

# WHAT TO EXPECT FROM AN EBSA INVESTIGATION

United States Department of Labor  
Employee Benefits Security Administration

Presented by Andy Cameron  
Senior Benefits Advisor, Seattle District Office

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## Disclaimer

This presentation may contain opinions of the presenter that may not comport with the official views of the U.S. Department of Labor and is meant for educational purposes only.

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## OUTLINE OF PRESENTATION

- Background on EBSA
- ERISA and fiduciary responsibility
- Types of investigations
- Investigation Projects
- EBSA investigation process
- Correction & VFCP
- Compliance assistance and other resources

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**THE EMPLOYEE BENEFITS  
SECURITY ADMINISTRATION  
(EBSA)**

General Organization Overview

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## EBSA's Mission Statement

The mission of the Employee Benefits Security Administration is to assure the security of the retirement, health and other workplace related benefits of America's workers and their families. We will accomplish this mission by:

- developing effective regulations;
- assisting and educating workers, plan sponsors, fiduciaries and service providers; and
- vigorously enforcing the law.

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## EBSA ORGANIZATIONAL CHART



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graph TD
    AS[Assistant Secretary] --> DASPO[Deputy Assistant Secretary for Program Operations]
    AS --> DASPOL[Deputy Assistant Secretary for Policy]
    DASPO --> OPP[Office of Program Planning Evaluation and Management]
    DASPO --> OHS[Office of Health Plan Standards and Compliance Assistance]
    DASPO --> OTIS[Office of Technology and Information Services]
    DASPOL --> OE[Office of Enforcement]
    DASPOL --> OIR[Office of Regulations and Interpretations]
    DASPOL --> OOA[Office of Outreach Education & Assistance]
    DASPOL --> OPR[Office of Policy and Research]
    DASPOL --> OED[Office of Exemption Determinations]
    DASPOL --> OCA[Office of the Chief Accountant]
    RO[Regional Offices] --- ROList["Boston, Chicago, New York, Kansas City, Philadelphia, Dallas, Atlanta, Los Angeles, Cincinnati, San Francisco"]
  
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## EBSA - STRUCTURE

### National Office

- Establishes policy and agency protocols
- Oversight of reporting and disclosure requirements
- Drafts regulations and interpretive guidance
- Conducts economic research to determine impact of policy and regulations on regulated community
- Conducts outreach such as the Health Benefits Education Campaign

### Regional Offices

- Conduct investigations of ERISA plans
- Provide compliance assistance through Benefit Advisors
- Conduct outreach to plan sponsors and other stakeholders

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## EBSA FIELD OFFICES



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## EBSA ENFORCEMENT STRATEGY

### Department of Labor Strategic Plan 2014-2018

- This outlines the strategies the Department uses to guide the agency mission

### EBSA Strategic Enforcement Plan

- Last published in 2000, the primary purpose is to establish a general framework through which EBSA's enforcement resources may be efficiently and effectively focused to achieve the agency's policy and operational objectives

### National Enforcement Projects

- Published annually and publically available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/programs-and-initiatives>

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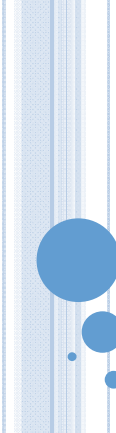
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## ERISA BASICS FOR GROUP HEALTH PLANS

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EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

Applies to employee benefit plans sponsored by *private sector* employers and/or unions

NOT government plans	NOT church plans	Other exclusions may apply
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Generally, ERISA allows the plan sponsor to decide whether to offer a plan and allows flexibility in the plan's benefit design.

