BY THE U.S. GENERAL ACCOUNTING OFFICE

# Report To The Chairman, Committee On Labor and Human Resources United States Senate

# Assessment Of How The Department Of Labor's Solicitor's Office Handles Pension and Welfare Benefit Cases

The Employee Retirement Income Security Act was passed to protect employee pension and welfare benefit plans' funds and assets against mismanagement and misuse. The Department of Labor's Office of Pension and Welfare Benefit Programs directs Labor's enforcement of the act, and it refers cases to the Office of the Solicitor for legal advice on whether to seek compliance of alleged violations of the act voluntarily or through litigation.

Because of the newness and complexity of the act and Labor's policy of seeking cases for litigation to develop case law, many cases were referred to the Solicitor's Office between 1976 and 1981. As a result, the Solicitor's Office accumulated a backlog of cases. This report discusses (1) the backlog, (2) delays in providing legal analyses on cases, (3) the effects of the delays on Labor's enforcement efforts, and (4) the appropriateness of referring certain cases to other agencies for disposition.

Labor has given field offices greater enforcement authority, and the Office of Pension and Welfare Benefits Programs has reduced the cases referred to the Solicitor. The Solicitor's Office has revised its case processing procedures, increased its staff, and reduced the backlog of cases. Although GAO has not reviewed cases under the new procedures, it believes, if properly implemented, they should help reduce the likelihood of a large case backlog occurring in the future.





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NOVEMBER 6, 1984

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WASHINGTON, D.C. 20548

HUMAN RESOURCES
DIVISION

B-204000

The Honorable Orrin G. Hatch, Chairman
Committee on Labor and Human Resources
United States Senate

Dear Mr. Chairman:

This report is in response to your request that we review the Department of Labor's Office of the Solicitor's handling of employee pension and welfare benefit cases involving alleged violations of the Employee Retirement Income Security Act. You expressed concern that the Solicitor's Office was not taking timely and vigorous enforcement action on employee pension and welfare benefit cases, thereby contributing to a sizable backlog.

The report discusses the (1) backlog and factors contributing to it, (2) delays in completing legal analyses on cases, (3) effects of the backlog and delays on Labor's enforcement efforts under the act, and (4) efforts by Labor to improve case processing and reduce the backlog.

As arranged with your office, unless you publicly announce its contents earlier, we will make no further distribution of this report for 30 days. At that time, we will send copies to the Under Secretary of Labor; the Commissioner of Internal Revenue; the Attorney General; the Executive Director, Pension Benefit Guaranty Corporation; appropriate congressional committees and subcommittees; and other interested parties. We will also make copies available to others upon request.

Sincerely yours,

Richard L. Fogel

Richard L. Fogel
Director

GENERAL ACCOUNTING OFFICE
REPORT TO THE CHAIRMAN
SENATE COMMITTEE ON LABOR
AND HUMAN RESOURCES

# ASSESSMENT OF HOW THE DEPARTMENT OF LABOR'S SOLICITOR'S OFFICE HANDLES PENSION AND WELFARE BENEFIT CASES

## D I G E S T

The Chairman, Senate Committee on Labor and Human Resources, was concerned that untimeliness by the Department of Labor's Office of the Solicitor in handling cases involving alleged violations of the Employee Retirement Income Security Act (ERISA) delayed Labor's enforcement actions to protect pension and welfare plan participants. The Chairman asked GAO to review cases in the Solicitor's Office during 1976 to 1981 to determine (1) the size of the backlog and extent of delays, (2) the effect of the backlog and delays on enforcement, and (3) the appropriateness of referring certain cases to other agencies for disposition.

The Congress passed ERISA to protect employees' private pension and welfare benefit plans from mismanagement, misuse, and abuse. Labor and the Internal Revenue Service primarily enforce the act. The Pension Benefit Guaranty Corporation also has certain responsibilities, and the Department of Justice is responsible for prosecuting alleged criminal violations of the act. Labor is primarily responsible for enforcing the act's reporting, disclosure, and fiduciary provisions. Labor's Office of Pension and Welfare Benefit Programs (Programs Office) directs its enforcement efforts. The Programs Office refers cases to the Plan Benefits Security Division of the Solicitor's Office for legal analyses and for advice on whether to obtain voluntary compliance with the act or to secure compliance through litigation. (See pp. 1 to 7.)

## SOLICITOR'S OFFICE BACKLOG OF CASES

From 1976 to 1981, the Solicitor's Office received 620 cases for legal analyses. GAO defined "backlog" as those cases which the Solicitor's Office had not yet decided to litigate or had not provided its legal analyses to the



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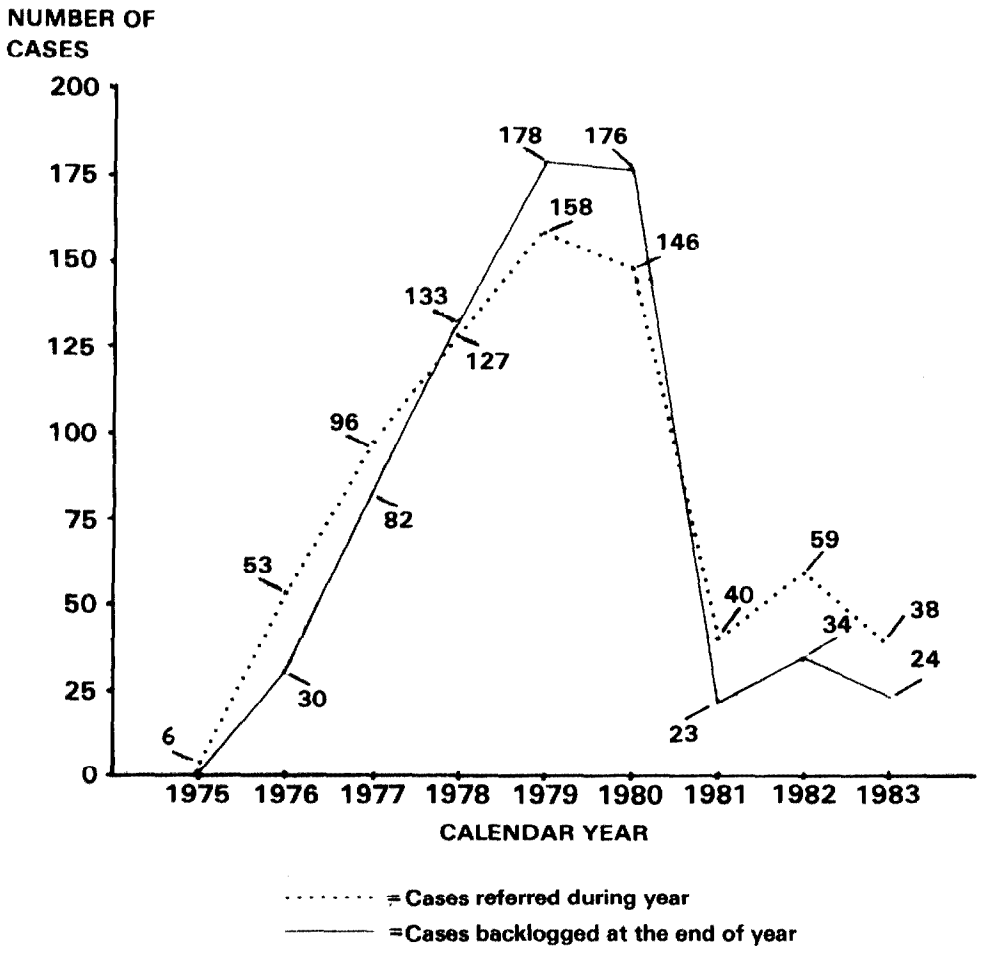
Tear Sheet

Programs Office. As shown below, the backlog increased significantly--by about 500 percent--from 30 cases at the end of 1976 to 176 cases at the end of 1980. In 1981, however, the backlog was decreased to 23 when the Solicitor's Office closed 165 cases and returned them with recommendations for disposition to the Programs Office. The backlog was 34 on December 31, 1982, and 24 on December 31, 1983.




The average time for the Solicitor's Office to review a case, which was 3.1 months in 1976, steadily increased to about 14.9 months in 1981. During 1982 and 1983, the average time to review was about 9 months and 8 months, respectively. (See pp. 8 to 11.)

