ERISA’s Three-Headed Guardian

By: Samuel Henson, J.D.

Cerberus in Greek and Roman mythology was a three-headed hound guarding the gates of the Underworld. While not necessarily the Underworld, the Employee Retirement Income Security Act (ERISA) can be just as daunting and mysterious for many plan sponsors.

Guarding ERISA is the federal government’s own version of Cerberus in the Internal Revenue Service (IRS), Department of Labor (DOL) and the Pension Benefit Guarantee Corporation (PBGC). These three agencies have been tasked by Congress to work in tandem and enforce ERISA.

Why Three Agencies?

ERISA was the direct result of the failure of traditional defined benefit pension plans to keep their end of the bargain with American workers in the 1960s and 1970s. Workers spent their entire careers working in anticipation of a secure retirement, but when pension plan administrators mismanaged their plans, the American worker was left with little or no retirement. Congress’ solution was to pass ERISA to address the mismanagement and abusive practices of retirement plans and to guard the benefits of America’s workers. Widely regarded as one of the most complex pieces of legislation ever passed, ERISA was divided into four Titles. Due to the immense scope of coverage and the complexity, ERISA’s interpretation was left to three distinct agencies.

**Title I**

Title I contains rules for reporting and disclosure, vesting, participation, funding, fiduciary conduct and civil enforcement. This is administered by the DOL.

**Title II**

Title II mirrors much of Title I for the Internal Revenue Code and is administered by the IRS.

**Title III**

Title III is concerned with jurisdictional matters and with coordination of enforcement and regulatory activities by the DOL and the IRS.

**Title IV**

Title IV covers the insurance of defined benefit pension plans and is administered by the PBGC.
In simple terms:

- The DOL primarily focuses on the fiduciary provisions and prohibited transactions of ERISA.
- The IRS primarily focuses on the qualification requirements of ERISA.
- The PBGC primarily focuses on the defined benefit plan funding and insurance requirements of ERISA.

**How Does the DOL Enforce ERISA?**

The DOL conducts compliance investigations under Title I of ERISA through its Employee Benefits Security Administration. It is the DOL’s policy to promote voluntary compliance with ERISA, which includes making corrections to plans, paying amounts to restore losses, disgorging profits and paying penalty amounts. In the DOL’s view, conducting the investigation at the place of the sponsor’s business, results in the most thorough and likely chance at identifying violations. Typically, the DOL will issue an appointment letter with a detailed list of documents to be produced for a three-year period (but it can be six). An investigator will then arrive on-site and conduct the examination, including a series of detailed interviews with plan fiduciaries. Subsequent to the on-site review, the DOL will typically issue a letter requesting the fiduciaries’ voluntary compliance in correcting any violations. Should this be ineffective at obtaining compliance, the DOL also employs attorneys who work with field offices. Generally, if fiduciaries take the proper corrective action, the DOL will not bring a civil lawsuit with regard to the issues involved. However, when voluntary compliance is not achieved, the DOL’s investigators may refer a case for litigation. All plan assets recovered by the DOL benefit the affected plans and their participants and do not benefit the agency.

Common areas of investigation by the DOL will include a determination of:

- Has the plan operated prudently and for the exclusive benefit of participants?
- Have plan assets been used to benefit certain related parties to the plan, including the plan administrator, the plan sponsor and parties related to these individuals?
- Has the plan properly valued plan assets at their current fair market value, or held plan assets in trust?
- Has the plan followed its own terms?
- Has the plan properly selected and monitored service providers?
- Has the plan timely remitted employee deferral contributions?
- Has the plan properly diversified and administered its investments?