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A Few Basic Things a Group Health Plan Must Have:

- Governing plan document(s) must comply with ERISA
- A Summary Plan Description (SPD) provided to participants and beneficiaries
- Named Fiduciary
- Reasonable claims & appeals procedure
- Fidelity bond (to protect against dishonesty) unless the plan is funded solely by general assets of plan sponsor

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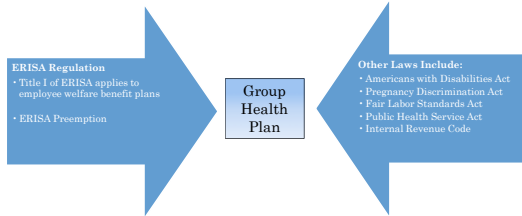
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## REGULATION OF GROUP HEALTH PLANS



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## HEALTH LAWS INCLUDED IN ERISA PART 7

- Consolidated Omnibus Budget Reconciliation Act (COBRA)
- Health Insurance Portability and Accountability Act (HIPAA)
- Mental Health Parity Act (MHPA)
- Newborns' and Mothers' Health Protection Act (Newborns' Act)
- Women's Health and Cancer Rights Act (WHCRA)
- Genetic Information Nondiscrimination Act (GINA)
- Mental Health Parity and Addiction Equity Act (MHPAEA)
- Children's Health Insurance Program Reauthorization Act (CHIPRA)
- Michelle's Law
- Patient Protection and Affordable Care Act (Affordable Care Act)

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## ENFORCEMENT AND JURISDICTION

- Department of Labor • ERISA
- Department of Health and Human Services • Public Health Service Act
- Department of Treasury • Internal Revenue Code
- States • State Insurance Laws
- Participants and Beneficiaries • Private litigation

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ENFORCEMENT AND JURISDICTION

**Department of Labor’s Enforcement Role**

- DOL is responsible for enforcing the requirements of Title I of ERISA with respect to employment-based group health plans

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ENFORCEMENT AND JURISDICTION

**Role of the States**

- States have direct jurisdiction over health insurance issuers that sell products in their state.
- Group health plans frequently purchase health insurance products from licensed health insurance issuers. Generally, these products have been reviewed for compliance by the state insurance department.

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ENFORCEMENT AND JURISDICTION

**Department of Health and Human Service’s Role**

- Generally, the states enforce state laws that place requirements on issuers. These provisions of these state laws must be at least as protective as ERISA part 7 and the Public Health Service Act (PHSA).
- However, if HHS determines that a state has failed to “substantially enforce” its parallel laws, HHS can directly enforce the PHSA with respect to health issuers in that state.
- HHS may also be invited in by the state to enforce in that state

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## ENFORCEMENT AND JURISDICTION

### **Department of Treasury's Enforcement Role**

- Treasury enforces most of the requirements of the ERISA health laws through parallel Internal Revenue Code provisions.
- Treasury may impose an excise tax on plans or employers that fail to comply with these health laws

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## ENFORCEMENT AND JURISDICTION

### **Participants and beneficiaries**

- ERISA 502(a) - Participants and beneficiaries also have a private right of action to enforce their rights against plans and issuers

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## **ERISA REPORTING AND DISCLOSURE FOR GROUP HEALTH PLANS**

### **Reporting Requirements**

- Certain group health plans must file the Annual Report (Form 5500)

### **Disclosure Requirements include:**

- Summary Plan Description (SPD)
- Summary of material modifications (SMM)
- Summary of Benefits and Coverage (SBC)
- Adverse Benefit Determinations and other disclosures as required by ERISA 503 claims procedure rules
- Various notices to comply with the health laws of ERISA part 7
- COBRA notices

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## A Fiduciary is any person:

- Named as a plan fiduciary in plan documents -or- who:
  - Exercises discretionary authority or control over plan management - or -
  - Exercises authority or control over plan assets - or -
  - Provides investment advice for compensation (direct or indirect)

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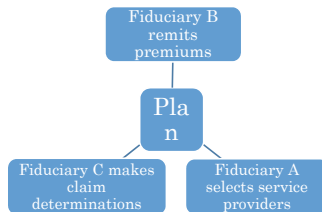
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## PLAN FIDUCIARIES