## FACTORS CONTRIBUTING TO THE BACKLOG

The Congress passed ERISA in 1974. Because of the act's newness and complexity and the lack of program staff expertise and guidance on what cases should be referred, the Programs Office referred many cases to the Solicitor's Office from 1976 to 1981 to obtain advice on what enforcement action Labor should take. This was a primary factor contributing to the backlog and time for legal analyses.

Also, the number of referrals was higher than it might have been principally because of Labor's policy of encouraging the Programs Office to refer many of its cases to help select the best for litigation to develop case law. Additionally, the Solicitor's Office, during this time, did not promptly return the cases not selected for litigation to the Programs Office to handle administratively. Other contributing factors were limited legal staff to perform analyses and lack of written criteria or guidelines for processing and handling the referred cases. (See pp. 11 to 15.)

## DELAYS AFFECTED LABOR'S ENFORCEMENT EFFORTS ON SOME CASES

GAO reviewed 33 of the 165 cases the Solicitor's Office returned to the Programs Office in 1981. As discussed below, GAO found that time delays, and in 2 cases misanalysis, affected Labor's enforcement action on 7 of the 33 cases and halted proposed litigation on 1 case.

--In one case, the plan's trustees paid nearly $1 million to purchase the sponsoring employer's stock when it was allegedly worth much less because of the employer's poor financial condition. However, time delays and misanalysis as to when the act's 3-year statute of limitations expired resulted in the statute expiring, which prevented Labor from initiating litigation.

--In another case, the plan lost over $165,000 because the plan's fiduciaries placed the plan's assets in non-interest-bearing checking accounts. Misanalysis and time delays caused the statute of limitations to expire on some of the violations, and Labor accepted a $70,000 offer from the fiduciaries to settle the case.

--Three cases had statute-of-limitations problems before the Solicitor's Office received them, and this was cited as one of the reasons Labor did not seek litigation or pursue voluntary compliance on the alleged violations.

In the three other cases, although Labor believed alleged violations of the act occurred, it decided litigation was not appropriate generally because the violations were not sufficiently well documented to prosecute. The Programs Office did not seek to obtain voluntary compliance of the alleged violations because 18 months to over 3 years lapsed between when the violating incidents occurred and when the Solicitor's Office's recommendations were obtained. According to Programs Office officials, this time lapse made pursuing the cases impractical and they therefore were closed.

On a ninth case Labor was trying to negotiate a settlement with the pension plan at the time GAO completed its review.

The remaining 24 cases consisted of

--4 in which violations did not exist or caused no financial harm,

--10 in which the delays in the Solicitor's Office did not affect enforcement actions, and

--10 that were referred to other government agencies. (See pp. 22 to 30.)

## REFERRALS TO OTHER LABOR OFFICES OR FEDERAL AGENCIES

GAO's review of a sample of 76 cases showed no evidence that the Solicitor's Office referred any case to another Labor office or federal agency to avoid its responsibility. Of the 76 cases, 15 were referred--2 to other divisions in the Solicitor's Office, 2 to the Department of Justice, 1 to the Pension Benefit Guaranty Corporation, and 10 to the Internal Revenue Service. The referrals were made because they involved issues or alleged violations of the act's provisions for which these divisions or agencies had primary enforcement responsibility.

Labor generally did not determine the actions taken on referrals to other agencies. However, in 1983, Labor and the Internal Revenue Service agreed to notify the referring agency of the enforcement action taken and planned. (See pp. 35 to 41.)

## ACTIONS TAKEN TO IMPROVE CASE PROCESSING AND REDUCE BACKLOG

Labor had taken a number of actions to reduce the number of cases sent to headquarters or improve the processing of cases, including:

--Since 1979, increasing the Solicitor's Office staff and number of supervisors.

--Since 1980, giving field enforcement offices greater authority to initiate voluntary compliance actions without headquarters approval.

--Since 1981, stressing that the Programs Office is responsible for setting enforcement policy and the Solicitor's Office role is one of legal assistance.

--Since 1982, establishing guidance on the applicability of the statute of limitations, giving priority handling to cases in which prompt attention is needed to avoid statute-of-limitations problems, and establishing an experimental project, in three regional solicitor's offices, of providing legal assistance in the field.

By the end of 1982 and 1983, the Solicitor's Office had a backlog of 34 and 24 cases, respectively. The average time that Office took to complete legal analyses on cases was about 9 months in 1982 and about 8 months in 1983. As of December 1983, the Solicitor's Office had another 13 cases in which legal analyses were completed and Labor was negotiating settlements with plan officials or the Solicitor's and Programs Offices were attempting to agree on what action to take. (See pp. 18 to 20 and 30 to 32.)

## CONCLUSIONS

The Solicitor's and Programs Offices have taken steps to improve ERISA case processing. The Programs Office, by exerting its enforcement authority, and Labor, by giving field offices greater enforcement authority to seek voluntary compliance, have reduced the number of cases referred to the Solicitor's Office.

The Solicitor's Office has improved the handling of pension and welfare cases and has increased its staff. Since 1981, the Solicitor's Office had reduced the backlog of cases as well as the time for completing legal analyses. GAO has not reviewed Labor's handling of ERISA cases under its new processing procedures or under its project to decentralize ERISA legal assistance to the regional solicitors. GAO believes, however, that if Labor's new procedures and pilot project are properly implemented in Labor's field and national offices, they should help reduce the likelihood of a large case backlog and statute-of-limitations problems from occurring in the future. (See pp. 21 and 33.)

## AGENCY COMMENTS AND GAO'S EVALUATION

GAO did not obtain official agency comments on this report. However, GAO discussed its findings with Labor officials and incorporated their comments as appropriate when preparing the report.

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## ABBREVIATIONS

| | |
|---|---|
| ERISA | Employee Retirement Income Security Act |
| GAO | General Accounting Office |
| IRS | Internal Revenue Service |
| LMSA | Labor-Management Services Administration |
| OPWBP | Office of Pension and Welfare Benefit Programs |
| SOL | Plan Benefits Security Division, Office of the Solicitor |

# CHAPTER 1

## INTRODUCTION

The Department of Labor administers several laws that directly affect the rights, pensions, benefits, and welfare of millions of union members and other workers in the United States. One such law is the Employee Retirement Income Security Act of 1974 (ERISA), whose purpose is to make sure that employees who are covered by private pension and welfare plans receive benefits from these plans.

The Chairman, Senate Committee on Labor and Human Resources, asked us to review Labor's Office of the Solicitor's handling of cases involving employee pension and welfare plans under ERISA, because of his concern that the Solicitor's Office was not taking timely and vigorous enforcement action on these cases, thereby contributing to a sizable backlog. This report discusses the backlog of ERISA cases in the Solicitor's Office, the causes of the backlog, and its effect on Labor's efforts to enforce ERISA.

### THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

ERISA was approved on September 2, 1974, to regulate private pension and welfare plans. Its purpose is to better ensure that workers have an equitable right to and receive plan benefits.

Labor estimated that in 1983 ERISA covered about 880,000 pension plans with over 65 million participants and $900 billion in assets. Labor also said ERISA covered about 4.6 million welfare plans which provide such benefits as insurance, medical, or vacation benefits. These plans had about 200 million participants and $20 billion in assets.

Title I of ERISA established a comprehensive framework of minimum standards and requirements that pension plans must meet, including (1) participation standards, which set forth the age and work service requirements that employees must meet to become eligible to participate in a plan; (2) vesting standards, which specify how employees earn a nonforfeitable right to pension benefits; (3) funding provisions, which specify how employers are to fund or finance the plans; (4) reporting and disclosure requirements, which require that plans disclose to participants, and report to the federal government, information about plan provisions and financial status; and (5) fiduciary standards, which specify how plans are to operate in the best interest of plan participants.

One of ERISA's more significant features designed to prevent abuse and misuse of private pension funds is the stringent requirements placed on fiduciaries--persons who exercise control or authority over plan management and assets. ERISA requires a fiduciary to discharge his or her duties solely in the interest of the participants and beneficiaries in order to exclusively provide them with benefits and defray the reasonable expenses of administering the plan.

Another significant feature of ERISA is its "prohibited transactions" provisions, under which plan fiduciaries may not engage in certain activities with parties who may have an interest in the plan. As examples, a plan (1) cannot lend money or extend credit to a firm that is a contributing employer to a plan or has a relationship (e.g., is a subsidiary) with a contributing employer and (2) is limited in the amount of the sponsoring employer's securities it can purchase.

