

# U.S. Department of Labor

Office of Inspector General—Office of Audit

## EMPLOYEE BENEFITS SECURITY ADMINISTRATION



## EBSA COULD STRENGTHEN POLICIES AND PROCEDURES OVER THE REACT PROJECT

Date: September 30, 2009  
Report Number: 05-09-005-12-001

**U.S. Department of Labor  
Office of Inspector General  
Office of Audit**

## **BRIEFLY...**

Highlights of Report Number: 05-09-005-12-001 to the Assistant Secretary for Employee Benefits Security.

### **WHY READ THE REPORT**

The Employee Retirement Income Security Act of 1974 (ERISA) was enacted to protect pension, health, and other employee benefit plans of American workers. Currently, there are more than 6 million plans, involving 150 million workers and \$6 trillion in assets.

EBSA seeks to focus its enforcement resources on areas that have the greatest impact on the protection of plan assets and participants' benefits. As part of its efforts to accomplish this goal, EBSA has identified five national enforcement projects: Employee Contributions Project, Health Fraud/Multiple Employer Welfare Arrangements, Employee Stock Ownership Plans, Consultant/Adviser Project, and Rapid ERISA Action Team (REACT).

In the REACT project, EBSA aims to respond in an expedited manner to protect the rights and benefits of plan participants when the plan sponsor faces severe financial hardship or bankruptcy and the assets of the employee benefit plan are in jeopardy. Under REACT, when a company has declared bankruptcy, EBSA's goal is to take immediate action to (1) ascertain whether there are plan contributions which have not been paid to the plans' trust, (2) advise all affected plans of the bankruptcy filing, and (3) provide assistance in filing proofs of claim to protect the plans, the participants, and the beneficiaries. EBSA also attempts to identify the assets of the responsible fiduciaries and evaluate whether a lawsuit should be filed against those fiduciaries to ensure that the plans are made whole and the benefits secured.

### **WHY OIG CONDUCTED THE AUDIT**

The OIG conducted a performance audit of EBSA's REACT project. The audit was designed to answer the following question: Is EBSA's REACT project accomplishing its goal?

### **READ THE FULL REPORT**

To view the report, including the scope, methodology, and full agency response, go to:

<http://www.oig.dol.gov/public/reports/oa/2009/05-09-005-12-001.pdf>

September 2009

## **EBSA Could Strengthen Policies and Procedures over the REACT Project**

### **WHAT OIG FOUND**

EBSA could strengthen policies and procedures over the REACT project to better attain project goals of identifying plan sponsors facing severe financial hardship or bankruptcy in order to protect any assets of employee benefit plans that are in jeopardy.

EBSA has not developed and implemented national policies or procedures to proactively identify potential REACT cases prior to a bankruptcy filing. Specifically, EBSA has not defined "severe financial hardship" or a standard method of assessing a plan sponsor's financial condition in identifying potential REACT cases.

EBSA does not have a comprehensive method for measuring the desired activities and outcomes of the REACT project, and does not perform a national assessment to judge the value of the REACT project in meeting its overall enforcement mission. EBSA either does not document information needed to assess all REACT project goals or has not defined or implemented measures to determine how well these goals are being accomplished or their value to the REACT project.

### **WHAT OIG RECOMMENDED**

We recommended the Assistant Secretary for Employee Benefits Security require EBSA to (1) develop more specific guidance for proactively targeting REACT cases based on severe financial hardship, (2) establish a performance measure(s) to accurately capture the REACT project's impact, and (3) develop an overall REACT project assessment that incorporates the regional assessments to determine whether the project is accomplishing its goal.

EBSA disagreed with many of our audit conclusions and defended their current practices. They did, however, agree to take several actions aimed at addressing most of our recommendations. For example, EBSA proposed to (1) establish a list of criteria that regions should consider when determining whether a company is experiencing "severe financial hardship," and (2) conduct an overall REACT project assessment starting in fiscal year 2010.

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**U.S. Department of Labor**

Office of Inspector General  
Washington, D.C. 20210



September 30, 2009

## **Assistant Inspector General's Report**

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The Office of Inspector General conducted a performance audit of the Department of Labor's (DOL) Employee Benefits Security Administration's (EBSA) Rapid ERISA Action Team (REACT) project. EBSA protects the integrity of pensions, health plans, and other employee benefit plans for more than 150 million Americans.

EBSA seeks to focus its enforcement resources on areas that have the greatest impact on the protection of plan assets and participants' benefits. To accomplish this goal, EBSA has identified certain national enforcement projects in which field offices are to place particular investigative emphasis. The REACT project is one of those projects. Through REACT, EBSA aims to respond in an expedited manner to protect the rights and benefits of plan participants when the plan sponsor faces severe financial hardship or bankruptcy and the assets of the employee benefit plan are in jeopardy.

The audit objective was to determine if EBSA's REACT project was accomplishing its stated goal of identifying and responding quickly to protect the rights and benefits of plan participants; and doing so when a plan sponsor faces severe financial hardship or bankruptcy and the assets of the employee benefit plan are in jeopardy.

The audit covered current EBSA practices, policies, and procedures. We conducted interviews with the National REACT Coordinator, the Regional REACT Coordinators, various Regional Directors (RD), and various Deputy Regional Directors to gain an understanding of the REACT project and how each region operates the project. We reviewed each region's Fiscal Year (FY) 2008 Program Operating Plan (POP) to determine how each region planned to operate the REACT project. In addition, we reviewed 108 REACT cases closed between October 1, 2006, and February 6, 2009.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence

obtained provides a reasonable basis for our findings and conclusions based on our audit objective. Our objective, scope, methodology, and criteria are detailed in Appendix B.

## **RESULTS IN BRIEF**

EBSA could strengthen policies and procedures over the REACT project to better attain project goals of identifying plan sponsors facing severe financial hardship or bankruptcy in order to protect assets of employee benefit plans that are in jeopardy. Specifically, policies and procedures could be strengthened to proactively identify REACT cases.

EBSA has not developed and implemented national policies or procedures to proactively identify potential REACT cases prior to a bankruptcy filing. Specifically, EBSA has not defined “severe financial hardship” or a standard method of assessing a plan sponsor’s financial condition in identifying potential REACT cases. As a result, individual regions interpret this target population differently. EBSA relies heavily on complaints from plan participants to identify potential REACT cases. While investigation of complaints received is a valid source, it is reactive, may not provide the most timely or systematic identification of troubled plans or the highest risk cases, and may reduce EBSA’s ability to fully recover unpaid plan assets.