- o Plans can have multiple fiduciaries
- o Fiduciaries can be named or functional



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## A Fiduciary must:

- Act “solely in interest” of participants & beneficiaries
- Discharge duties prudently with care, skill and diligence
- Diversify plan investments
- Follow terms of governing documents (to the extent they are consistent with ERISA)

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## Fiduciary must NOT:

- act in own self interest
- act on behalf of a party with adverse interests
- accept “anything of value” from those doing business w/ the Plan (e.g. kickbacks)

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## Fiduciaries must NOT cause the Plan to engage in a prohibited transaction such as:

- Sale or exchange of plan assets with party in interest (PII)
- Extension of loan or credit to PII
- Contract for goods, services or facilities with PII
- Transfer plan assets to a PII for their use or benefit

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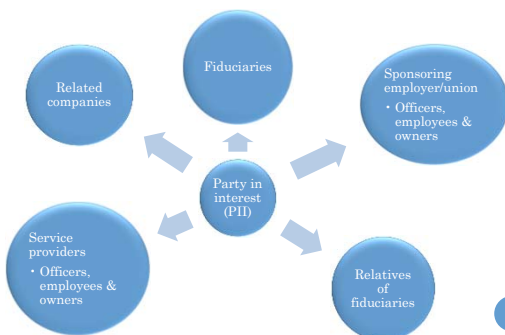
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## PARTIES IN INTEREST



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**Fiduciaries can be held *personally liable* for losses resulting from a fiduciary breach**

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For example: Fiduciary A can also be held *personally liable* for losses resulting from a breach by Fiduciary B

if A's failure(s) allowed B to breach	if A knowingly participated in or knowingly concealed B's breach	if A knows about B's breach and fails to make reasonable efforts to correct B's breach
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**Penalties may be imposed for a breach of fiduciary duty**

- ERISA Sec. 502(l) imposes 20% penalty on the amount paid pursuant to a court order or settlement agreement
- IRS can impose excise tax on prohibited transactions
- IRS can impose excise tax under IRC Sec. 4980D for failure to meet certain group health plan requirements
- Numerous other penalties for R&D failures

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**Some fiduciary breaches may also constitute criminal violations of ERISA, other federal law, or state law.**

- Examples include:
  - Accepting kickbacks
  - Filing fraudulent claims
  - Stealing premiums or contributions

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## TYPES OF INVESTIGATIONS

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Investigations may be civil or criminal in nature and may focus on:

- The Plan
- The Plan Sponsor
- A Service provider
- An Individual

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Sources for Targeted Investigations

- Participant complaints
- Form 5500 Reviews
- Referrals from:
  - Other agencies
  - State insurance departments
  - Advocacy groups
- Media
- Private litigation

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## NATIONAL PROJECTS

- Contributory Plans Criminal Project (CPCP)
- Rapid ERISA Action Team (REACT)
- Employee Stock Ownership Plans (ESOPs)
- Consultant/Advisor Project (CAP)
- Health Benefits Security Project

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## HEALTH BENEFITS SECURITY PROJECT

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### Health Benefits Security Project ( HBSP)

- Established October 2012
- Comprehensive national project to review health plans for ERISA compliance including all applicable health laws
- Includes a broad range of investigative issues such as:
  - Compliance with ERISA provisions such as the health laws included in part 7
  - Unpaid or improperly processed benefit claims
  - Excessive service provider fees
  - Systemic denial of promised benefits
  - Criminal misconduct by plan fiduciaries or medical providers

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Examples of Group Health Plan Violations

- Failure to provide benefits in accordance with plan terms
- Improper or arbitrary claims adjudication
- Failure to follow the DOL claims procedure rules
- Failure to forward employee premiums to the insurance provider
- Failure to provide mental health benefits in parity with medical/surgical benefits in accordance with mental health parity rules
- Failure to provide required notices