Labor, the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation share the primary responsibilities for ERISA. Labor is primarily responsible for enforcing the reporting, disclosure, and fiduciary provisions. IRS enforces the act's participation, vesting, and funding provisions and makes sure plans meet Internal Revenue Code requirements for favorable tax treatment. The Corporation, which was established by ERISA, administers the insurance programs the act established to guarantee payment of at least part of the vested benefits promised to participants of certain plans that become unable to pay benefits.

The Department of Justice, as the government's chief law enforcement agency, is responsible for prosecuting alleged violations of ERISA's criminal provisions, such as the embezzlement by a fiduciary of a plan's funds or assets.

## ERISA ENFORCEMENT

The Labor-Management Services Administration (LMSA), the Office of Pension and Welfare Benefit Programs (OPWBP), and the Solicitor's Office are involved in Labor's enforcement of ERISA.

OPWBP,[1] which was in LMSA, is primarily responsible for enforcing ERISA. Within OPWBP, the Office of Enforcement provides policy guidance and direction on ERISA enforcement to the LMSA field offices, and it reviews investigative reports and recommendations from the field.

LMSA, which is under the Assistant Secretary for Labor-Management Relations, has a staff at the Washington, D.C., headquarters and 6 regional and 24 area offices nationwide.[2] LMSA area offices investigate employee benefit plans to determine whether the plans comply with ERISA and submit their investigative reports to the LMSA regional office for review and approval. The regional office either (1) returns the case to the area office, with recommendations to secure corrections of any ERISA violations through voluntary compliance, or (2) submits the case to the Office of Enforcement, with a recommendation for stronger enforcement action, such as sending the plan a demand letter (demanding the plan correct the alleged violations or Labor will initiate litigation to correct the alleged violations).

On the basis of its review, the Office of Enforcement decides whether to accept or reject the field office's recommendations for further enforcement action or, if deemed necessary, refers the case to the Solicitor's Office for legal assistance. For example, if the Office of Enforcement believes a plan will not voluntarily correct the ERISA violations, it may refer the case to the Solicitor's Office for consideration of litigation.

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[1]Before May 12, 1984, OPWBP was called the Pension and Welfare Benefit Programs Office (PWBP) and was part of LMSA. On January 20, 1984, the Secretary of Labor signed an order removing PWBP from LMSA, designating it as OPWBP, and making it a separate unit within Labor, reporting directly to the Secretary. The transfer took effect at the national level on May 12, 1984. Although OPWBP was PWBP, within LMSA, during the period covered by our review, we refer to it in this report as OPWBP.

[2]The Secretary of Labor issued an order on May 3, 1984, which abolished LMSA's national office and realigned LMSA's remaining components to (1) a newly established Office of Labor-Management Standards and (2) the Office of Labor-Management Relations Services. The transfer took effect at the national office level on May 12, 1984. In addition, Labor is realigning LMSA's field offices into separate entities, one for OPWBP and one for the Office of Labor-Management Standards. The separation at the field office level is in a transition, which Labor anticipates completing by January 1985.

## The Solicitor's Office role

The Solicitor of Labor is responsible for all legal activities within Labor, including serving as legal advisor to the Secretary of Labor. The Plan Benefits Security Division, Office of the Solicitor (SOL), headed by an Associate Solicitor, provides legal assistance to OPWBP in its enforcement of ERISA. SOL reviews the ERISA cases OPWBP submits and returns them with legal analyses of the issues and alleged violations and a recommendation(s) for appropriate enforcement action, or litigation if deemed necessary. SOL also assists OPWBP in issuing regulations, rules, exemptions, opinions, and interpretative guides under ERISA.

SOL has primary litigative responsibilities for ERISA cases. Pursuant to a memorandum of understanding between the two agencies in February 1975, the Justice Department delegated to Labor the responsibility to litigate most civil cases involving violations under ERISA in U.S. district courts and courts of appeals.

SOL can, for example, initiate litigation (1) against an employee benefit plan's fiduciaries to require them to make good any loss suffered by the plan because of a breach of fiduciary duty or to restore any profits gained through a violation of fiduciary obligations or (2) for removal of a trustee or other fiduciaries.

## OBJECTIVES, SCOPE, AND METHODOLOGY

By letter dated December 8, 1981,[3] the Chairman, Senate Committee on Labor and Human Resources, stated that allegations had been made that when complaints are made by rank-and-file union members, Labor's field offices and other elements proceed with their inquiry and generate case files which are referred for action to the Solicitor's Office. The Chairman said, however, the cases often seem to stop in the Solicitor's Office and go no further, contributing to a very sizable backlog.

Therefore, in accordance with the Chairman's letter and in later discussions with his office, we were requested to make a comprehensive review of the Solicitor's Office role in handling

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[3]On September 7, 1982, the Chairman submitted another letter directing us to coordinate our efforts with the Committee staff's review of the Solicitor's Office operations.

complaints of labor union activities under the Labor-Management Reporting and Disclosure Act[4] and employee pension and welfare benefit plans under ERISA. After our preliminary examination disclosed that the Solicitor's Office did not have a significant backlog of cases involving labor union activities, we agreed with the Committee's office to limit our review to ERISA cases.

In requesting our review, the Chairman asked that we answer the following questions:

" 1 - How large a backlog of cases has existed in a yearly basis?

1a - What was the size of that backlog as of June 1, 1981?

2 - How long is the average delay for each case in that office?

3 - Does such a delay have the effect of halting the inquiry or preventing some comprehensive action from being taken on cases?

4 - Does the Solicitor's Office refer such cases, or even the entire backlog, to another Labor Department element, such as the IG's office [Office of the Inspector General] to be rid of formal responsibility for the cases?

5 - Do such referrals do anything to finally resolve the cases?

6 - What recommendations do you have as to how and where these referrals should be made?"

The Chairman's letter also requested us to list Labor officials, past and present, who have had, and presently have, responsibilities for the matters we reviewed.

The Chairman's letter asked that our review cover the period of 1976 to December 1981. We determined the backlog for each of these years and the factors and problems causing the backlog.

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[4]Under this law, the Department of Labor regulates the activities of private labor unions.

Also, on the basis of discussions with the Committee's office, we agreed to review and consider (1) certain Labor actions to correct the backlog problems, such as issuance of new enforcement and compliance strategies, policies, and procedures in OPWBP and SOL; (2) the Solicitor's Office project, which began in San Francisco in March 1982, to give regional solicitors certain responsibilities for ERISA litigation; and (3) Labor's action on the findings and recommendations in the May 1982 internal Labor report entitled Report, Evaluation and Recommendations, ERISA Enforcement.

In addition, during the Committee's February 23 and 24, 1982, hearings on "Labor Department ERISA Compliance," the Chairman expressed concern that Labor accumulated a large backlog of enforcement cases, many of which were becoming endangered by potential statute-of-limitations problems that could preclude Labor from taking enforcement action. The Chairman was also concerned that an inordinately large number of these cases were closed out administratively in 1981 and believed that Labor's Solicitor's Office had refused to act meaningfully, vigorously, or timely against those who abuse pension funds.

On the basis of our discussion with the Committee's office, we agreed to cover the statute-of-limitations problems and their effect on Labor's ERISA enforcement during our review of a sample of ERISA cases. We also agreed to analyze the ERISA case backlog figures cited in the Committee's hearings (247) and reconcile them with the backlog figure (163) cited by the Solicitor's Office in a December 29, 1981, letter to the Committee Chairman.

We performed our review at (1) SOL in Labor's headquarters in Washington, D.C.; (2) OPWBP, at its Office of Enforcement in Washington, D.C.; and (3) 3 of 6 LMSA regional offices and 6 of its 24 area offices. We reviewed pertinent sections of ERISA as well as OPWBP's enforcement strategies, policies, and procedures and assessed SOL's policies, procedures, and criteria for handling and reviewing ERISA cases referred by OPWBP.

To determine the backlog of cases in SOL and the average delay for each case (i.e., the Chairman's questions 1, 1a, and 2), we reviewed a report showing the 620 ERISA cases OPWBP referred to SOL from 1976 through 1981. We also determined the backlog of SOL cases as of December 1982 and 1983.

To determine what effect the backlog and delays have had on Labor's enforcement action under ERISA (question 3), we selected and reviewed samples of (1) 50 of the 620 cases OPWBP referred during 1976 through 1981 and (2) 33 (7 of which were included in the random sample of 50 cases) of 165 cases that SOL closed during 1981 and returned to OPWBP. We also used the samples to

determine whether SOL referred any cases to other Labor offices or other federal agencies, whether the referrals do anything to resolve the cases, and what recommendations we had on the referrals (questions 4, 5, and 6).