EBSA does not have a comprehensive method for measuring the desired activities and outcomes of the REACT project, and does not perform a national assessment to judge the value of the REACT project in meeting its overall enforcement mission. EBSA measures each national enforcement project, including REACT, using the same measure it uses under the Government Performance and Results Act of 1993 (GPRA) for its overall enforcement mission — cases closed with corrected fiduciary violations as a percentage of all closed cases. This does not measure three specific REACT goals related to bankruptcy — (1) immediately identifying any unpaid plan contributions; (2) notifying all affected plans of the bankruptcy filing, and (3) providing assistance to plans, participants, and beneficiaries in filing “proofs of claim.” EBSA either does not document information needed to assess these goals or has not defined or implemented measures to determine how well these goals are being accomplished or their value to the REACT project.

We recommended the Assistant Secretary for Employee Benefits Security require EBSA to (1) develop more specific guidance for proactively targeting REACT cases based on severe financial hardship, (2) establish a performance measure(s) to accurately capture the REACT project’s impact, and (3) develop an overall REACT project assessment that incorporates the regional assessments to determine whether the project is accomplishing its goal. In response to our draft report, EBSA disagreed with many of our audit conclusions and defended their current practices. They did, however, agree to take several actions aimed at addressing most of our recommendations. EBSA’s written response to our draft report is provided in its entirety in Appendix D.

## RESULTS AND FINDINGS

### Objective 1 — Is EBSA’s REACT project accomplishing its goal?

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No. EBSA’s REACT project was not accomplishing its stated goal. In addition, EBSA did not effectively measure the results or value of the REACT project.

#### Finding 1 - EBSA’s REACT project was not accomplishing its stated goal

EBSA’s REACT project was not accomplishing all parts of its stated purpose. Specifically, it was not proactively targeting plan sponsors for REACT investigations prior to a bankruptcy filing.

According to EBSA, it has

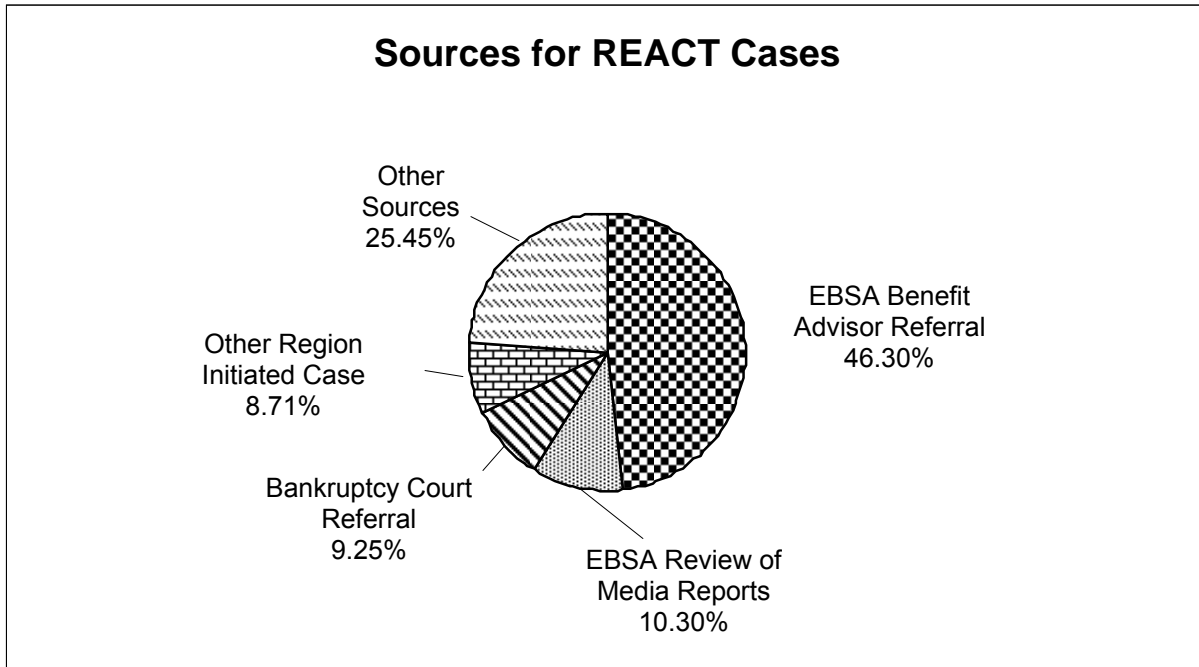
... targeted populations of plan participants who are potentially exposed to the greatest risk of loss....The REACT project ... enables EBSA to respond in an expedited manner to protect the rights and benefits of plan participants when the plan sponsor faces severe financial hardship or bankruptcy and the assets of the employee benefit plan are in jeopardy.

The REACT project began in FY 2001, and the project’s goals are to identify two populations of interest — (1) plan sponsors with severe financial hardship and (2) plan sponsors in bankruptcy. While bankruptcy is an extreme level of financial hardship, indications of severe financial hardship may precede a plan sponsor’s decision to file for bankruptcy protection. The project should emphasize identifying at risk plans as early as possible.

At the beginning of the project, EBSA’s National Office provided general REACT guidelines to the regions. It stated “the REACT project is designed to target plans which may not be otherwise protected in bankruptcy proceedings and, thereby, potentially expose plan participants to harm. Consequently, the regions need to identify targets where the participants appear to be most vulnerable.” However, EBSA did not provide any definition or criteria to determine vulnerability. The regions were to exercise prudence to determine which cases to open. No further targeting guidance was offered.

