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## If the DOL Investigates You...

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By Kerry Pechter    *Thu, May 20, 2021*

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*Here are five FAQs about Department of Labor investigations of retirement plan advisers, and answers from attorneys at the prominent ERISA law firm Faegre Drinker. (Photo: Labor Secretary Marty Walsh.)*

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New Secretary of Labor Marty Walsh is known as a champion of the interests of working people, a group that retirement plan participants presumably belong to. His agency said in April that it might revisit the current “exemptions from prohibited transactions” for play advisers (Read FAQ 5, [here](#)).

But the former Boston mayor and former president of Laborers’ Union Local 223 seems more concerned about jobs these days than re-opening old debates over the meaning of “best interest” and “fiduciary” with respect to advising [ERISA](#) plan sponsors and participants.

So Registered Investment Advisors and broker-dealers have no special reason to fear a storm-surge of DOL investigations into the probity of their investment or rollover recommendations. The DOL will still launch investigations, however, and they’ll be as Kafkaesque as ever.

To help prepare advisers for what a DOL investigation might entail, the ERISA experts at the law firm of Faegre Drinker held a webinar two weeks ago. They offered answers to some of the most common concerns and apprehensions that advisory firms have about DOL investigations.

The bad news seems to be that cooperating with a DOL investigation can be distracting and time-consuming. The good news is that investigators prefer to arrive at amicable solutions that allow both sides to raise a flag and declare victory at the end.

### ***What happens first, and how should I act?***

“In most cases, you’ll receive a letter informing you that your organization is under investigation under ERISA, with regard to your advice to pension plans or 401(k)s,” said Faegre Drinker partner Josh Waldbesser, himself a former DOL investigator. “You’ll typically get a long list of document requests and a request for ‘voluntary cooperation.’ A

letter might say, ‘Give us all communications to subject X.’”

His advice: Call your ERISA lawyer and stay calm. Many aspects of the investigation will be negotiable. That includes the scope of the investigation, the range of documents you need to produce, the amount of time you’ll be given to produce them, the people who will be interviewed and, when the time comes, the terms of the outcome.

“You can negotiate everything and you should,” said partner Phil Gutwein, noting that the DOL isn’t your friend, either. “Approach this as you would litigation. Think of the DOL as a plaintiff’s attorney. They have similar incentives to find a problem and to get certain results. You need to figure out something you can give them to end it. Position your response to get the result you want. Being strategic pays off in the end.”

***What will the DOL investigators be looking for?***

Their job, obviously, is to look for violations of the Employee Retirement Income Security Act of 1974, as ERISA is officially known. If your firm advises a retirement plan, the DOL will be looking for any evidence of prohibited transactions, such as the sale of your firm’s proprietary products. They’ll look at the plan’s Form 5500 for red-flag investments and for opaque fee arrangements. They’ll want to know if your firm is properly bonded.

“Their biggest focus will be on prohibited transactions and conflicts of interest,” Waldbesser said. “You can have an economic conflict, related to a proprietary product for example, that can easily be rectified. You may have a source of undisclosed compensation. Those are the things you want to have at front-of-mind.”

“ESOPs [Employee Stock Ownership Plans] have been an enforcement priority for years,” said Brad Campbell, also a Faegre Drinker partner. “There are incentives within the DOL to investigate sales to participants and rollovers. We’ve seen a focus on fiduciary service providers, compensation for RIAs, proprietary goods or services, and managed accounts.” Gutwein added, “Sometimes the DOL finds something amiss at a plan sponsor, and then starts looking at the plan fiduciaries for sins of commission or omission.”

“I often hear the question, ‘Does the DOL have a quota for finding violations? Or did we just get unlucky?’” Campbell said.

***How can we not shoot ourselves in the foot?***

Ask the agents why they’re investigating you. That will help you tailor your response and

speed the resolution. “Don’t withhold anything and don’t volunteer anything—unless you want to volunteer low-hanging fruit,” Campbell said. Finding a violation, getting a correction, and closing the case is in everybody’s interest.

“They don’t want to read truckloads of documents any more than you want to produce them,” Waldbesser said. “Don’t wait until you can send them all of your documents. Send them the easy-to-reach documents right away, and the harder-to-reach documents later, when you can lay hands on them.”

If your firm is both an RIA and a broker-dealer, find out which one the DOL is interested in. Some practices are prohibited at one and not the other. “Ask the agents if they’re investigating the RIA or the B/D,” said Campbell. “If you can narrow it to the RIA, all the better. From the very beginning, negotiate the scope of the investigation and keep it as narrow as possible.”

Be cooperative, but “don’t invite them to go through our files,” said Faegre Drinker senior counsel Bruce Ashton. “Don’t be tempted to do a data dump. You must provide anything they ask for. Sometimes you can withhold things under attorney/client privilege. Some internal memos you may not want to provide.”

The worst thing you can do is not to cooperate with the investigation by ignoring requests.

***How long is the investigation likely to take?***

The initial phase, for fact-finding, is also the longest phase. “You can expect it to take months and it may drag out for years,” Waldbesser said. “You might receive a request for a document and then not hear from the DOL for a long time.”

Agents may be called away to other duties. Regional offices of the DOL may need to decide which region should lead the investigation. Don’t be surprised, or worried, if you don’t hear from them. “It’s not bad if there’s a long pause,” Campbell said. “Let sleeping investors lie. There’s no need to reach out to them.”

You may be asked to sign a [tolling agreement](#) to stop the statute-of-limitations clock from running down. If the DOL is going to file a lawsuit, there’s a rule that its fact-finding phase has to end at least six months prior to the filing. Delays may also occur because of jurisdictional overlap. If your company has offices in two different DOL districts, you might get calls from both districts, or have to wait until the two districts sort out who should investigate you.

***What sort of resolution can I expect?***

“The vast majority of investigations do not wind up as law suits,” said Waldbesser, a former Chicago-based DOL investigator.

“There’s no ‘quota’ system per se, but the investigators are measured on performance. There are different ways the DOL measures that,” Campbell said. “They used to look at the rate of opening new cases, rather than opening ‘good’ or ‘likely’ cases. Then they looked at the number of cases closed with results.” If they find something simple, like inadequate bonding, and they can get a solution with action right away, they’re likely to take it. “Their fiscal year ends September 30, so there’s a lot of desire to wrap things up by then.”

“The DOL has a lot of authority, but if you don’t cooperate they’ll sue and they don’t want to have to do that,” Gutwein said. “That provides each side with an incentive to compromise. The DOL only has so many resources, so there’s a desire to resolve a case without more effort than necessary.”

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