Because of the limited numbers of cases in our two samples and the sampling methodology used in our sample of 33 cases, we cannot statistically project our sample results to OPWBP's universe of cases referred to SOL. Nevertheless, we believe that, in the aggregate, our review work was sufficient for us to achieve our objectives--that is, responding to the third, fourth, fifth, and sixth questions in the Chairman's letter.

At the request of the Committee's office, we did not follow our usual policy of obtaining either written or oral advance agency comments on this report. However, we discussed the matters contained in the report with Labor officials and considered their comments in finalizing the report. Except for the above, our work was performed in accordance with generally accepted government auditing standards.

The details of our review's scope and methodology are discussed in appendix I; the list of officials is in appendix II; and the analysis of the ERISA case backlog figures cited by the Committee and Labor's Solicitor's Office in the 1982 hearings is in appendix III.

## CHAPTER 2

## SOLICITOR'S OFFICE BACKLOG OF ERISA CASES AND ITS CAUSES

The Congress passed ERISA in 1974. Because of ERISA's newness and complexity and the lack of program staff expertise and guidance on what cases should be referred, OPWBP referred many cases to SOL from 1976 to 1981 to obtain advice on what enforcement action it should take. This was a primary factor contributing to SOL's caseload backlog and increased time for completing legal analyses.

SOL's backlog increased from 30 cases at the end of 1976 to 176 cases at the end of 1980--an increase of almost 500 percent. SOL's average time to review a case--3.1 months in 1976--steadily increased to about 14.9 months in 1981, an increase of almost 400 percent.

The number of referrals was higher than it might have been principally because of Labor's policy and strategy of encouraging OPWBP to refer many cases to help select the best cases for litigation to develop case law for ERISA. Additionally, SOL did not promptly return the cases not selected for litigation to OPWBP to handle administratively.

Other problems contributed to the buildup of backlogged cases. These included SOL's (1) limited staff to perform legal analyses and (2) lack of written criteria or guidelines for processing and handling cases referred by OPWBP.

Some of these problems were also discussed in a May 1982 Labor internal review report entitled Report, Evaluation and Recommendations, ERISA Enforcement.

SOL reduced the backlog to 23 by the end of 1981 when it completed 165 cases and (1) returned them to OPWBP with recommendations to obtain voluntary compliance of the alleged violations or close the case or (2) SOL or OPWBP referred them to other federal agencies (such as IRS) for enforcement action.

At the end of December 1982 and 1983, SOL had a backlog of 34 and 24 cases, respectively. The average time SOL took to complete the legal analyses on cases was about 9 months in 1982 and about 8 months in 1983.

The LMSA field offices have been given increased authority for handling cases, which has reduced the number of cases submitted to OPWBP and to SOL. Also, SOL has taken action to improve handling of ERISA cases.

## SOL BACKLOG OF ERISA CASES DURING 1976-81

OPWBP started referring cases in 1975, when it referred six cases to SOL. The number of cases steadily increased through 1979, and from 1976 through the end of 1981, OPWBP referred 620 cases to SOL.

We defined "backlogged cases" as those cases--at the end of the year--which SOL had not yet decided to litigate or had not provided its legal advice on them to OPWBP. As the following table shows, the backlog of ERISA cases increased to a high of 178 at the end of 1979.

Solicitor's Office Backlogged Cases
From 1976 to 1981

| Year | Cases referred by OPWBP | Cases awaiting completion of legal analyses in SOL | Cases in or authorized for litigation | Cases closed and returned to OPWBP | Cases backlogged |
|---|---|---|---|---|---|
| 1976 | 53 | 59[a] | 4 | 25 | 30 |
| 1977 | 96 | 126 | 6 | 38 | 82 |
| 1978 | 127 | 209 | 14 | 62 | 133 |
| 1979 | 158 | 291 | 22 | 91 | 178 |
| 1980 | 146 | 324 | 15 | 133 | 176 |
| 1981 | 40 | 216 | 28 | 165 | 23 |
| | 620 | | 89[b] | 514 | |

[a]SOL had six cases at the beginning of 1976.

[b]SOL had a total of 80 cases authorized for or in litigation through 1981. This actually represents 89 cases referred from OPWBP; however, SOL combined several cases for litigation purposes.

To respond to question 1a of the Chairman's request, we found that on June 1, 1981, SOL had a backlog of 97 ERISA cases.

## DELAYS IN SOL COMPLETING LEGAL ANALYSES

From 1976 through 1981, SOL did not have any written criteria regarding time for its attorneys to complete cases. As shown in the above schedule, from 1976 through 1981, SOL authorized for litigation or closed 603 cases (89 and 514 cases). We computed the average time it took SOL to perform its legal analyses on 590 of these cases from 1976 through 1981. Thirteen cases that SOL received and closed out the same day were not included in our computation because the Associate Solicitor of SOL told us these cases required no analyses. We computed the average processing time it took SOL to perform its legal analyses on these 590 cases. By average processing time, we mean the time from when SOL received a case until it submitted its legal analyses to OPWBP or authorized litigative action.

As shown below, SOL's average time to complete a legal analysis rose from 3.1 months in 1976 to 14.9 months in 1981.

Solicitor's Office Average Time
to Complete Legal Analyses
From 1976 to 1981

| Calendar year | Average time to complete legal analyses (months) |
|---|---|
| 1976 | 3.1 |
| 1977 | 5.3 |
| 1978 | 7.9 |
| 1979 | 11.5 |
| 1980 | 12.4 |
| 1981 | 14.9 |

We also analyzed the 192 cases closed in 1981 to determine the average time it took SOL to complete the legal analyses. The following schedule shows the results of our analysis.

Solicitor's Office Average Time
to Complete Legal Analyses
in 1981

| Period of time cases were in SOL | Number of cases | Average time to complete legal analyses (months) |
|---|---|---|
| Under 6 months | 34 | 2.6 |
| 6 months to 1 year | 46 | 9.0 |
| 1 to 2 years | 83 | 17.8 |
| 2 to 3 years | 24 | 27.7 |
| 3 years or more | 5 | 42.7 |
| | 192 | |

## FACTORS CONTRIBUTING TO THE BACKLOG

SOL's backlog and delays in completing legal analyses were affected by (1) Labor's litigation strategy and policy, (2) OPWBP's reliance on SOL for enforcement decisions, (3) OPWBP's lack of guidance on what cases should be referred, (4) SOL's lack of written criteria or guidelines for handling cases, and (5) the lack of sufficient legal staff.

### Labor's litigation strategy and policy

In the late 1970's, SOL and OPWBP decided to litigate ERISA cases in selected courts to develop case law for ERISA. Labor's litigation policy and strategy was to select only certain cases for litigation to establish sound legal precedents. Under this policy, OPWBP referred numerous cases so that SOL could choose which cases Labor wanted to litigate.

According to the Associate Solicitor, before 1981 SOL had no written criteria to determine what ERISA matters were worthy of litigation. However, in a January 1982 memorandum, the Associate Solicitor stated that the principal criteria used in deciding what cases to litigate were the (1) significance of the impact of litigation, (2) novelty and importance of the issues, (3) egregiousness of the perceived abuse of the pension plan, and (4) dollar amounts involved. The strategy, the Associate Solicitor said in February 1982 hearings before the Senate Committee on Labor and Human Resources, was to have OPWBP refer many cases and have SOL select those that seemed to present the best vehicles for developing case law.

The former Solicitor, who held the office from March 1981 to April 1983, in February 1982 hearings before the same Committee, also said that his predecessor's ERISA enforcement policy resulted in OPWBP submitting many issues in the form of cases to SOL. However, when the SOL attorneys determined that the cases should not be litigated, they put them aside rather than closing and returning them to OPWBP. This practice, according to the former Solicitor, led to the backlog of cases in SOL.

LMSA officials in the field offices responsible for ERISA enforcement were unclear as to what issues were appropriate for referral to SOL for litigation. In the three regions we visited, we spoke to the regional administrators and assistant regional administrators for OPWBP and the area administrators and investigators responsible for ERISA investigations. Several LMSA field office officials told us that they did not know the types of cases SOL would litigate under the policy. These comments were made to us by the Philadelphia regional administrator and assistant regional administrator for OPWBP, the Philadelphia Area Office supervisory investigator for ERISA cases, the Pittsburgh Area Office administrator and supervisory investigator for ERISA cases, the Los Angeles Area Office administrator, and the San Francisco Area Office supervisory investigator for ERISA cases.