A desire to target specific employee benefit plans for enforcement scrutiny implies a proactive effort to identify plans that possess selected characteristics. In the case of the REACT project, EBSA’s stated aim was to identify employee benefit plans whose assets may have been at risk because of the sponsor’s “severe financial hardship” or because the sponsor had filed for bankruptcy protection. In such situations, according to EBSA, it is common to find employers holding assets which belong to or are owed to plans. While REACT cases include both companies in financial hardship and those filing for bankruptcy, few cases were initiated as a result of proactive efforts by EBSA. Of the 2,389 REACT cases that EBSA had initiated through February 6, 2009, almost half (46 percent) were initiated by a referral from one of EBSA’s Benefit Advisors (BA). These

referrals were not the result of original work performed by the BAs to identify financially troubled or bankrupt plan sponsors. Rather, these plan sponsors come to the attention of the BAs through complaints from employees, service providers, plan administrators, or bankruptcy trustees. As shown in the following chart, only 10 percent of REACT cases were initiated as a result of a proactive effort by EBSA (i.e., review of media reports).



Source: EBSA EMS Database, all REACT cases as of February 6, 2009

Without a strong proactive effort, EBSA had no assurance that these sources identify the highest risk plans in the timeliest manner for its review. Furthermore, REACT becomes a means of classifying investigative cases rather than a targeting tool.

EBSA’s National Office had not provided regional offices with criteria or a methodology to assess a sponsor’s financial condition or a definition of what circumstances might indicate “severe financial hardship.” According to EBSA officials, they had not developed a national standard because they felt it would limit individual regional discretion. As a result in FY 2008, two regions initiated REACT cases only when a plan sponsor had filed for bankruptcy. The other eight regions implemented definitions of “severe financial hardship” that varied in content and lacked quantifiable standards. Examples of regional definitions included:

- A corporation that does not have sufficient cash flow to meet its fixed financial obligations. (Region 1)
- A company that has no money, but has not filed for bankruptcy. (Region 3)
- A company about which some kind of negative financial information is disclosed. (Region 7)



- A company that is unable to meet its employee benefit obligations or whose plan will be negatively impacted as a result of the company's financial condition. (Region 10)

None of these definitions contained sufficient detail to allow regional personnel to consistently identify potential REACT cases based on severe financial hardship of the plan sponsor. Development of national guidance on identifying plan sponsors in severe financial hardship would reduce the subjectivity and variability of these judgments across and within EBSA regions. Also, establishing a framework would assure consistency and still allow regional flexibility and professional judgment. Therefore, the ability to initiate a REACT case based on severe financial hardship would be clearer.

The broad discretion that regions had in selecting REACT cases also inhibited the implementation of best practices. For example,

- One region held outreach seminars to inform various professional groups about EBSA's enforcement interest in financially distressed plan sponsors.
- One region designated "region watchers" to review newspapers, business journals, and search the Internet for news in one of the nine regional geographic areas.
- One region developed a Targeting Committee that met quarterly to determine if the region was targeting the right plans, if new areas should be targeted, and if the region was on target with the number of investigations opened.
- One region arranged to receive a weekly listing of new Chapter 7 bankruptcy filings from the Bankruptcy Court in its area.

National Office staff indicated that best practices are shared through conference calls and EBSA's intranet site. However, EBSA does not mandate implementation of best practices, they are only suggestions. This seems contrary to the concept of "best practice."

According to a National REACT Coordinator "progress check<sup>1</sup>," as of March 31, 2009, multiple regions fell short of REACT project expectations. One region had not closed a REACT case during the first six months of the fiscal year. All regional offices were supposed to reach out to U.S. Bankruptcy Trustees as a source for potential REACT case leads. However, one REACT Coordinator was unaware of this.

Although each region designated a REACT Coordinator to facilitate project activities, EBSA had not provided any formal REACT training to these individuals since the project's inception in 2001. A majority of the regions rotate the REACT Coordinator position, on average, every 2-3 years. Current REACT Coordinators indicated they were trained by their predecessors. One region did create an in-house training binder for new REACT Coordinators.

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<sup>1</sup> A "progress check" is an informal performance appraisal that identifies where improvements can be made.

Because of the lack of structured criteria to operate the REACT project, EBSA was not accomplishing all of the project's goals, and EBSA may not have identified the highest risk plans or initiated timely action to protect participants' and beneficiaries' benefits.

**Finding 2 - EBSA did not effectively measure the results or value of the REACT project**

EBSA did not have a comprehensive method for measuring the desired activities and outcomes of the REACT project, and did not perform a national assessment to judge the value of the REACT project in meeting its overall enforcement mission.

EBSA measured REACT project performance using the same measure it used under GPRA for its overall enforcement mission — cases closed with corrected fiduciary violations as a percentage of all closed cases. This did not measure EBSA's ability to timely identify and protect plan assets at risk because of a plan sponsor's financial problems. EBSA either did not document information needed to assess all REACT project goals or did not define or implement measures to determine how well some goals were being accomplished.

Not all efforts to identify and protect plan assets at risk because of the financial condition of the plan sponsor result in a REACT case being opened. For example, Regional REACT Coordinators spent, on average 2-4 hours a week, reviewing Creditor's Edge<sup>2</sup>, searching the Internet, and reading/listening to media reports to identify financially troubled companies. After identification of a financially troubled company in their region, the Coordinator conducted preliminary steps to determine whether assets related to an employee benefit plan were at risk. Actions included:

- determining if the company had a benefit plan,
- reviewing the Form 5500 Annual Return/Report of Employee Benefit Plan,
- reviewing the Technical Assistance Inquiry System (TAIS)<sup>3</sup> for complaints,
- reviewing Public Access to Court Electronic Records (PACER)<sup>4</sup>, and
- contacting the company or plan administrator to determine the status of the plan.

If the Coordinator confirmed that no employee benefit plan assets were at risk, no REACT case would be initiated. Since EBSA's performance measure is based on closed REACT cases, these efforts were not included in the project's performance measure.

In addition to measuring the percentage of cases closed with fiduciary violations, EBSA's National Office used several quantitative measures to internally assess REACT's performance nationally and regionally. These include the number of cases

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<sup>2</sup> Creditor's Edge is a weekly newsletter that scans over 60 business publications each week while searching the Internet for companies nationwide that are having some sort of financial difficulty.

<sup>3</sup> TAIS is a computer database for inquiries and complaints that might come from Congressional offices, participants in plans, or other callers.

<sup>4</sup> PACER is a website that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and the U.S. Party/Case Index.

opened, the number of cases closed, the number of cases closed with results, cases forwarded for litigation, staffing level, and time spent on a case. An aggregate of these figures allow EBSA to monitor how the REACT project is performing compared to the other national projects. Standardized quarterly reports and graphs are generated and provided to all the regions. These reports allow the RDs to assess the results of the projects.