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**OTHER ISSUES/AREAS OF REVIEW IN CIVIL CASES**

- Review of Plan Assets
  - Prudence, Prohibited Transactions, Self Dealing
- Reporting and Disclosure
- Bonding
- General Plan Operations
- In accordance with Plan Document
- Remittance of Employee Contributions

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INVESTIGATIVE PROCESS

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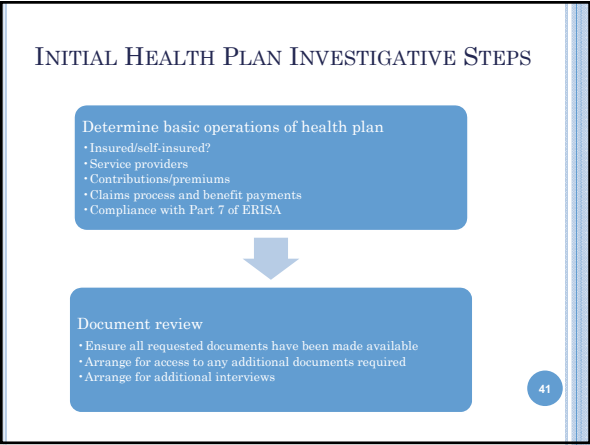
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- ### Basic Health Plan Documents
- Plan document / SPD / Certificate of Coverage
  - Summary of Benefits and Coverage (SBC)
  - Service provider contracts
  - Premium or contribution schedules
  - Documents related to plan finances
  - Documents related to claims
  - Participant notices required by ERISA
  - Other documents related to ERISA compliance
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## OTHER DOCUMENTS

- Trust Agreement
- Form 5500 filings (past 3 years)
- SAR for last year
- Fidelity Bond
- Fiduciary Insurance Policy
- Trustee Statements (past 3 years) (asset records)
- Meeting Minutes
- Benefit Statements
- Asset records
- Payroll/contribution records

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## Subpoenas

- ERISA grants DOL (EBSA) the power to “enter such places, inspect such books and records and question such persons ... as deemed necessary”
- DOL (EBSA) has the authority to issue subpoenas requiring the production of documents or testimony

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## INVESTIGATIVE EMPHASIS

### Disclosure Requirements

- Summary Plan Descriptions (SPDs)
- Summary of Material Modifications (SMM)
- Summary Annual Reports (SARs)
- “Blackout” Notices
- COBRA Notices & more
- Provide documents on request
- Participant Benefit Statements

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## INVESTIGATIVE EMPHASIS

### **Bonding**

- 10% of Funds Handled – not less than \$1,000 nor more than \$500,000 (\$1,000,000 for plans with employer securities)
- No deductible
- Plan should be named as insured
- Discovery Period of no less than one year after termination or cancellation of bond is required
- See FAB 2008-04

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## EMPLOYEE CONTRIBUTIONS

### **Basic Rule –**

As soon as they can be  
“reasonably segregated”  
from Employer’s general assets

Safe Harbor Reg. – 1/14/2010 - for plans with  
fewer than 100 participants

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## EMPLOYEE CONTRIBUTIONS

○ “As soon as” varies from plan to plan

○ will ask questions about handling

○ will review practice / experience

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## EMPLOYEE CONTRIBUTIONS

- o Outside Limits (Not a safe harbor)

- o Pension – 15 Business Days  
after end of month  
of withholding / receipt

*<< SIMPLE IRA Plans – 30 days after end  
of month >>*

- o Welfare – 90 days after withholding / receipt

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## Findings and Follow-Up

- Speak with plan sponsor and service providers to clarify plan terms to determine if violations of the health laws or other systemic problems exist
- Determine the most appropriate action to take to correct the problem
- Work with service provider (if applicable) to make global corrections for all affected plan clients

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## Voluntary Compliance Letter

- Identifies problems
- Offers chance to discuss corrective action
- If corrective action is not taken, potential referral to the Solicitor's Office