The Philadelphia regional administrator and Pittsburgh Area Office administrator and ERISA supervisory investigator also said that, in some instances, SOL gave OPWBP and the field offices no clear explanation as to why a case was inappropriate for litigation. The Philadelphia assistant regional administrator for OPWBP, the Philadelphia acting area administrator and supervisory investigator for ERISA cases, and the Kansas City deputy assistant regional administrator for OPWBP believe that, in the past, Labor was not very protective of the interests of plan participants because of Labor's litigation strategy of litigating only a few cases.

Also, the Philadelphia regional administrator, the Philadelphia acting area administrator, and the Pittsburgh and San Francisco area administrators believe LMSA's voluntary compliance efforts were hindered because the pension community knew that Labor would seldom litigate when voluntary compliance was not achieved.

In October 1982, the Assistant Secretary for Labor-Management Relations commented on the drawbacks of Labor's past litigation strategy of placing great emphasis on establishing legal precedent under ERISA and of selecting only a limited number of cases for litigation based on precedential value. He said,

Several of these officials believed that OPWBP referred many enforcement decisions to SOL because of a lack of (1) leadership in the Office of Enforcement and (2) program staff expertise. Several officials also believed that the complexity and newness of ERISA made it difficult for OPWBP and LMSA's field staffs to identify violations.

Several of these headquarters and field officials also said that SOL, rather than OPWBP, made the litigation policy decisions. In addition, the chief, Division of Fiduciary Standards and Investigations, Office of Enforcement, believes that OPWBP's Office of Enforcement could have handled many of the cases referred to SOL through voluntary compliance efforts.

In January 1979, OPWBP issued guidelines on voluntary compliance. This notice permitted an area office, with regional office approval, to attempt corrective action through voluntary compliance on ERISA cases in which alleged violations could result in real or potential damage to a plan of up to $50,000. In January 1980 and March 1982, LMSA issued revised voluntary compliance guidelines giving the LMSA field staff authority to obtain voluntary compliance without OPWBP's approval on cases involving real or potential damages to a plan of up to $150,000 and $500,000, respectively. In October 1983, the $500,000 limitation was removed.

SOL did not have guidelines for case processing

Management weaknesses in SOL contributed to its backlog and delays in handling of ERISA cases. Specifically, SOL did not have any written criteria or guidelines for processing and handling cases referred by OPWBP. As a result, SOL

--had not established milestones or time frames for attorneys to complete their legal analyses,

--did not promptly return cases to OPWBP that it had not planned to litigate, and

--had no formal system for screening ERISA cases to determine what cases needed priority or immediate action and whether potential statute-of-limitations problems existed that would preclude Labor from taking corrective enforcement action.

SOL's Acting Associate Solicitor and the Counsel for Litigation agreed that SOL had no written criteria or milestones for completing legal analyses of ERISA cases. The Counsel for

"Unfortunately, this policy may have given the impression to some plan fiduciaries that they could avoid compliance with the law because the chances were good the department would not sue."

The Assistant Secretary also stated,

"That is no longer the case. Unscrupulous people no longer can break the law and reap ill-gotten gain from plan assets on the expectation of limited litigation. . . . We will no longer decline to pursue cases because they have limited precedential value. . ."

## OPWBP lacked guidance on referrals and relied on SOL for enforcement decisions

Several OPWBP officials told us that OPWBP had no written guidance or criteria specifying what types of cases OPWBP should refer to SOL. Regional offices submitted many cases to OPWBP for review and approval. In turn, OPWBP referred many cases to SOL for advice on what enforcement action Labor should take. For example, OPWBP not only referred cases to SOL for advice on whether to litigate cases but also referred many cases seeking concurrence on whether to take voluntary compliance actions.

We discussed the reasons for OPWBP's action with several Labor headquarters and field officials. In headquarters, we spoke to the former assistant administrator and two former acting assistant administrators, who headed the Office of Enforcement from July 1980 to February 1984; the chiefs of OPWBP's divisions of fiduciary standards and investigations and reporting enforcement; the regional coordinator for the Kansas City Region, Office of Enforcement; the former Solicitor and Deputy Solicitor of Labor (who became Solicitor in March 1984); and the Associate Solicitor for SOL, the Acting Associate Solicitor, and other SOL officials.

In the field, we spoke to the (1) Los Angeles and San Francisco Area Office administrators, (2) acting regional administrator and assistant regional administrator for OPWBP in San Francisco, (3) Philadelphia acting and Pittsburgh Area Office administrators, (4) regional administrator, deputy assistant regional administrator, and deputy assistant regional administrator for OPWBP in Philadelphia, (5) Kansas City Area Office area and deputy area administrators, (6) St. Louis area administrator, (7) assistant and deputy assistant regional administrators for OPWBP in Kansas City, and (8) supervisory investigators for ERISA cases in the six area offices we visited.

Litigation said, however, he had his own informal method for reviewing all incoming referrals and assigning them to staff attorneys. He said that he tried to expedite those matters he believed were worthy of litigation or needed special handling.

## SOL lacked sufficient staff to do legal analyses

According to Solicitor Office officials, SOL lacked sufficient staff for ERISA litigation, particularly at the supervisory level, to handle the volume of ERISA cases referred from OPWBP, and this contributed to the backlog problem. Both the Deputy Associate Solicitor and the Counsel for Litigation in SOL believe that SOL had been consistently understaffed. They stated that SOL only had 12 to 15 attorneys in 1978.

Although complete statistics of SOL staffing levels were not readily available, our review of available data showed that SOL's staffing consisted of 11 attorneys in March 1978. The levels increased to 20 in December 1979, 23 in March 1981, and 30 in March 1983 (including a regional detailee). The 30 does not include the two attorneys assigned to the pilot project--begun in March 1982--in San Francisco to decentralize ERISA litigation. (See p. 18.)

Also, from January 1977 through May 1980, SOL devoted considerable staff and effort to Labor's investigation of, and civil suits against, the Teamsters' Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds. For example, between October 1977 and May 1980, SOL had at least four attorneys, plus support staff, working full time on the Teamsters' cases. In May 1980, Labor established a separate unit, which is now the Division of Special Litigation, with a separate staff to handle the civil suits against the Teamsters' Pension and Health and Welfare Funds.

The former Solicitor told us that, when he first came to Labor in March 1981, SOL had only one Counsel for Litigation supervising 22 trial lawyers, who were each handling 2 or 3 cases in litigation. This, he said, was an impossible supervisory burden. (SOL records showed that as of March 1981, SOL had another Counsel for Litigation.)

He also told us that the high demand for attorneys with ERISA experience resulted in SOL losing attorneys as soon as they become knowledgeable in the law.

## Solicitor revises ERISA litigation policy

The former Solicitor of Labor, who headed the office from March 1981 to April 1983, also told us that before 1981 many tough policy decisions were delegated to the Solicitor's Office. The former Solicitor, in a September 1981 memorandum, attempted to correct the situation. The memorandum stated that the client agencies, not the Solicitor's Office, are the policymakers on all matters, including those in litigation. He added that the clients should be consistently kept apprised of developments in litigation affecting their programs and actively involved in decisions regarding both (1) whether to commence a case and (2) what positions the Solicitor's Office would take in pending litigation.

The memorandum stated that having the clients closely involved in litigation policy decisions would assure that the Solicitor's Office was not inappropriately making Labor's policy and would make policymakers accountable for decisions involving litigation in their program areas.

In the February 1982 hearings, the Associate Solicitor of SOL stated that the Solicitor directed SOL to pursue litigation of ERISA cases where violations are found, regardless of their possible precedential significance. Also, the Acting Associate Solicitor of SOL told us in March 1983 that SOL was not being as selective as in the past in deciding to litigate cases.

## LABOR'S INTERNAL REPORT FOUND SIMILAR PROBLEMS IN SOL

Further evidence of LMSA's and OPWBP's problems with SOL and Labor's litigation enforcement policy and strategy was noted in a May 1, 1982, Labor internal report. This report was prepared by a joint task force composed of five staff members from LMSA and five from the Inspector General's Office. The task force formed five teams and had a team visit each of the six LMSA regional offices plus five area offices and the OPWBP national office.

As part of the task force's review, it examined the relationship between SOL and the LMSA national and field office staffs. Its review identified many of the problems and inadequacies in SOL's activities that we found. The report stated that comments from five out of the six regional offices expressed displeasure with the relationship between the field and SOL.

