

# THE EXCELLENT FIDUCIARY

## Too Hot to Handle? The Truth About Retirement Plan Audits

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*With the recently enacted ERISA fee disclosure rule, the Department of Labor (DOL) has increased its vigilance on plan sponsors, resulting in increased numbers of DOL audits and enforcement actions for retirement plans of all sizes. The following article presents a discussion of key trends, common questions, and red flags to help retirement plan sponsors better prepare for a DOL audit.*

### THE DEPARTMENT OF LABOR'S HEIGHTENED ROLE

The DOL has ramped up its ERISA retirement plan enforcement actions in recent years, having added 1,000 employees to its ranks in 2011 alone to accommodate its increased workload.<sup>1</sup> Presumably, this upward trend in activity has

been in conjunction with the fee disclosure rule that was issued in 2012. This fee disclosure regulation, also known as 408(b)(2), intended to reduce the frequency of excessive vendor fees and help close what the DOL termed an "information gap" between retirement plan sponsor executives and their savvy investment managers and advisors. By requiring plan sponsors to more closely monitor and evaluate their vendors' fees and services, the DOL hoped to begin to reverse the trend of unwarranted retirement plan vendor fees (that were clearly detrimental to the plan sponsor and its participants).

Although the DOL's intention was good, a lack of clearly defined steps for achieving this new vendor oversight left many

plan sponsors in the dark about how to specifically measure vendor value and determine "fee reasonableness." While a flurry of activity around "benchmarking" fees became a fad in the fiduciary marketplace, plan sponsors still lacked an effective method for assessing their particular vendors' value to the plan, as mandated by ERISA (which entails not only examining fees, but also analyzing what services are provided for those fees, and how those services have evolved over time).

The result? Quite a busy year for the DOL and the Employee Benefits Security Administration (EBSA). In 2013, monetary results for the EBSA totaled \$1.69 billion, which included enforcement, voluntary fiduciary corrections, and informal com-

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plaint resolutions. Below are additional statistics regarding the EBSA's involvement with retirement plan audits and enforcement actions in 2013:

- **\$911.3 million** in prohibited transactions corrected/plan assets protected
- **\$423.6 million** in plan assets restored/participant benefits recovered
- **\$281.3 million** in monetary benefit recoveries from informal participant complaints
- **3,677** civil investigations closed
- **72.8%** of civil investigations resulted in fines or corrective action
- **320** criminal investigations closed and **88** individuals indicted.<sup>2</sup>

The retirement plan audit environment is abuzz with activity, and this rarely puts plan sponsors at ease. However, avoiding penalties and other enforcement actions from the DOL can be as easy as taking a few steps to prepare prior to a DOL audit. Effective preparation entails understanding how the retirement plan audit has evolved and changed over time, and what issues are top of mind for the DOL in its current audit investigations.

### THE CHANGING DOL AUDIT LETTER

DOL audit letters previously focused on garnering information about transactional activity for a retirement plan. The DOL letters examined over the last year by the Roland|Criss team indicate that several key focus areas that have changed. The biggest shift is that audit letter requests now include not only transactional records, but also documents related to all four disciplines of ERISA fiduciary duty, including Governance, Administration, Investments, and Controls (illustrated in Figure B).

In one letter Roland|Criss reviewed, there were 33 categories of documents requested, spanning all four of these fiduciary disciplines. In prior years, the primary area of documentation requests from the DOL was only in the Administration discipline. This proves an expansion of scope in what the DOL is looking for when commencing an audit. Some of the relatively new information requests that are appearing in current DOL audit letters include:

- Names of all **plan trustees**
- Evidence of **fiduciary liability insurance**
- Copies of each retirement plan vendor's **408(b)(2)**

**disclosure notices** (associated with the fee disclosure rule, mentioned earlier)

- Identification of all investment or fiduciary **committee members**
- **Minutes of meetings** for the investment or fiduciary committee (going back two years)
- Contracts and **arrangements with all vendors** that provide services to the plan
- Service **provider fees.**

While this certainly suggests a shift from prior years' audit letter requests, it is not necessarily too much for plan sponsors to overcome. Indeed, staying attuned to just a few potential "red flag" areas of retirement plan management can keep plan sponsors ahead of the audit game and provide them with peace of mind that their policies are in compliance with ERISA mandates.