## Closing Letter

- Identifies problems & corrective actions taken
- Indicates the case is closed

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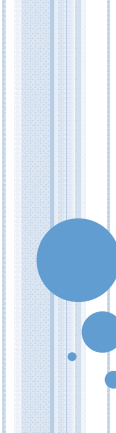
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**CORRECTION & VOLUNTARY  
FIDUCIARY COMPLIANCE  
PROGRAM**

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**Corrections Pre-Investigation**

- EBSA encourages self-correction
- Fiduciaries should regularly review operations
- Health Law Self-Compliance Tool
- Upon detection, take corrective action(s)
- Correction guidance is in VFCP documentation
- Call EBSA for compliance assistance

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**Correction During Investigation**

- Often, potential problems become clear during the investigation
- If problem is identified, work with EBSA to make corrections
- Correction guidance may be available
- Proof of correction and number of participants affected is required

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Depending on the circumstances, appropriate corrective action may include:

- Settlement agreement
- Notification to P's and B's of the correction
- Implementation of new internal controls
- Re-adjudication of claims
- Paying unpaid claims
- Payment of Plan's administrative costs and expenses
- Interest
- Disgorgement of profits or surcharge
- Penalties
- Removal of fiduciaries
- Removal of service providers
- Appointment of independent fiduciary

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## IRS REFERRALS

o IRS Coordination Agreement and Statute requires:

- referral of prohibited transactions to IRS
  - o IRC § 4975 excise tax (tax qualified pension plans)
- referral of potential issues affecting tax qualified status

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## Criminal Referrals

- Theft or embezzlement
- Health care fraud
- Kickbacks or bribes
- False statements to investigators
- Willful failures to file or false filings

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### Voluntary Fiduciary Correction Program (VFCP)

- “Self-help” program
- Correction methods specified in regulations
- Submit complete applications to Regional Office
- EBSA issues “No Action” letter
- Some transactions eligible for excise tax relief

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### COMPLIANCE RESOURCES



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### Health Plan Compliance Resources

- EBSA website (health plans):  
[www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance](http://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance)
- Health Benefits Laws Self Compliance Tools:  
[www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/health-plans/hbec/checksheets](http://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/health-plans/hbec/checksheets)
- Health and Human Services  
[www.hhs.gov/healthcare](http://www.hhs.gov/healthcare)

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## Compliance Assistance

- EBSA main site [www.dol.gov/agencies/ebsa](http://www.dol.gov/agencies/ebsa)
- EBSA health reform page [www.dol.gov/ebsa/healthreform](http://www.dol.gov/ebsa/healthreform)
- EFAST2 website: [www.efast.dol.gov/welcome.html](http://www.efast.dol.gov/welcome.html)
- Technical Assistance and Publications: [www.dol.gov/agencies/ebsa/about-ebsa/ask-a-question/ask-ebsa](http://www.dol.gov/agencies/ebsa/about-ebsa/ask-a-question/ask-ebsa) or 1-866-444-3272
- EFAST2 Hotline (Toll-free): 1-866-GO EFAST (1-866-463-3278)
- Form M-1 Filings: <http://www.askebsa.dol.gov/mewa> or call the Form M-1 Help Desk at 202-693-8360

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## Compliance Assistance

- Office of Health Plan Standards & Compliance Assistance (202) 693-8335
- Office of Chief Accountant (202) 693-8360
- Office of Regulations & Interpretations (202) 693-8500
- Office of Exemptions & Determinations (202) 693-8540

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### Publications

- Understanding Your Fiduciary Responsibilities under a Group Health Plan
- Reporting and Disclosure Guide for Employee Benefit Plans
- An Employer's Guide to Health Benefits under COBRA

### Outreach Events

- Health Benefit Education Campaign two-day seminar
- Webcasts
- Regional workshops

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GUIDANCE AND EVENTS**

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