For example, the report stated there were indications that SOL had more influence in setting enforcement policy than OPWBP and that SOL did not communicate its policy views to LMSA field offices except in individual cases. As a result, field personnel were frustrated because they spent a long time developing cases only to have SOL refuse to litigate them. According to the report, area and regional officials believed that their views were not considered by SOL and that they could not appeal SOL decisions not to litigate.

Other complaints in the report were that SOL (1) excessively delayed (by 2 to 3 years) making a decision on litigation, (2) gave self-serving or illogical reasons for refusal to litigate, (3) was interested only in establishing procedures on new case law and not in litigating individual cases to protect plan assets or participant rights, (4) intervened in ongoing investigations and negotiated settlements without consulting with OPWBP, and (5) failed to furnish guidance on the applicability of the statute of limitations.

Another complaint cited was that SOL litigated too few cases, even though, the report stated, litigation was effective when used. According to the report, a review of SOL's litigations status report showed that from September 2, 1974, when ERISA was enacted, through March 31, 1981, SOL litigated 58 cases, excluding the Teamsters' Central States litigations. Thus, on average, SOL filed fewer than nine cases a year in court during the first 6-1/2 years of ERISA's existence.

The report also stated that LMSA field officials believed that the decentralization of ERISA litigation would improve enforcement by (1) increasing the number of cases litigated, (2) giving the area and regional offices more input regarding litigation, and (3) facilitating voluntary compliance because litigation would be viewed as a serious alternative.

To improve the relationship between LMSA, OPWBP, and SOL, the report recommended that (1) SOL and OPWBP adopt a true attorney-client relationship with each adhering to its proper responsibilities and not intervening in the other's responsibilities; (2) OPWBP make the litigation decisions with the advice and counsel of SOL; (3) LMSA, OPWBP, and SOL adopt a more aggressive enforcement posture as to the number and types of cases litigated and remedies sought; (4) SOL and the field develop better communications to facilitate discussion of issues involved in cases, exchange views and recommendations, and make final decisions as to their disposition; (5) SOL seek significant staff increases to minimize delays and maximize litigation; and (6) Labor decentralize ERISA litigation by October 1, 1982.

Labor's actions on recommendations

SOL and LMSA officials told us that they have taken actions on the recommendations and believe the actions have resulted in improvements. For example, regarding the first and second recommendations, the Deputy Solicitor (who became the Solicitor in March 1984) and Acting Associate Solicitor for SOL told us that SOL is now operating in response to the former Solicitor's September 1981 litigation policy memorandum. This memorandum specifies that OPWBP, rather than SOL, is the policymaker on all matters, including those in litigation.

The former Deputy Assistant Secretary for Program Operations, LMSA, stated that OPWBP and SOL had improved their relationship and are operating more on a client-attorney relationship. He also said that the appointment of a strong leader to direct OPWBP's Office of Enforcement in 1982 helped to provide stronger program direction for OPWBP.

Regarding the third recommendation, the Deputy Solicitor and former Deputy Assistant Secretary stated they believe Labor is showing a more aggressive enforcement posture. The Deputy Solicitor cited the increase in cases in litigation or authorized for litigation--31 and 24 cases in fiscal years 1981 and 1982, respectively. All cases involved allegations of fiduciary violations by plan administrators or trustees, and the litigation sought remedies through removal of trustees, restitution of plan assets, and/or injunctive relief.

Regarding the fourth recommendation, both the Deputy Solicitor and the former Deputy Assistant Secretary told us that communications between SOL and OPWBP had improved considerably. The former Deputy Assistant Secretary said, for example, that SOL and OPWBP met weekly to discuss and update ERISA case reviews.

Regarding the fifth recommendation, SOL officials told us that SOL staffing has increased significantly over the past few years. In March 1978, SOL had 11 staff members assigned to ERISA litigation, but by March 1983, it had a staff of 30, including a regional detailee. As part of the increase, SOL added three assistant counsels to provide more supervision and accountability in the division. The sixth recommendation is discussed below.

SOLICITOR'S OFFICE EFFORTS TO DECENTRALIZE ERISA LITIGATION

In March 1982, the former Solicitor began a pilot project in the San Francisco Regional Solicitor's Office to determine

whether Labor could effectively decentralize ERISA litigation. According to the former Solicitor, the project represents part of Labor's strategy to protect the benefits of participants and beneficiaries covered by employee benefit plans through an increased enforcement presence. Under this project, selected ERISA litigation matters are being handled by attorneys in the regional office rather than by SOL.

The San Francisco Region's status records showed that from March 1982 through February 1984, 35 ERISA cases were referred to the regional solicitor's office. Of these, 16 had been settled through either court action or voluntary compliance, 7 were pending in court, 5 were returned to the area offices for closing, and 7 were pending as of February 29, 1984. The San Francisco Region's status report also showed that settlements reached in several cases resulted in plan assets being restored.

The San Francisco regional solicitor told us that he believes that the pilot project has helped ERISA enforcement by providing legal assistance to the LMSA San Francisco Region in enforcing certain types of cases. Legal issues of greater complexity are still handled by SOL. He, as well as the two attorneys assigned to the project, believes that the pension community is aware that attorneys are available locally to help enforce ERISA, through litigation, if pension plan administrators and trustees fail to comply voluntarily.

We noted one problem during the start-up of the pilot project. The LMSA regional office was not given enough lead time for identifying and developing cases appropriate for litigation by the pilot project. This resulted in few cases being referred to the regional solicitor's office for several months after the project commenced.

In March 1983, the former Solicitor decided to expand the pilot project to two other regional solicitor offices--Atlanta and Boston. The Boston office is handling cases referred by the LMSA New York Region. The attorneys selected for these projects began the initial review of cases in their regions on August 15, 1983. We discussed the start-up problem in the San Francisco pilot project with the former Assistant Administrator for Enforcement, OPWBP. He told us that sufficient lead time was given to the Atlanta and New York Regions to develop cases appropriate for litigation before assigning attorneys to review cases.

Our review of the initial status reports, as of August 31, 1983, on Atlanta and New York indicated Labor had apparently corrected the start-up problem of the pilot project. In

Atlanta, the region had referred 10 cases to the regional solicitor, and in New York, 4 cases were referred during the initial 2 weeks of the projects.

SOL HAS REDUCED BACKLOG

SOL reduced the backlog of ERISA cases from 176 at the end of 1980 to 23 cases by the end of 1981.

According to the Associate Solicitor for SOL, OPWBP's reduced referrals played a major role in SOL's backlog reduction because it allowed SOL's attorneys to process cases backlogged from previous years. The Associate Solicitor of SOL attributed the reduction in ERISA referrals to (1) a change in OPWBP's enforcement personnel and (2) a shift in OPWBP's enforcement strategy--that is, in 1981, OPWBP returned more cases to the field for voluntary compliance.

The OPWBP official who was Acting Assistant Administrator for Enforcement from April 1981 to February 1982 offered another reason. He told us that he became aware of the backlog and, as a result, became more selective in referring cases. Another condition which led to the decrease in referrals, according to LMSA officials in the Pittsburgh, Philadelphia, and Los Angeles Area Offices and the San Francisco Regional Office, was Labor's reduction of its ERISA investigative staff level due to budget cuts. Also, the OPWBP Office of Enforcement regional coordinator for Kansas City stated that the field offices' referrals to the Office of Enforcement decreased because of their increased authority to seek voluntary compliance and their staffs' increased expertise in ERISA.

We reviewed records to determine the number of cases OPWBP referred to SOL since 1981. During 1982 and 1983, OPWBP referred to SOL 59 and 38 cases, respectively. We also reviewed the status of ERISA cases in SOL, as of December 31, 1982 and 1983, to determine the number of cases in backlog. There were 34 and 24 cases awaiting completion of legal analyses at the end of 1982 and 1983, respectively. The average processing time it took SOL to perform legal analyses on cases was about 9 months in 1982 and about 8 months in 1983.

SOL also had another 13 cases at December 1983 in which it had completed legal analyses and settlement negotiations were occurring with plan officials or SOL and OPWBP were attempting to reach an agreement on what action to take.

## CONCLUSIONS

SOL's backlog and timeliness problems resulted primarily from OPWBP's number of referrals, Labor's policy and strategy of selecting cases of precedential value for litigation, and SOL's management and staffing problems. Also, because of ERISA's newness and complexity, OPWBP often referred enforcement decisions to SOL, seeking advice on what enforcement actions Labor should take.

