

A Primer On DOL Probes For ERISA Plan Service Providers

By **Michael Kreps, George Sepsakos and Arsalan Malik** (October 7, 2021)

The U.S. Department of Labor has proactively shifted its enforcement resources in recent years from the sponsors of plans covered by the Employee Retirement Income Security Act to the financial institutions that provide services to ERISA plans.[1] This has allowed the agency to conduct investigations involving hundreds or thousands of plans at once rather than investigating individual plan sponsors.

The DOL originally targeted fiduciary providers, such as investment advisers, investment managers and trustees. But the agency has devoted more time and resources toward nonfiduciary providers such as record-keepers.

Given this shift, it is important to know both what to expect when the DOL decides to investigate and how to respond.

How are service provider investigations different from plan sponsor investigations?

Service provider investigations are fundamentally different than typical plan-level investigations, and the stakes are significantly higher. The DOL often enlists an entire team for service provider investigations, and the team may include not only a slate of investigators but also various experts — e.g., forensic accountants and financial analysts — depending on the focus of the investigation.

This can lead to extensive information requests, and years of discussions with the DOL. Consequently, the cost of service provider investigations can be staggering, and even small alleged violations can balloon into major liabilities when spread across a provider's entire book of business.

How does the DOL choose which providers to investigate?

The most common question providers have when an investigation begins is why the DOL opened the investigation in the first place. Unfortunately, it can be difficult to answer that question with any certainty, and the DOL usually will not share what piqued its interest.

Based on our experience, and as explained in a recent U.S. Government Accountability Office report, there are a variety of reasons that can lead the DOL to open a service provider investigation.[2]

One of the most common reasons for an investigation is that, in the course of conducting unrelated plan-level investigations, the DOL identifies a concern relating to a service provider.

For example, plan-level investigations may lead the DOL to flag what it believes is a systemic issue — e.g., a record-keeper's fee disclosure practices or procedures for managing uncashed checks — that warrants an independent investigation of the provider's business practices.



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However, the DOL may also open an investigation after:

- Receiving complaints from plan sponsors or participants;
- Receiving a referral from a state or federal agency — e.g., the U.S. Securities and Exchange Commission;
- Identifying compliance concerns from annual Form 5500 filings;
- Reviewing litigation filings — e.g., bankruptcy filings; or
- Reading reports in the media, including the trade press.

Notably, national enforcement priorities and issues of the day can also be a basis for service provider investigations. For example, fiduciary service providers and investment managers of plan asset vehicles are often subject to investigation under the DOL's long-standing Plan Investment Conflicts initiative.

Similarly, in the summer of 2020, the DOL launched limited-scope investigations of various investment managers and consultants to examine their incorporation of environmental, social and governance factors in investment decisions.[3] These efforts coincided with efforts by the national office to modify the rules governing such investments.

What's the process and how long does an investigation take?

Service provider investigations generally begin with a written notice from the DOL and a demand for a wide swath of information and materials. It is often necessary to engage in back-and-forth with the DOL to tailor the requests and reduce burdens.

Additionally, information requests sometimes involve sensitive plan information — e.g., participant census data — so it is important for providers to consider whether notice or consent from their client plans is required to respond to the DOL. Sometimes, it may be beneficial to obtain a subpoena from the DOL before producing some or all of the requested information.

After the initial production of documents, the DOL will generally request in-person interviews with key employees. While not formal depositions, the stakes for such interviews can be very high because every comment made by an interviewee can and is used by the DOL as evidence to build its case.

It is critical to select the interviewees carefully and to thoroughly prepare them well in advance of the official interview as one would in preparation for a trial. Interviewees should be reminded to keep their answers short and to answer only the specific question asked.

After the interviews, the DOL will usually continue to gather facts and make further requests for information, materials and interviews.

Unlike investigations by other federal and state agencies, it is not unusual for DOL service provider investigations to stretch on for multiple years and to cover the same ground multiple times. It is not uncommon for there to be multiple staffing changes over the course of an investigation.

Because of the length of time associated with an investigation, the DOL often seeks tolling agreements to preserve its ability to bring claims for violations of ERISA. Whether to grant a tolling agreement is an important decision that should be carefully considered.

What are the key risks for service providers?

Key service provider personnel — e.g., in-house counsel, business leaders — should have a full appreciation of the risks posed by a DOL investigation. The agency may question legal positions fundamental to the operation of the business, and the DOL often takes aggressive legal positions in an effort to gain leverage to compel changes to business practices.

Additionally, DOL investigators understand that service providers are extremely sensitive to reputational risk, and the agency often uses that as a cudgel, even where the agency's legal theories may be weak.

For example, in our experience, the DOL will sometimes engage directly with a service provider's clients to obtain data and confirm facts, and this can result in significant client relations issues and put the service provider's business at risk.

How should service providers respond to an investigation?

It is critically important that service providers approach their dealings with the DOL strategically. One should make every effort to be cordial and professional throughout the investigation, regardless of how adversarial the process may become.

That said, given the risks involved, it is important to establish boundaries early on and to not shy away from defending legitimate business practices.

Additionally, providers should take the opportunity, when appropriate, to push the DOL to conclude the investigation in a timely manner, and it may be worth pausing the implementation of any changes demanded by the DOL until there is a clear path to a global agreement and a closure of the investigation.

What are some common issues in service provider investigations?

Over the past 10 years, service provider investigations have focused on a number of specific areas. The particular areas of focus normally depend on the business of the service provider, but they have included:

- Abandoned plans;
- Fee disclosures;
- Uncashed checks and missing participants;
- Trade error corrections;
- Cross-trading; and
- Retention and disclosure of "float" income.

These focus areas are constantly evolving and can vary greatly between the different DOL field offices.

For example, in our experience, there has recently been an uptick in investigations focusing on service provider cybersecurity practices, which appears to be a direct response to highly

publicized security incidents resulting in losses to participant retirement accounts.

Moreover, in response to the recently passed 2021 Consolidated Appropriations Act^[4] there has been an increase in DOL investigations of health insurers and other service providers examining compliance with mental health parity requirements.

What is the most important thing service providers should keep in mind?

DOL investigations are serious matters, so it is important to have a full understanding of what to expect and to communicate those expectations to others in the organization. Service providers should be prepared for the investigation to be time-consuming and to require a material expenditure of resources.

Additionally, it is a best practice to designate a single point of contact for all communications with the DOL — e.g., in-house or external counsel. This helps ensure that all responses are accurate, timely and strategic.

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[1] Emp. Benefits Sec. Admin., National Enforcement Priorities, <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement> (last visited Oct. 5, 2021).

[2] U.S. Gov't Accountability Off., GAO-21-376, Employee Benefits Security Administration: Enforcement Efforts to Protect Participants' Rights in Employer-Sponsored Retirement and Health Benefit Plans (2021).

[3] Nat'l Assoc. of Plan Advisors, Update: EBSA Probing ESG Holdings, Policies (June 17, 2020), <https://www.napa-net.org/news-info/daily-news/update-ebsa-probing-esg-holdings-policies>.

[4] Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. (2020).