

***HOW TO PREPARE FOR A DOL OR IRS QUALIFIED  
PLAN AUDIT***

**HOLIFIELD JANICH RACHAL & ASSOCIATES PLLC**

**ANNUAL EMPLOYEE BENEFITS SEMINAR**

**AUGUST 2017**

**BY DANIEL N. JANICH**



***DOL or IRS INVESTIGATION or AUDIT:  
Two Sides of the Same Unpleasant Coin***

- **WHAT IS THE DIFFERENCE BETWEEN A DOL AND IRS AUDIT/INVESTIGATION OF QUALIFIED RETIREMENT PLANS?**
  - **DOL's Responsibility:**
    - **Enforcement of ERISA: fiduciaries must act prudently in the best interest of plan participants and beneficiaries:**
    - **Investigations of breaches of fiduciary duty and of instances of prohibited transaction by focusing on:**

# ***DOL or IRS INVESTIGATION or AUDIT***

## ***Two Sides of the Same Unpleasant Coin (Cont'd)***

- **Investigation of breach of fiduciary duty and prohibited transaction--focus is on: (cont'd)**
  - **1) Form 5500 filings;**
  - **2) Plan documents (SPDs and SMMs provided to participants);**
  - **3) Fee disclosures;**
  - **4) Timeliness of deposits of employee deferrals;**
  - **5) Monitoring of employee loan repayments;**
  - **6) QDRO Processing**
  - **7) Investment valuations.**

*DOL or IRS INVESTIGATION or AUDIT  
Two Sides of the Same Unpleasant Coin (Cont'd)*

• **IRS Responsibility:**

- **Ascertain plan qualification by insuring compliance with tax laws:**
  - **Focus investigation on:**
    - **1) Plan and Plan amendments drafting;**
    - **2) Coverage and nondiscrimination tests;**
    - **3) Compensation definition;**

*DOL or IRS INVESTIGATION or AUDIT*  
*Two Sides of the Same Unpleasant Coin (Cont'd)*

- Plan qualification – focus investigation on: (Cont.)
  - 4) Plan eligibility requirements;
  - 5) Minimum distribution requirements;
  - 6) Vesting;
  - 7) Loan repayments and defaults;
  - 8) Identification of highly compensated and key employees.

*WHY ARE YOU A TARGET:  
Bad Luck or Something Else?*

- **Increase in audits of retirement plans (one in every three plan sponsors experienced an audit in the past two years according to Wills Towers Watson survey)**
- **Imperative for plan sponsors to consistently monitor plan compliance with ERISA and IRC requirements**

*WHY ARE YOU A TARGET:  
Bad Luck or Something Else?  
(Cont'd)*

- **Although selection for audit might be random (bad luck) there are certain triggers:**
  - **1) complaints from plan participants (25% of audits);**
  - **2) EBSA audit initiatives;**
  - **3) plan sponsor responses to IRS questionnaires;**
  - **4) intra-agency referrals**

# *AUDIT PROCESS*

## *How It Begins*

- **It may begin with a phone call followed by a letter or simply with a letter – “Information Request Letter”**
- **What is in the letter?**
  - **Date of on-site auditor’s visit to review documents and possibly interview personnel responsible for the administration of the plan**



# *AUDIT PROCESS*

## *How It Begins (Cont'd)*

- **Documents/records sought by the administrative agencies:**
  - **Plan/trust documents;**
  - **Corporate/meeting minutes;**
  - **TPA/service provider agreements;**
  - **Investment documentation;**
  - **Fiduciary liability insurance and fidelity bond;**
  - **Documentation regarding fees and expenses;**

# *AUDIT PROCESS*

## *How It Begins (Cont'd)*

- **Documents sought by the administrative agencies: (cont.)**
  - **IRS determination letter;**
  - **Payroll records;**
  - **Participant benefit statements;**
  - **Form 5500 and attachments;**
  - **Missing participants;**
  - **Unclaimed benefits.**

# *AUDIT PROCESS*

## *How It Begins (Cont'd)*

- **What do you do now?**
  - **Don't ignore the letter**
  - **Don't panic;**
  - **Call your TPA;**
  - **Call/hire ERISA counsel;**
  - **Contact fiduciary insurance carrier**