**How Does the IRS Enforce ERISA?**

The IRS Employee Plans Office is responsible for overseeing compliance with the retirement plan provisions of the Internal Revenue Code, including the qualification requirements of retirement plans. The IRS conducts examinations to analyze operational features of retirement plans. Unlike the DOL, the IRS employs significant use of limited scope compliance checks to assess potential areas of noncompliance. These compliance checks can be as simple as a survey on demographic changes in a plan, seeking to determine whether a partial termination has occurred, or to a broader inquiry about the operations of a plan. Like the DOL, the IRS will issue a letter advising a plan sponsor that it is under examination for a specific timeframe within the statute of limitations. An IRS examination
ERISA’s Three-Headed Guardian  (continued)

will generally include a formal opening meeting with an
IRS agent at the plan sponsor’s office. However, it is not
uncommon that correspondence may be done entirely
via mail and telephone. The IRS will attempt to answer
the following:

- Has service and vesting been properly credited?
- Have contributions, benefits, rights or features
  improperly favored highly compensated employees?
- Have minimum contributions and benefits and
  accelerated vesting been provided?
- Are contributions and benefits within
  applicable limits?
- Are contributions correct and timely and deductions
  within applicable limits?
- Are distributions correctly calculated, properly made
  and timely and accurately reported?
- Do the forms of the plan and trust meet applicable
tax law?
- Have federal returns and reports been timely and
  accurately filed?
- Has the plan been amended for legally required
  amendments, interim amendments and any
  amendments required pursuant to a prior
determination letter request?

How Does the PBGC Enforce ERISA?

The PBGC was created by ERISA to encourage the
continuation and maintenance of private-sector defined
benefit pension plans, provide timely and uninterrupted
payment of pension benefits and to oversee pension
insurance premiums. Funding for the PBGC comes
from premiums paid by employers who sponsor insured
pension plans, money from investments and the funds
from pension plans the PBGC takes over. While the
DOL and IRS conduct most of the compliance-related
enforcement activity, the PBGC does have limited
enforcement authority. Most commonly, this would be in
the form of taking legal action against an employer who
fails to make a required minimum funding contribution.
The real focus of the PBGC is to monitor the status
of a pension plan through a variety of reporting
requirements which allow the PBGC to investigate and
take action to protect plan funding. This is accomplished
through a few different PBGC tools:

- The Reportable Events Regulation requires written
  notice of certain events involving the plan or the
  company that may expose plan participants and the
  PBGC's insurance program to risk.
- The Early Warning Program monitors corporate
  transactions and bankruptcy proceedings that may
  threaten funding or continuation of ongoing plans.
  The PBGC negotiates financial protections to keep
  these plans ongoing for workers and retirees and to
  limit losses to those individuals and the PBGC, if
  termination does occur.
- The Pension Protection Act requires controlled
groups with at least one plan that is less than
80 percent funded to report annually additional
information that will enable the PBGC to better
monitor the situation.

How Well Do They Work Together?

Now that you understand which head does what,
the logical question is how well do these heads work
together? The answer is like most federal agencies with
overlapping jurisdictions, not very well. The PBGC is
unique in its mission and thus does not overlap with
either the DOL or IRS on a regular basis. However,
the DOL and IRS are constantly working in each
other's backyard. In reality, both agencies carry out
their enforcement missions with little cooperation or
communication. It is not uncommon for a plan to undergo an IRS investigation and then have the DOL open its own investigation soon after, or vice versa. Under a memorandum of understanding between the two, the IRS and DOL have developed procedures for determining whether issues presented in an investigation by one agency should be referred to the other agency. In every investigation, the referring agency is required to complete the appropriate referral on the basis of the information obtained. Typically, this is the beginning and ending of communications and information sharing between the agencies.

How Does This Affect You?

The three-headed guardian is relatively unique amongst the federal bureaucratic structure. There are few, if any other situations, in which a law causes three regulatory agencies to be so intertwined in their enforcement activities. In an ideal world, the IRS and DOL would coordinate their investigations of plans, allowing a plan sponsor to make an efficient use of its time and resources in a single examination. The costs of document production and manpower in a plan examination can be significant. For plan sponsors unlucky enough to do it for both the IRS and DOL, it can be huge. The truth is we are never going to see joint enforcement by the IRS and DOL. Federal agencies are territorial and entrenched in how they conduct business, and these agencies have been operating separately for almost 40 years. The best thing plan sponsors can do is to be diligent in their documentation and retention policies, corporate governance and fiduciary practices in order to minimize the bite of ERISA’s three-headed guardian.

SAMUEL HENSON, J.D.
Senior ERISA Counsel
Lockton Retirement Services
816.751.2245 | shenson@lockton.com