However, while a goal of the REACT project is to “respond in an expedited manner” and “take immediate action” when plan sponsors declare bankruptcy, EBSA does not measure the timeliness of REACT case openings or related investigative actions. Plans whose sponsor had filed for bankruptcy protection made up one of the target groups in the REACT project. Due to the tight time frames and the intricacies of bankruptcy laws, plan assets and employee benefits are often lost because of the plan fiduciaries' failure to timely identify pension plan contributions that have not been paid to the plan's trust. Therefore, when a plan sponsor files for bankruptcy protection, EBSA's REACT project aims to (1) take immediate action to ascertain whether there are plan contributions which have not been paid to the plans' trust, (2) advise all affected plans of the bankruptcy filing, and (3) provide assistance in filing proofs of claim to protect the plans, the participants, and the beneficiaries. However, neither the current performance measure (closed cases with fiduciary results), nor any other individual quantitative measure used by EBSA, demonstrate whether these goals were being accomplished.

EBSA's REACT project has protected and restored plan assets. We reviewed 108 of 359 closed REACT cases that had been closed between October 1, 2006, and February 6, 2009. Of these closed cases, 75 cases (69 percent) were closed with a monetary recovery totaling \$72,488,481. Of that amount, \$53,072,755, nearly 75%, of the assets recovered by EBSA were from one case. Seven cases were closed with better than \$1,000,000; and one case closed with more than \$2,000,000 recovered. Only four of the closed REACT cases reviewed showed unrecovered assets totaling \$522,275.

Each REACT investigative file contained (1) TAIS printout(s), (2) EBSA's Enforcement Management System (EMS) tabs<sup>5</sup>, (3) Report of Investigation, (4) Report of Interview(s) with key individuals, (5) bankruptcy documents (e.g., bankruptcy filing(s), proofs of claim, etc.), and (6) recovery package (if applicable). However, the files lacked evidence to demonstrate the timing of (i.e. immediacy) actions taken to ensure all plan contributions were paid to the plans' trust.

The REACT files did contain documentation supporting EBSA contacting and working with plan sponsors and supporting proof of claim filings, but the overall effect of EBSA's assistance could not be determined. EBSA has not defined or implemented measures to determine how well these goals are being accomplished or their value to the REACT project. Monetary recovery is not guaranteed when a proof of claim is filed.

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<sup>5</sup> EMS tabs – Case opening and closing, monetary results, violations, etc.

Finally, EBSA did not have a national REACT assessment. EBSA only measured the project's performance in each region, incorporating statistical data (such as cases opened and closed), and the National Office Coordinator's knowledge of the project in each region. The National REACT Coordinator spoke individually to each Regional Coordinator at least twice a year. The National REACT Coordinator used these calls to assess the region's performance and gain a deeper understanding of how the project works. However, the evaluations did not demonstrate if the REACT project was accomplishing its goals at a national level.

## **Recommendations**

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We recommend that the Assistant Secretary for Employee Benefits Security:

1. Strengthen standard policies and/or procedures for the REACT project to create consistency among all the regional offices. Specifically,
  - a. establish a definition of and a methodology for assessing "severe financial hardship;"
  - b. implement recurring REACT training and/or create a training manual for REACT Coordinators;
  - c. assure REACT Coordinators routinely communicate with and obtain information from U.S. Bankruptcy Trustees;
  - d. implement new and unique procedures determined to be "best practices" across all regions; and
  - e. require the investigators to document when and how they have advised all affected plans of the bankruptcy filing.
2. Establish a performance measure(s) to accurately capture the REACT project's impact — specifically measure the results of the preliminary research the REACT Coordinators perform on bankrupt companies.
3. Develop an overall REACT project assessment that incorporates the regional assessments to determine whether the project is accomplishing its goal.

## **EBSA RESPONSE**

In its response to our draft report, EBSA disagreed with many of our audit conclusions and defended their current practices. They did, however, agree to take several actions aimed at addressing most of our recommendations.

EBSA maintained that it initiated REACT cases through several proactive methods not acknowledged in the audit report. In addition to computer targeted cases, EBSA reasoned that referrals from the bankruptcy courts and the complaints made to the BAs should be considered proactive cases because they resulted from time EBSA personnel had spent (a) developing cooperative relationships with other oversight entities and (b) educating participants about ERISA requirements.

Furthermore, EBSA disagreed that complaints do not provide timely or systematic identification of plans in jeopardy. EBSA stated that BA referrals based on plan participant complaints are one of the best sources to identify high risk plans because participants have first-hand knowledge of the plan sponsor's financial condition and information that may not be available to EBSA in a timely manner. For example, since privately-held companies are not required to publicly file financial information, EBSA would not know if such a plan sponsor was facing severe financial hardship except through a plan participant complaint or bankruptcy filing.

EBSA believes that establishing a fixed definition of "severe financial hardship" would unduly constrain RDs' discretion to target areas of risk within their respective jurisdictions, to the significant detriment of the project. EBSA contended that the definitions provided by the regional REACT coordinators represent a general understanding of the term and that the lack of a formal definition has not resulted in any investigations improperly being coded as REACT. However, recognizing the need for a degree of uniformity in implementing the project, EBSA agreed to establish a list of criteria that regions should consider when determining whether a company is experiencing "severe financial hardship."

EBSA stated that REACT Coordinators receive recurring and extensive training through a variety of means, including in-depth teleconferences conducted by the National REACT Coordinator, specific guidance issued by the National Office and made available on EBSA's intranet site, training workshops as needed, and ad hoc communication with the National REACT Coordinator on individual technical and procedural issues. EBSA agreed to continue providing recurring training and to consolidate this information into a manual for use in training new REACT Coordinators.

EBSA provided information from the U.S. Government Accountability Office in reasoning that best practices should not be mandated. EBSA paraphrased GAO's caution that before implementing wholesale changes to emulate best practices, it is important for an organization to understand the similarities and differences between its own setting and the context from which the best practice was taken. EBSA stated that it would continue to identify and share best practices among the regions, while allowing RDs to retain discretion with respect to implementing best practices based on an understanding of their region. It will also continue to include "utilization of best practices" as part of its evaluation of each field office's performance.