# *AUDIT PROCESS*

## *Preparation*

- **Goal: smooth and productive on-site auditor's visit**
- **Consider whether ERISA counsel should manage audit response;**
- **Start collecting, reviewing and organizing the documents/records requested by the administrative agency (bound and labeled book);**

# *AUDIT PROCESS*

## *Preparation (Cont'd)*

- **Organize your audit response team:**
  - **1) Personnel responsible for plan administration;**
  - **2) ERISA counsel;**
  - **3) Consultants;**
  - **4) Investment advisor;**
  - **5) Administrator; and**
  - **6) Trustees**
- **If necessary ask for an extension of time**

# *AUDIT PROCESS*

## *Audit*

- **Interview:**
  - **DOL auditors may conduct voluntary interviews with individuals who might have information relevant to the investigation;**
  - **Provide only the information requested (do not volunteer any information not specifically asked for);**
  - **Make sure your ERISA counsel is present**
- **Generally:**
  - **Be responsive, courteous and cooperative (but exercise caution) – do not be adversarial or antagonistic**

# *AUDIT PROCESS*

## *Most Common Deficiencies*

- **Most common deficiencies identified by the DOL and IRS:**
  - **Not updating plan documents to keep up with new legislation;**
  - **Not administering the plan consistent with its terms;**
  - **Using an incorrect definition of compensation to calculate deferrals;**
  - **Depositing participants' deferrals in an untimely manner;**

# *AUDIT PROCESS*

## *Most Common Deficiencies (Cont'd)*

- **Most common deficiencies identified by the DOL and IRS:  
(Cont.)**
  - **Failure to follow plan eligibility requirements;**
  - **Improper participant loans and failure to monitor and pursue repayment;**
  - **Improper hardship withdrawals;**
  - **Failure to perform ADP/ACP nondiscrimination testing;**
  - **Failure to make minimum required distributions**



# *AUDIT AFTERMATH*

## *What Should You Expect?*

- **Do Not Expect a Quick Response (Now is the time for patience)**
- **DOL:**
  - **Best case result: “No Action” letter: no further action is necessary**

# *AUDIT AFTERMATH*

## *What Should You Expect? (Cont'd)*

- **Most common result: “Voluntary Compliance Letter”**
  - **Detailing certain deficiencies such as: untimely deferrals; issues related to employee loans**
  - **Describing corrective actions that need to be undertaken under the Voluntary Fiduciary Compliance Program (VCP)**
- **Worst result: DOL threatens/files litigation on behalf of plan participants**

# *AUDIT AFTERMATH*

## *What Should You Expect? (Cont'd)*

- **IRS:**

- **Best case result: Letter stating that the IRS will not pursue any further actions;**
- **If violations are found corrective actions need to be pursued under the IRS's Audit Closing Agreement Program: make plan and participants whole through corrective contributions plus interest to participants accounts, excise taxes (IRC 4975), other fees and penalties.**
- **If plan sponsor disagrees, appeal process is available**

## *AN OUNCE OF PREVENTION . . .*

- **WARNING: YOU CANNOT ESCAPE AN AUDIT BUT YOU CAN ALWAYS BE PREPARED:**
  - **Have internal controls (processes and procedures) in place;**
  - **Conduct an audit “selfie” by periodically (year-end) reviewing:**

## *AN OUNCE OF PREVENTION . . . (Cont'd)*

- **Conduct an audit “selfie” by periodically (year-end) reviewing: (Cont.):**
  - 1) plan, plan amendments, SPDs, SMMs against plan operation;
  - 2) investment policy statement, loan procedures, QDRO procedures documents;
  - 3) IRS determination letters;
  - 4) fee related documentation;
  - 5) signed plan documents, amendments, board resolutions;
  - 6) compliance testing, participant allocations;
  - 7) Form 5500s
- **If you ascertain deficiencies or errors in plan operation or administration avail yourself of the agencies’ self correction programs**

## *IN CONCLUSION*

- **YES, YOU TOO CAN AND WILL SURVIVE A PLAN AUDIT!**
- **ANY QUESTIONS?**