SOL and OPWBP have taken steps to improve ERISA case processing. OPWBP, by exerting its ERISA enforcement authority, and Labor, by giving LMSA field offices greater enforcement authority to seek voluntary compliance, have reduced the number of cases sent to SOL. SOL has increased its staff and supervisors. As a result, SOL has reduced the backlog of cases as well as the time for completing legal analyses.

We have not reviewed OPWBP's, LMSA's, and SOL's handling of ERISA cases under the new processing procedures. However, in our opinion, if Labor's new procedures are properly implemented in its field and national offices, they should help reduce the likelihood of backlog and time delay problems occurring in the future.

## CHAPTER 3

## DELAYS AFFECTED ENFORCEMENT EFFORTS ON SOME CASES

The Chairman believed that SOL had refused to act meaningfully, vigorously, and timely and that many of the cases were becoming endangered by statute-of-limitations problems that could preclude Labor from taking enforcement action. We reviewed 33 of the 165 cases SOL closed and returned to OPWBP in 1981 to determine what effect, if any, the backlog and time delays had on Labor's enforcement action and outcome of the cases.

The 33 cases were in SOL for an average of about 15 months before they were returned to OPWBP or referred to another federal agency. Labor halted proposed litigation on one of the 33 cases and enforcement actions were or may have been affected on seven other cases because of the processing time taken. In two of the seven cases, SOL and/or OPWBP misanalyzed the time available under the statute of limitations. For one other case, which was referred to SOL in June 1980, OPWBP wrote to the plan in September 1984, seeking its cooperation to have the alleged violations corrected without the need for litigation.

For 10 of the 33 cases, the delays did not prevent enforcement action to have the alleged violations corrected, and for 3 cases, violations did not exist. In one other case, Labor determined that there was a violation but took no action since there was no financial harm to the plan.

For the remaining 10 cases, Labor referred them to other government agencies, such as IRS, to act on the alleged violations since they fell under IRS' or other agencies' responsibilities under ERISA. (We discuss the cases Labor referred to other agencies in ch. 4.)

The 33 selected cases included 13 from the LMSA Kansas City Region, 10 from Philadelphia, and 10 from San Francisco. The three LMSA regional offices had originally referred the cases to OPWBP's Office of Enforcement, and OPWBP, after reviewing the cases, referred them to SOL with recommendations for various enforcement actions, such as litigation or voluntary compliance, or for other reasons.

SOL returned 32 cases to OPWBP and referred 1 to the Pension Benefit Guaranty Corporation. (This case is discussed in ch. 4.) OPWBP reviewed SOL's legal analyses and recommendations and eventually returned the 32 cases to the three regional

offices where the cases originated with recommendations to (1) take the voluntary action recommended by SOL or other action OPWBP believed appropriate, (2) refer the cases to other federal agencies (such as IRS), or (3) close the cases.

## DELAYS CAUSED STATUTE-OF-LIMITATIONS PROBLEMS WHICH LIMITED LABOR'S ENFORCEMENT EFFORTS

ERISA provides a 3- or 6-year time limitation--that is, a statute of limitations--on when Labor can initiate enforcement actions to have alleged violations of the act corrected.

The statutes of limitations, which are in section 413 of ERISA, specifically provide that:

> (a) No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of
>
> (1) six years after (A) the date of the last action which constituted a part the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title; except that in the case of fraud or concealment, such action may be commenced not later than 6 years after the date of discovery of such breach or violation.

In two cases, the statute-of-limitations problems developed while the cases were in SOL. In one case, for example, Labor had to halt proposed litigation to recover plan losses because the 3-year limitation period had expired. This case, as discussed below, was in SOL for 17 months.

In April 1979, an LMSA area office completed an investigation (which it had begun in May 1977) which disclosed that a

pension plan's trustee in 1975 had purchased 9,270 shares of the sponsoring employer's preferred stock for the plan at $100 a share, or $927,000, when the employer was in poor financial condition. Shortly after the purchase, the trustee devalued the 9,270 shares to $463,500 and in 1977 revalued them to $600,000.

The area office concluded that the trustee had acted imprudently and breached its fiduciary duty and responsibilities under ERISA by (1) failing to take steps to determine the fair market value of shares purchased from the employer and (2) paying more than adequate consideration for the shares.

On May 15, 1979, OPWBP referred this case to SOL and recommended that SOL prepare a demand letter requesting that the employer and trustee arrange for the employer to repurchase the preferred stock from the plan. OPWBP stated that Labor may be precluded from taking any action after December 1979 due to the 3-year limitation on such action prescribed by ERISA. This apparently was based on the plan's disclosure of the stock purchase in its annual report for calendar year 1975 which was filed in December 1976. The documents referred to SOL also included several letters indicating that an area office compliance officer/auditor had discussed the alleged violations with a trustee official in August 1977.

SOL took 17 months before completing its legal analysis on October 20, 1980. SOL agreed with the area office and OPWBP's conclusions that the trustee had acted imprudently and had violated ERISA. It also concluded that because the employer appears to have sold the stock to the plan for more than it was worth, the sale constituted a violation under ERISA's prohibited transaction rules, which limits the holding of employer securities.

By October 21, 1980, letter, SOL notified the Administrator, OPWBP, that it was initiating litigation which would (1) allege that the plan trustee failed to take steps to determine the fair market value of the shares of preferred stock purchased for the plan and (2) request the plan sponsor (the employer) to rescind the prohibited transaction and seek restitution by the trustee for losses caused to the plan. Although the area office and OPWBP documents noted that the 3-year statute of limitations would expire in December 1979 and the area office compliance officer/auditor discussed the allegations in August 1977, SOL considered the expiration date as February 1981. This was based on the plan's filing of its annual report for calendar year 1976 in February 1978.

In late 1980 and early 1981, SOL and the plan's attorney attempted to settle the case without litigation. During the

discussion, the plan's attorney brought up an area office compliance officer/auditor's discussion of the alleged ERISA violations in the summer of 1977 and argued that, based on this discussion, the statute of limitations had expired on the violations in the summer of 1980.

As of result of this discussion, SOL, in an April 1, 1981, memorandum, recommended that Labor not pursue litigation against the employer or trustee. OPWBP concurred and, in June 1981, advised the LMSA regional office that the case be closed.

Documents in the case file showed that the Associate Solicitor for SOL acknowledged that SOL was responsible for the statute problems on this case. The Associate Solicitor for SOL stated that it did not get to the case early enough and when SOL got to the case, it was misanalyzed. She said nobody in SOL recognized the statute problem created by the August 1977 discussion until they were confronted with it by defense counsel. Thus, she said SOL had to acknowledge at that time that the statute had run out on the claims. As a result, Labor could not litigate the case and took no further action.

Another case involved an LMSA area office investigation of a health and welfare benefit plan, completed in July 1980, which disclosed that the plan's fiduciaries held about $548,000 in a non-interest-bearing checking account from January 1, 1975, through December 31, 1979. In September 1980, OPWBP referred the case to SOL and stated that the fiduciaries acted imprudently and violated ERISA by holding the large amounts of cash in a non-interest-bearing account. Although the area office's investigation showed that violations occurred from 1975 through 1979, the area and regional officials believed that the 3-year statute of limitations may preclude Labor from recovering 1975 and 1976 losses. OPWBP, however, stated in its memorandum that it did not believe that the statute of limitations would bar recovering losses beginning on January 1, 1975.

SOL replied in July 1981 and agreed with OPWBP's decision to seek voluntary compliance to have alleged violations corrected and recover plan losses. SOL also stated that, since the plan failed to properly report the amount of available cash in its 1975 and 1976 annual reports to Labor, the 3-year statute of limitations had not run on the 1975-76 losses. SOL's legal analysis, however, did not mention the 6-year limitation on the 1975-76 losses or the 3-year limitation on the 1977-79 losses.

OPWBP returned the case to the LMSA regional office in August 1981, and based on SOL's opinion that the statute of limitations had not run, for 7 months the area office attempted to reach a voluntary settlement with the plan. In April 1982,

after the plan's attorney refused to offer more than $70,000 in repayment of plan losses, the regional office referred the case to the regional solicitor's office for consideration of litigation.

According to the regional solicitor's office May 1982 legal analysis--which was prepared by an attorney on loan from SOL for the pilot project--Labor's area office computed plan losses for the years 1975 through the first 4 months of 1980. The regional solicitor's analysis stated that, assuming that Labor could file the case for litigation in May 1982, the 6-year statute of limitations would have expired on all 1975 violations and on some 1976 violations.