EBSA disagreed that it is not effectively measuring the results or value of the REACT project. EBSA stated that it had spent more than 10 years attempting to create a pure outcome measure for its enforcement programs and that such a measure has been difficult to create. EBSA explained that its measures focus on investigative outcomes, such as whether fiduciary violations were found and corrected, rather than investigative steps such as the timeliness of investigative actions. Furthermore, EBSA stated that it was not possible to create a measurement that would capture the REACT Coordinators' preliminary research that does not result in case openings. EBSA stated that the

accepted GPRA measure already reflects, to some degree, the value of preliminary research in identifying fiduciary breaches.

EBSA agreed that it would be beneficial to develop a formal REACT project assessment. EBSA will conduct an overall REACT project assessment, which takes into account the regional project assessments starting in fiscal year 2010.

## **OIG CONCLUSION**

We continue to conclude that the REACT program would benefit from a greater emphasis on and clearer guidance for proactively identifying employee benefit plans whose sponsors are in “severe financial hardship.” EBSA cites computer targeted cases as a proactive methodology. However, in our audit universe of 2,389 REACT cases, EBSA opened only 42 cases (1.76 percent) based on its computer targeting.

EBSA also disagreed that “complaints do not provide timely or systematic identification of plans in jeopardy.” However, participant complaints are the result of knowledge, criteria, and judgment unique to the complainant. Under a specific set of circumstances, different individuals may take different periods of time to reach the same or different conclusions about their plan’s risk. Even if they perceive a risk to exist, they may choose not to file a complaint. Therefore, we do not see how participant complaints can be viewed as a timely or systematic means of identifying plans in jeopardy. We continue to recommend that EBSA develop a standardized criteria and methodology that its personnel can use to identify potentially high risk plan sponsors based on indicators of severe financial hardship.

While EBSA points out that that the lack of a formal definition has not resulted in any investigations improperly being coded as REACT, the audit did not draw that conclusion nor cite that as a deficiency.

We acknowledge that new procedures and techniques should be fully evaluated before being labeled as “best practices” and implemented program-wide. This would include assessing how regional differences impact the usefulness of the practice. However, an RD’s discretion must be balanced by the responsibility of EBSA’s National Office to guide and manage the project nationally. Sharing, evaluating, and implementing best practices should involve and be directed by EBSA’s National Office. A region’s decision not to implement a procedure deemed to be a “best practice” should be justified and agreed to by the National Office.

Performance measures must evaluate all aspects of a program. We do not agree with EBSA’s argument that it cannot quantify or determine the outcome of REACT Coordinator activities that do not result in a case opening. If a REACT Coordinator conducts limited research about a plan sponsor who is believed to be in severe financial hardship and determines that the employee plan assets are fully accounted for and safeguarded, no case would be opened. But, that effort should be measured and reflect

favorably on the value of the project. In contrast, if measures show that only a small percentage of plans that undergo this initial review develop into investigative cases, initial targeting methods may require adjustment or the overall value of the project may be questioned. Measuring only efforts expended in cases opened prevents an effective assessment of the overall project.



Elliot P. Lewis  
Assistant Inspector General  
for Audit

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## Appendices

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**Background**

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The Employee Retirement Income Security Act of 1974 (ERISA) was enacted to protect pension, health, and other employee benefit plans of American workers. Currently, there are more than 6 million plans, involving 150 million workers and \$6 trillion in assets.

Administration of ERISA is divided among the Employee Benefit Security Administration of the U.S. Department of Labor (EBSA), the Internal Revenue Service of the Department of the Treasury (IRS), and the Pension Benefit Guaranty Corporation (PBGC). EBSA is responsible for enforcing the fiduciary, reporting, and disclosure provisions of ERISA. The IRS assures that pension, profit sharing, and stock-bonus plans meet requirements for established tax benefits. The PBGC provides insurance coverage for defined benefit pension plans.

In pursuing its mission, EBSA uses a combination of compliance assistance, voluntary compliance, and enforcement. Enforcement actions, both civil and criminal, are intended to deter and correct violations of ERISA and ensure workers receive promised benefits. EBSA's approximately 400 investigators rely on participant complaints, computer analyses, published news reports, and referrals from other government agencies to identify and initiate cases. Areas of emphasis are established through a series of national and regional projects contained in annual Program Operating Plans (POP). Each region determines the distribution of its enforcement resources among these projects. With more than 8,000 plans under its authority for every 1 investigator, it is critical that EBSA direct its limited resources at areas with the most impact.

EBSA seeks to focus its enforcement resources on areas that have the greatest impact on the protection of plan assets and participants' benefits. To accomplish this goal, EBSA has identified five national enforcement projects, in which field offices are to place particular investigative emphasis. The five National Projects are Employee Contributions Project, Health Fraud/Multiple Employer Welfare Arrangements, Employee Stock Ownership Plans, Consultant/Adviser Project, and Rapid ERISA Action Team (REACT).

In the REACT project, which began in Fiscal Year (FY) 2001, EBSA aims to respond in an expedited manner to protect the rights and benefits of plan participants when the plan sponsor faces severe financial hardship or bankruptcy and the assets of the employee benefit plan are in jeopardy. Under REACT, when a company has declared bankruptcy, EBSA's goal is to take immediate action to (1) ascertain whether there are plan contributions which have not been paid to the plans' trust, (2) advise all affected plans of the bankruptcy filing, and (3) provide assistance in filing proofs of claim to protect the plans, the participants, and the beneficiaries. EBSA also attempts to identify the assets of the responsible fiduciaries and evaluate whether a lawsuit should be filed against those fiduciaries to ensure that the plans are made whole and the benefits secured.

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**Objective, Scope, Methodology, and Criteria**

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**Objective**

Our audit was designed to address the following question:

Is EBSA's REACT project accomplishing its goal?

**Scope**

DOL OIG audited EBSA's REACT project, a national enforcement initiative. Through REACT, EBSA aims to respond in an expedited manner to protect the rights and benefits of plan participants when the plan sponsor faces severe financial hardship or bankruptcy and the assets of the employee benefit plan are in jeopardy.

We specifically examined the process of how each of the 10 regions identify (target), select, and investigate REACT cases. We reviewed REACT cases closed from October 1, 2006, through February 6, 2009.

