciaries who often rely on the advice of pension consultants in operating their plans. Recently, EBSA and SEC issued tips to help plan fiduciaries evaluate the objectivity of advice and recommendations provided by pension consultants.

Concluding Observations

Americans face numerous challenges to securing their economic security in retirement, including the long-term fiscal challenges facing Social Security; the uncertainty of promised pension benefits; and the potential volatility of the investments held in their defined contributions plans. Given these concerns, it is important that employees' benefits are adequately protected. EBSA is a relatively small agency facing the daunting challenge of protecting over \$4 trillion in assets of pension and welfare benefits for millions of Americans. Over the years, EBSA has taken steps to strengthen its enforcement program and leverage its limited resources. These actions have helped better position EBSA to more effectively enforce ERISA.

EBSA, however, continues to face a number of significant challenges to its enforcement program. Foremost, despite improvements in the timeliness and content of the Form 5500, information currently collected does not permit EBSA and the other ERISA regulatory agencies to be in the best

¹⁹See SEC, *Staff Report Concerning Examinations of Select Pension Consultants, The Office of Compliance Inspections and Examinations* (Washington, D.C.: May 16, 2005).

position to ensure compliance with federal laws and assess the financial condition of private pension plans. Given the ever-changing complexities of employee benefit plans and how rapidly the financial condition of pension plans can deteriorate, it is imperative that policymakers, regulators, plan participants, and others have more timely and accurate Form 5500 information. In addition, there is a legitimate question as to whether information currently collected on the Form 5500 can be used as an effective enforcement tool by EBSA or whether different information might be needed. Without the right information on plans in a timely manner, EBSA will continue to have to rely on participant complaints as a primary source of investigations rather than being able to proactively identify and target problem areas. Second, in some instances, EBSA's enforcement efforts continue to be hindered by ERISA, the very law it is charged with enforcing. For example, because of restrictive legal requirements, EBSA continues to be hindered in assessing penalties against fiduciaries or others who knowingly participate in a fiduciary breach. Congress may want to amend ERISA to address such limits on EBSA's enforcement authority. Finally, the significant changes that have occurred in pension plans, the growing complexity of financial transactions of such plans, and the increasing role of mutual funds and other investment vehicles in retirement savings plans require enhanced coordination of enforcement efforts with SEC. Furthermore, such changes raise the fundamental question of whether Congress should modify the current ERISA enforcement framework. For example, it is important to consider whether the current division of oversight responsibilities across several agencies is the best way to ensure effective enforcement or whether some type of consolidation or reallocation of responsibilities and resources could result in more effective and efficient ERISA enforcement. We look forward to working with Congress on such crucial issues.

Mr. Chairman, this concludes my statement. I would be happy to respond to any questions you or other members of the committee may have.

Contact and Acknowledgments

For further information, please contact me at (202) 512-7215. Other individuals making key contributions to this testimony included Joseph Applebaum, Kimberley Granger, Raun Lazier, George Scott, and Roger Thomas.

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