### DOL AUDIT: KEY ISSUES AND RED FLAGS

When ensuring that a retirement plan management process is in compliance with ERISA and in alignment with fiduciary best practices, plan sponsors may ask themselves, "What does a DOL audit team really look for, and what 'red flags' might

cause them to want to dig deeper into a particular issue?” While there is an exhaustive list of technical requirements DOL auditors are expected to adhere to during a retirement plan audit, Roland|Criss has determined three main areas that are critical to a plan sponsor’s success—both in its retirement plan management approach, and in surviving a DOL audit.

**1. Testing of Vendors’ Fees**

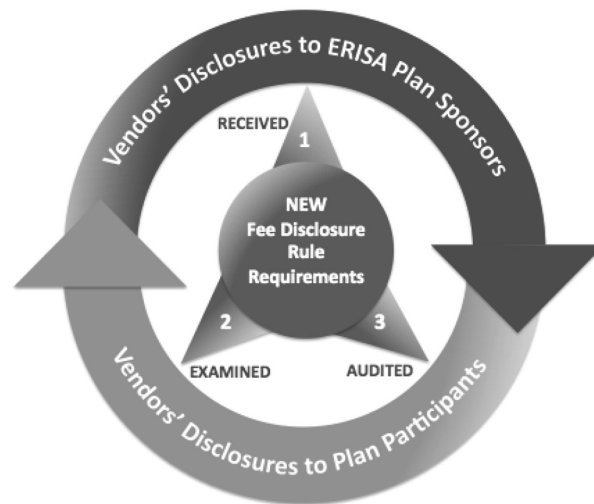
As alluded to earlier, the testing of vendors’ fees became

required under the 2012 fee disclosure rule found in ERISA Section 408(b)(2). When it was introduced, the impression in the marketplace was that the burden would fall on vendors to disclose their fees to plan sponsors. What was less understood (or publicized) was the rule’s effect on plan sponsors themselves. The regulation imposes a duty on the plan sponsor not only to receive a copy of its vendors’ fee disclosures, but also to test the “reasonableness” of those fees (a task many plan sponsors have not

performed before, and/or may not know how to complete effectively). If plan sponsors do not maintain documentation that attests to this assessment of their vendors’ fees, DOL auditors have a clear-cut opportunity to cite an ERISA violation.

**Key Plan Sponsor Takeaway:** Ensure there is a regular process in place for assessing the fees of each vendor that provides services to the retirement plan, including documentation of how those analyses and conclusions are made.

Figure A. ERISA Regulation 408(b)(2)’s Requirements for Plan Sponsors—Receiving, Examining, and Auditing Vendors’ Fees



**2. Committee Documentation**

When DOL auditors begin an audit engagement for a retirement plan, they expect to receive documentation of formal deliberations by the plan sponsor and/or the committee in charge of overseeing fiduciary

issues on behalf of the retirement plan. Whether these deliberations occur once per year or once per quarter is dependent upon the size and complexity of the organization’s retirement plan. At a minimum, however, DOL auditors expect to see formal documentation showing

careful deliberation of the plan conduct and processes, as well as informal gatherings or discussions of the fiduciary oversight committee throughout the year.

**Key Plan Sponsor Takeaway:** Organize a regular,

recurring fiduciary committee meeting with internal retirement plan management committee members at least once annually (but preferably more frequently). At the meetings, be sure to prepare (and keep records of) a detailed agenda, and take formal minutes to reflect key discussion points regarding the retirement plan status, management, and go-forward action steps.

### 3. Undisciplined Oversight

In the terms of the DOL, “undisciplined oversight” is evidenced by plan sponsors or investment committees that focus too exclusively on the wrong areas of fiduciary management. The fiduciary focus of many plan sponsors over the years has predominantly fallen on a retirement plan’s investment portfolios. This is not without good cause, as one

of the major intentions of plan sponsors and primary purposes of having a retirement plan is to enable retirement readiness for the plan’s participants—and thus, the performance of investments is critical. According to the DOL, however, major fiduciary breaches in recent years do not have as much to do with failings in the Investments area (which may be thanks to the growth and professionalism of the tools and resources offered by the investment community). Instead, breaches of fiduciary duty and other ERISA violations have been related to the other three fiduciary disciplines of Governance, Administration and Controls. Unless bolstered by skills in all four of these areas, plan sponsors may be more susceptible to DOL actions going forward than they would otherwise face with proper

training and/or outsourced expertise.