We performed our fieldwork from March to April 2009 and were on-site at the following regional offices:

Atlanta, Georgia  
Boston, Massachusetts  
Chicago, Illinois  
Dallas, Texas  
Kansas City, Missouri  
Los Angeles, California  
New York, New York  
Philadelphia, Pennsylvania

We obtained and reviewed cases from the Cincinnati and San Francisco regional offices and performed the reviews at the Chicago office.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

A performance audit includes an understanding of internal controls considered significant to the audit objective and testing compliance with significant laws, regulations, and other requirements. In planning and performing our audit, we considered whether internal controls significant to the audit were properly designed and

placed in operation. This included reviewing EBSA's policies and procedures for administering the REACT project. We confirmed our understanding of these controls and procedures through interviews, documentation review, and REACT case testing.

## Methodology

To accomplish the audit objective, we conducted on-site interviews and teleconferences with EBSA management and staff responsible for administering the REACT project. We spoke to the National REACT Coordinator and other officials from EBSA's National Office<sup>6</sup>; four Regional Directors; three Deputy Regional Directors; and 11 Regional REACT Coordinators. From these interviews, we gained an understanding of the REACT project and how each region operated it. In addition to interviews, we reviewed FY 2001 REACT guidance and each region's FY 2008 POP to gain an understanding of how each region planned to operate the REACT project.

We evaluated internal controls used by EBSA for reasonable assurance that the REACT project was accomplishing its goal of identifying and responding quickly to protect the rights and benefits of plan participants; and doing so when a plan sponsor faces severe financial hardship or bankruptcy and the assets of the employee benefit plan are in jeopardy. Our consideration of EBSA's internal controls for administering the REACT project would not necessarily disclose all matters that might be reportable conditions. Because of inherent limitations in internal controls, non-compliance may nevertheless occur and may not be detected.

In performing the audit, we requested and received EBSA's Enforcement Management System (EMS) database of 2,389 REACT cases, as of February 6, 2009. From this database, 359 cases were closed between October 1, 2006 through February 6, 2009. During our initial fieldwork, we reviewed 56 of 58 REACT cases, closed during FY 2007 and FY 2008, from the Chicago Regional Office.<sup>7</sup> We then determined to review additional cases from the nine other regions.<sup>8</sup> We stratified the remaining 301 closed cases into 10 categories based on the dollar amount recovered by EBSA (ranging from \$0 to more than \$1 million). The samples were drawn from each stratum using a random number generator. From this population, we randomly selected 52 REACT cases, closed from October 1, 2006, through February 6, 2009. In total, we reviewed 108 of the 359 closed REACT cases.

In order to determine if the REACT project was identifying and responding quickly to protect the rights and benefits of plan participants, we reviewed the closed REACT cases to determine (1) the amount of assets recovered by EBSA or other means (i.e., settled in bankruptcy court), (2) if any assets were lost or not recovered, (3) the value of the REACT case (i.e., assets restored, assets protected, ensured participant rights,

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<sup>6</sup> Deputy Assistant Secretary for Program Operations; the Director for the Office of Enforcement; and the Chief for the Division of Field Operations.

<sup>7</sup> The Chicago regional office could not provide the other two cases for our review.

<sup>8</sup> We were on-site at 8 of the 10 regional offices. REACT cases from the Cincinnati and San Francisco offices were sent to Chicago for our review.

etc.), and (4) if there was other information available for EBSA to identify the company's problems at an earlier date.

We obtained a data file of REACT cases directly from EBSA and determined it to be sufficient and appropriate to provide a reasonable basis for our findings and conclusions within the context of our objective. Since we are not making any projections from our audit sample, we did not independently confirm that the file contained all REACT cases for our audit period. Since all REACT cases are inputted into EBSA's EMS, we do not know of any practical way to independently confirm the completeness of the data file.

### **Criteria**

We used the following criteria to accomplish our audit:

- EBSA's Enforcement Manual

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**Appendix C**

**Acronyms and Abbreviations**

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BA Benefit	Advisor
DOL	Department of Labor
EBSA	Employee Benefits Security Administration
EMS	Enforcement Management System
ERISA Employee	Retirement Income Security Act of 1974
FY Fiscal	Year
GPRA	Government Performance and Results Act of 1993
OIG	Office of Inspector General
PACER	Public Access to Court Electronic Records
POP	Program Operating Plan
RD Regional	Director
REACT	Rapid ERISA Action Team
TAIS	Technical Assistance Inquiry System

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## EBSA Response to Draft Report

## U.S. Department of Labor

Assistant Secretary for  
Employee Benefits Security Administration  
Washington, D.C. 20210



MEMORANDUM FOR: ELLIOT P. LEWIS  
Assistant Inspector General for Audit

FROM: PHYLLIS C. BORZI *copy of L.O. for Phyllis C. Borzi*  
Assistant Secretary of Labor

SUBJECT: EBSA Response to OIG REACT Audit  
Report No. 05-09-005-12-001

DATE: September 18, 2009

We appreciate the opportunity to comment on the recommendations made in your performance audit of the Employee Benefits Security Administration's policies and procedures related to the Rapid ERISA Action Team (REACT) project.

The Employee Benefits Security Administration (EBSA) is responsible for the administration and enforcement of the civil and criminal provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and related criminal statutes. As you pointed out, EBSA protects the integrity of retirement and welfare benefit plans for over 150 million Americans.

An important part of EBSA's mission is to deter and correct violations of ERISA and other relevant statutes and to ensure workers receive promised benefits. Due to its comparatively small investigative staff, limited resources, and the size of the plan universe that EBSA oversees, EBSA must focus its enforcement efforts in order to direct resources toward areas that will have the greatest impact on the protection of plan assets and participants' benefits. One of the ways in which EBSA's efforts are focused is by the use of national enforcement projects. The REACT project, which focuses on plan sponsors that are in severe financial hardship or that have declared bankruptcy, is one such national enforcement project.

As stated in your report, the REACT project has protected and restored plan assets. In fiscal year 2008, EBSA achieved over \$89.5 million in monetary results through this project. The project has achieved over \$113 million in monetary results in FY 2009 through March 31, 2009.

Your audit was designed to determine if EBSA's REACT project was identifying and responding quickly to protect the rights and benefits of plan participants when a plan sponsor faces severe financial hardship or bankruptcy and the assets of the employee benefit plan are in jeopardy. Before addressing your recommendations, we would like to review the operation of EBSA's REACT project.

#### Overview of REACT

The REACT project began in fiscal year 2001. The goal of REACT is to protect the rights and benefits of plan participants in an expedited manner when the plan sponsor faces severe financial hardship or bankruptcy and the assets of the employee benefit plan are in jeopardy. In a REACT investigation, EBSA takes a variety of steps to meet this goal, including taking immediate action

to ascertain whether all plan contributions have been paid into the trust, advising all affected plans of the bankruptcy filing, and providing assistance in filing proofs of claim.

Like any national project, one of the characteristics of REACT is that it identifies certain types of plans that EBSA has targeted for investigation. In the example of REACT, potential subjects of cases are plans whose sponsors are facing severe financial hardship or that have declared bankruptcy. The U.S. Small Business Administration Office of Advocacy reports that in 2008 there were 595,600 small business closures and 43,546 bankruptcies and that overall about half new small firms survive five years. EBSA must select REACT investigations from a large, heterogeneous pool using available information.

Approximately half of all REACT cases opened in fiscal year 2008 were opened on companies experiencing severe financial hardship. EBSA believes that this distribution is optimal, as ERISA violations in REACT cases can arise both prior and subsequent to bankruptcy. The percentage of cases based on severe financial hardship also reflects the careful case development EBSA must perform to attain the historical results achieved by REACT.

#### **Case openings**

Under REACT, EBSA opens cases based on information from multiple sources, including leads from bankruptcy courts or other government entities, EBSA computer targeting, EBSA's review of media reports, and EBSA benefit advisor referrals. According to the OIG draft report, only the review of media reports should be considered proactive work by EBSA. However, other sources, such as computer targeted cases, referrals from the bankruptcy courts and the predicate complaints made to the Benefit Advisors (BAs) are also the result of proactive efforts by EBSA. For example, cases opened due to EBSA computer targeting are the direct result of EBSA's proactive review of Form 5500s filed by plans. Similarly, referrals from bankruptcy courts or other outside organizations – and complaints made to BAs – are the result of EBSA's successful efforts in developing relationships with outside entities and in educating both the regulated community and participants about ERISA and EBSA.

The OIG draft report specifically identifies BA referrals as a reactive source because they are not the result of "original work" performed by the BAs. This statement ignores the important REACT outreach and education work done by EBSA. As the report cites, almost half of recent REACT cases were based on credible information provided by the public to BAs. Such a response is in fact attributable to proactive work by the agency.

The OIG draft report also assumes that EBSA's case opening sources may not represent identification of the highest risk plans. In EBSA's experience, BA referrals are one of the best sources of actionable information on plans with ERISA violations, particularly complaints from working participants, as they have first-hand knowledge of the plan sponsor's financial condition that is not otherwise available to EBSA in a timely manner. For example, privately-held companies are not required to make any public filings of their financial condition, and information on their financial condition is not consistently reported in the media. Therefore, absent a bankruptcy filing, it is difficult for EBSA to know about the plan sponsor's severe financial hardship other than by receipt of a complaint. Although we agree EBSA's response to



participant complaints is in some respects reactive—and appropriately so—we therefore disagree that complaints do not provide timely or systematic identification of plans in jeopardy.

EBSA has declined to define the term severe financial hardship for several reasons. First, there is the danger that any definition would be under inclusive, and exclude investigations that would otherwise be classified under the REACT project. EBSA regulates plans sponsored by public and privately-held companies of varying size, complexity, and enterprise. Pronouncing a single definition would be simplistic and limiting. Second, the imposition of a static definition would remove discretion from the Regional Directors and hamper their ability to respond to unforeseen situations under the auspices of the REACT project. Finally, different risks are present in different areas of the country, and the imposition of a one-size-fits-all definition will limit a Regional Director's ability to address risks unique to a region. We also reiterate that nationally a large number of companies may be in severe financial distress, but their status may not be apparent outside a limited circle of creditors, advisers, customers, and employees.

Furthermore, we note that the field definitions provided in the draft report, while using different language, are complementary in nature, and represent a general understanding within field offices of the contours of the term severe financial hardship. We do not believe the lack of a formal definition has resulted in any investigations improperly being coded as REACT.

#### **Training and best practices**

As the OIG draft report stated, comprehensive REACT training was provided at the inception of the project. Since then, the National Office has provided guidance through conference calls, the EBSA intranet site, and training at EBSA managers' conferences. In addition, in quarterly training for investigative staff (not only the REACT Coordinators), regional offices have periodically included modules on either REACT or bankruptcy on an as-needed basis (as determined by the Regional Director). Finally, the REACT Coordinators are able to contact the National Office to help resolve technical or procedural questions.

The OIG draft report correctly observes that EBSA does not view best practices as mandates. Best practices are suggestions that, if applicable in a given region, may help the region to achieve its goals more efficiently. According to the United States Government Accountability Office (GAO), best practices are the processes, practices, and systems identified in leading organizations. However, the GAO cautions that before implementing wholesale changes to emulate best practices, it is important for an organization to understand the similarities and differences between its own setting and the context from which the best practice was taken.<sup>1</sup> In EBSA, best practices are identified, consolidated and shared by a best practices committee. However, each Regional Director has a unique and unparalleled understanding of the nature and risks of his or her region. Therefore, Regional Directors should retain the discretion with respect to implementing best practices. We also note that, while discussing best practices in its 2002 Congressional Report on the Pension Welfare Benefits Administration,<sup>2</sup> the GAO did not state that best practices should be mandated.<sup>3</sup>

<sup>1</sup> <http://www.gao.gov/bestpractices/>

<sup>2</sup> EBSA was known as the Pension and Welfare Benefits Administration prior to February 3, 2003

<sup>3</sup> <http://www.gao.gov/new.items/d02232.pdf>

### **REACT Evaluations**

EBSA's Office of Enforcement formally evaluates each region's enforcement performance (including REACT) at the end of each fiscal year. The regional REACT evaluation is based on both qualitative and quantitative factors, derived from case statistics and the National Office REACT Coordinator's knowledge of the program in each region. The National Office REACT Coordinator's knowledge is derived, in part, from individual calls that take place at least once a year.