**Key Plan Sponsor Takeaway:** Enroll organization fiduciaries in an online or in-person training class to provide basic skills needed in each of the four fiduciary disciplines. Alternatively, outsourcing fiduciary responsibility to an independent, accredited 3(16) plan administrator also ensures that the plan is running in accordance with fiduciary best practices, as this entity should be an expert in all four fiduciary disciplines. All fiduciaries may obtain a copy of the handbook titled, *Retirement Plan Administrator: Scope and Conduct*, in which the steps needed to fulfill the four fiduciary disciplines are defined. It may be ordered online at [www.rolandcriss.com/publications/fiduciary-standards](http://www.rolandcriss.com/publications/fiduciary-standards).

Figure B. The Four Fiduciary Disciplines

Fiduciary Discipline	What It Entails
<b>Governance</b>	Creating and following a “prudent process” for the management and oversight of the retirement plan.
<b>Administration</b>	Evaluating and managing vendors, administering the plan, and serving the plan participants.
<b>Investments</b>	Ensuring the plan is being run in accordance with the investment policy, and that the policy is focused on the “right things” that impact participants’ retirement readiness.
<b>Controls</b>	Testing fiduciary practices on a regular basis to ensure that the Plan Administrator and other fiduciaries are serving the plan as directed by ERISA.

### A FINANCIAL AUDITOR’S PERSPECTIVE

An employee benefit plan audit is a way for the DOL to add additional assurance to the ac-

curacy of a plan’s Form 5500, which is essentially the tax return for the employee benefit plan. Organizations requiring an audit include those with plans

that have 100 or more employees at the beginning of the plan year who are eligible to participate in the plan. There are two main types of these audits: full

scope and limited scope. Full scope audits mean that everything in the plan is subject to review and detailed testing. More common are limited scope audits, which allow the auditor to pass on information that can be certified by a custodian or trustee of the plan as accurate and complete.

An employee benefit plan audit can be an in-depth and time-consuming process, so it is wise to outline a plan from the beginning. Plan sponsors first have a fiduciary responsibility to vet their CPA firm, so choosing a firm with appropriate and specific experience in auditing retirement plans is essential. Then allowing the selected auditor access to the recordkeeper's website enables the auditor to pull information directly, which can ease the burden on the plan sponsor.

According to Audit and Assurance Services Vice President Daniel Williams, CPA, with LaPorte CPAs & Business Advisors, "Once the audit begins, we are both testing transactions and looking to be sure that plan sponsors are meeting their fiduciary responsibilities."

These fiduciary duties include the following:

- Review of fund performance
- Review of recordkeeping and custodian statements
- Analysis of reasonableness of fees
- Holding regular fiduciary committee meetings (recommended at least twice per year).

Daniel concludes that typical findings in the audit process range from not having a formal fiduciary committee to deficiencies in the plan document. The Department of Labor estimates that about one third of plans with an audit requirement fail to meet standards. Therefore, it is critical to:

- Review retirement plan management processes in advance of an audit
- Select a credentialed CPA firm
- Ensure the plan sponsor can competently accomplish its fiduciary duties, either through the internal fiduciary team or through an outsourced compre-

hensive 3(16) plan administrator.

**SURVIVING A RETIREMENT PLAN AUDIT**

If plan sponsors check to ensure their retirement plan management processes avoid any key red flags or common issues uncovered in the audit process, they will be well on their way to maintaining fiduciary practices that protect themselves and their plan participants. And if preparing for an audit seems too overwhelming, there are always resources available to help. Some plan sponsors may be able to garner the expertise they need in-house, while others may need to outsource some fiduciary responsibility in order to feel confident about their fiduciary liability and role. In either case, plan sponsors should know that with the right intentions (and proper checks and balances), they can excel in their fiduciary role, comply with ERISA mandates, and, of course, survive a DOL audit.

**NOTES:**

<sup>1</sup>From Department of Labor.

<sup>2</sup>Statistics from United States Department of Labor, Employee Benefits Security Administration.