At midyear, each Regional Director is also given an informal oral evaluation that includes the REACT "progress check" referenced in the OIG draft report. The "progress check" is not only an identification of areas of potential improvement, it also identifies positive aspects of the project's implementation in each region. The overall purpose of the "progress check" is to discuss the region's apparent ability to meet its goals by the end of the fiscal year. Therefore, no regions were falling short of project expectations at midyear 2009.

The OIG draft report also states that EBSA did not have a comprehensive method for measuring the desired activities and outcomes of the REACT project, because the quantitative measures used do not measure the timeliness of EBSA's investigative actions. The performance measures used for the REACT project do not focus on investigative steps such as the timeliness of investigative actions, which are issues of case quality. Instead, they focus on investigative outcomes, such as whether fiduciary violations were found and corrected. Partly in order to monitor the quality of the investigation, including whether all necessary steps were taken in a timely manner, supervisory personnel review case files. In addition, ten percent of all cases closed by EBSA are randomly sampled and comprehensively reviewed for case quality. This robust process allows EBSA to ensure that casework is conducted in accordance with agency objectives. We also note that, as stated in the OIG draft report, an aggregate of the quantitative measures compiled by EBSA allows the agency to monitor how the REACT project is performing. Furthermore, as part of its annual planning process, the agency determines whether the REACT project should remain a national enforcement project.

The OIG draft report correctly states that EBSA's performance measures are based on the measure used under the Government Performance and Results Act of 1993 (GPRA), and do not include the preliminary research conducted by the REACT Coordinators. The preliminary research conducted by the Coordinators is not quantifiable if it does not result in a case opening. For example, if a Coordinator speaks to a bankruptcy trustee and informs the trustee of his responsibilities under ERISA, there is no quantifiable measure for the future ERISA violations that the trustee may not commit due to that interaction.

EBSA has spent over ten years attempting to create a pure outcome measure for the work generally undertaken by its enforcement program and recognizes that such a measure is, at best, extremely difficult. This problem is faced by other law enforcement agencies as well as EBSA and the difficulty of creating such a measure has been acknowledged by external reviewers and performance management experts. Instead, a variety of surrogate measures, such as cases closed



with fiduciary results, are used in conjunction with other data to measure the level of success of the EBSA's enforcement program, including the REACT project. Based on EBSA's experience in developing performance measures, we do not believe it is possible to create a measurement for the Coordinators' preliminary research.

**OIG Recommendations**

**Recommendation 1: EBSA should strengthen standard policies and/or procedures for the REACT project to create consistency among all the regional offices. Specifically,**

**a. establish a definition of and a methodology for assessing "severe financial hardship;"**

We continue to believe that establishing a fixed definition of "severe financial hardship" would unduly constrain Regional Directors' discretion to target areas of risk within their respective jurisdictions, to the significant detriment of the project. At the same time, we recognize the need for a degree of uniformity in the manner in which the project is implemented. We agree to establish a list of criteria that regions should consider when determining whether a company is experiencing "severe financial hardship."

**b. implement recurring REACT training and/or create a training manual for REACT Coordinators;**

Regional REACT Coordinators receive recurring and extensive training through a variety of means, including in-depth teleconferences conducted by the National REACT Coordinator, specific guidance issued by the National Office and made available to everyone in the field on EBSA's intranet site, training workshops conducted at national managers' conferences and replicated in various field offices as needed, and ad hoc communication with the National REACT Coordinator on individual technical and procedural issues. We agree to continue providing recurring training and to consolidate this information into a manual for use in training new REACT Coordinators.

**c. require REACT Coordinators to routinely communicate with and obtain information from U.S. Bankruptcy Trustees;**

We will reiterate to the field the importance of ongoing communication with U.S. Bankruptcy Trustees. However, an inflexible requirement to obtain information is impractical because EBSA cannot predict the ability of Trustees to provide desired information.

**d. implement best practices across all regions; and**

Consistent with GAO's approach to best practices, EBSA will continue to identify and share best practices among the regions, incorporating them into the ongoing training provided to the regional REACT Coordinators (identified in 1.b., above). Field office performance will be evaluated, as it has been, based on program accomplishments,

measured against expectations as developed each year in the enforcement program's Program Operating Plan. Field office utilization of best practices is an important part of that evaluation.

- e. **require the investigators to document when and how they have advised all affected plans of the bankruptcy filing.**

We agree with this recommendation, and will amend the Enforcement Manual to reflect this requirement.

**Recommendation 2: Establish a performance measure(s) to accurately capture the REACT program's impact – specifically measure the results of the preliminary research the REACT Coordinators perform on bankrupt companies.**

We disagree with this recommendation. EBSA's accepted GPRA measure already reflects to some degree the value of preliminary research in identifying fiduciary breaches. Moreover, as previously stated, there is no way to practically measure the outcome of the preliminary research conducted by REACT Coordinators.

**Recommendation 3: Develop an overall REACT project assessment that incorporates the regional assessments to determine whether the project is accomplishing its goal.**

We believe that the REACT project should continue to be assessed on an annual basis in order to determine whether it is accomplishing its goal. However, we agree that it would be beneficial to develop a formal REACT project assessment. An overall REACT project assessment, which takes into account the regional project assessments, will be conducted starting in fiscal year 2010.

**Conclusion**

Through its civil and criminal enforcement program, EBSA plays an essential role in protecting the integrity of retirement and welfare benefits of over 150 million people. Although EBSA has a comparatively small investigative staff relative to other enforcement agencies and the size of the employee benefits universe, we have successfully leveraged our resources to achieve over \$1 billion in monetary results for each of the past six fiscal years. In the first six months of fiscal year 2009, EBSA has achieved over \$113 million in results through the REACT project alone.

The REACT project has played an important role in meeting EBSA's mission of successfully deterring and correcting violations of ERISA and other relevant statutes, assisting workers in getting the information they need to exercise their benefit rights, and assisting plan officials in understanding the requirements of the relevant statutes in order to meet their legal responsibilities. One of the strengths of the REACT project, like EBSA's enforcement program overall, is that it gives Regional Directors discretion in order to face risks unique to their region, which is essential given the rise in bankruptcy filings and increase in the number of companies facing severe financial hardship.



**Appendix E**

**Acknowledgements**

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Key contributors to this report were Charles Allberry (Audit Director), Michael Kostrzewa, Michael Elliott, Lisa LaRosa, Robert Slattery, Wilma Perez, and Kathleen Mitomi.

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