In addition, the analysis stated that the plan's annual report for the 1977 plan year was received by Labor in October 1978. The regional solicitor's analysis stated it may be argued that Labor could reasonably be expected to have obtained knowledge of the breaches, which occurred during 1977, from the information received in October 1978. Accordingly, the regional solicitor's analysis stated that the 3-year statute of limitations probably expired in October 1981 on all the 1977 violations.

The regional solicitor's analysis recommended that the regional office reconsider the $70,000 voluntary compliance offer. The regional solicitor stated that, although the violations resulted in plan losses of over $165,000, it could be argued that the statute of limitations would probably limit the amount that Labor could recover through litigation to about $75,000. In July 1982, Labor accepted the plan fiduciaries' offer of $70,000 to settle the case.

In three cases, according to SOL legal analyses, statute-of-limitation problems developed before OPWBP referred the cases to SOL. The statute problems were attributed to Labor having actual knowledge of the alleged violations because they were included in annual reports, which the plan filed with Labor over 3 years before the cases were referred to SOL. OPWBP had referred the three cases to SOL for litigative action, and in all three cases, SOL cited the statute-of-limitations problems as one of the reasons for not litigating these cases or for pursuing voluntary compliance to correct the alleged violations.

In all three cases, OPWBP, based on SOL's comments on the statute-of-limitations problems, instructed the originating LMSA area office to close the case. The area offices, in turn, notified the plan trustees and administrators that Labor had concluded its investigation, and it was taking no further action on the alleged violations.

## OTHER CASES WHERE INTERESTS OF PLAN PARTICIPANTS MAY HAVE BEEN AFFECTED BECAUSE OF DELAYS

In addition to the five cases involving statute-of-limitations problems, we found three other cases where the delays in SOL and/or OPWBP caused enforcement problems and the interests of plan participants may not have been fully protected as required by ERISA.

In one case, in February 1978, an LMSA area office completed an investigation which disclosed that a plan transferred property valued at $170,709 to a labor union, a party in interest. The transfer was for repayment of a loan the plan had borrowed from the union. In April 1978, OPWBP requested SOL's opinion on whether the transaction--which was made under a verbal agreement before June 1975 when the union and the plan entered into a written agreement--was a binding contract under ERISA. The act provides that certain party-in-interest transactions in effect on July 1, 1974, made under a binding contract will not be prohibited until June 30, 1984. OPWBP stated that it believed the transaction was not made under a binding contract and therefore was prohibited.

In August 1981, 40 months after OPWBP referred the case, SOL returned the case and its legal analysis, stating that the conveyance of the property to the union is arguably a party-in-interest transaction in violation of ERISA. Also, whether the transaction is exempted depends upon whether a binding contract was in effect before July 1, 1974, which depends upon an interpretation of state law. Because of the nature of the alleged violation and absence of any recommendation for litigation by OPWBP, SOL said it was not ready to render an opinion on the application of state law to the question. Instead, SOL recommended that Labor take no enforcement action.

OPWBP transmitted SOL's legal analysis to the regional office, stating its belief that the exemption was not applicable to the case. In addition, OPWBP directed the field office to determine whether the union still retained an interest in the property and, if so, render technical assistance to the trust with regard to ERISA requirements relating to joint property ownership. The area office supervisory investigator told us the office took no action on the case after OPWBP returned it because of the long delay in SOL--over 3 years since the transaction occurred--and the time for technical assistance had long passed. He also said providing technical assistance was a low priority in the area office.

In the second case, an LMSA area office investigation, completed in June 1979, disclosed that pension, welfare, vacation, and training plans paid a labor organization, a party in interest, over $300,000 a year to perform certain administrative services in violation of ERISA's prohibited transaction provisions. According to the investigation, the payments were based on the number of hours worked by each employee and not on services rendered to the plans. Also, the investigation disclosed that nothing in the plans' documents authorized the payments, that there was no contract between the plans and the labor organization for the services, and that the plans had no clear indication what services were rendered.

In July 1979, OPWBP referred the case to SOL, seeking legal action to recover losses realized by the plans and to prevent similar payments in the future. In August 1981, 25 months later, SOL returned the case to OPWBP. SOL's legal analysis stated that although apparent violations of ERISA were involved, the case was inappropriate for litigation because the payments ceased sometime in 1980 and the extent to which the union was overpaid for its services was not known. SOL also said that the amount of Labor's resources needed to develop the issue through further investigation and litigation did not appear justified. Accordingly, SOL recommended that Labor close the case without further enforcement action.

In the closing memorandum to the field, OPWBP stated that it concurred with the SOL's recommendation and suggested the area office send no letter to the pension plans because 2 years had passed since the area office completed its investigation. As directed, the area office took no further action on the case to recover the plans' losses. While the case was pending legal analysis in SOL, according to an area office supervisory investigator, the plans paid the union an additional $134,000 for administrative services.

In the third case, an LMSA area office investigation completed in July 1979 disclosed that trustees of a pension plan retroactively terminated an employer's participation in the pension plan, resulting in (1) current participants losing service credits and (2) seven retired participants having their benefits reduced by 73 percent, or about $113,000. In September 1979, OPWBP referred the case to SOL and recommended that Labor take immediate action to ensure the retired participants receive their full benefits. According to OPWBP, the plan trustees violated ERISA because they did not discharge their duties solely in the interest of participants and beneficiaries.

After 18 months, in March 1981, SOL returned the case to OPWBP. SOL's legal analysis stated that the plan fiduciaries

may have violated an ERISA provision requiring the fiduciaries to discharge their duties in accordance with plan documents. However, SOL said that they had not violated any other provision of title 1 of the act. SOL said, accordingly, the case is inappropriate for litigation by Labor, but stated that Labor should inform the participants that they may have cause to take legal action themselves.

About 38 months passed from the date the LMSA area office opened the investigation to the date Labor sent a letter to the participants that it would not litigate the case and that the participants had a right to file a suit on their own behalf. From our review of Labor's records and discussions with Labor officials, we found no indication of whether the participants took any action to recover their benefits.

In another case, an LMSA area office's investigation of a pension plan maintained by an insurance company for its employees, which was completed in June 1980, revealed that the plan's fiduciary (1) commingled plan assets with the general assets of the firm (as a general rule, ERISA requires that the assets through which a plan is funded be held in trust) and (2) arbitrarily limited the plan's investment earnings to 4.5 percent, thereby causing a loss of over $300,000. On July 23, 1980, OPWBP referred this case to SOL with a recommendation that Labor send a letter to the plan's fiduciaries advising them to voluntarily correct the violations and losses or face litigation by Labor.

On July 15, 1981, or about a year later, SOL returned the case and recommended that OPWBP confer with IRS to have the two agencies adopt common views on the need to have the plan set up a separate trust fund. After consulting with IRS and the American Council of Life Insurance Companies--the issue also involved several other insurance company plans--OPWBP on July 2, 1982, re-referred the case to SOL and stated it believed enforcement action similar to that which it suggested previously was appropriate.

On September 13, 1983, SOL responded and recommended that, after seeking final concurrence with IRS, OPWBP should seek voluntary compliance from the plan on the issues. On November 4, 1983, OPWBP wrote to SOL and said it agreed and requested that SOL advise IRS of Labor's decision to proceed on this case. In February 1984, SOL received IRS' concurrence on the planned action on the case.

In a September 5, 1984, letter to the plan, OPWBP concluded that the fiduciaries had breached the prudence requirements of ERISA in that the plan assets were placed at unnecessary risk in

the event the company were to become insolvent. The plan assets had been improperly commingled with the company's general assets. Thus, the participants' assets would not be protected because, under California bankruptcy law, they would stand behind policyholders for a share of the company's assets. The letter also concluded that the fiduciaries breached ERISA's prohibitions against causing a plan's assets to benefit a party in interest or dealing with the plan's assets in their own interest or for their own gain. The letter stated, in Labor's view, to the extent plan assets are commingled with the general assets of an insurance company, and to the extent the company retains investment income thereon, this constitutes a transfer or use by or for the benefit of the plan sponsor of assets of the plan, as well as self-dealing under ERISA. On September 19, 1984, the plan wrote SOL stating that it was willing to resolve the alleged violations voluntarily.

## LABOR HAS ADOPTED PROCEDURES TO HELP PREVENT STATUTE-OF-LIMITATIONS PROBLEMS

Until early 1982, neither OPWBP nor SOL had a system for reviewing cases for statute-of-limitations problems or for tracking potential expiration dates under the 3- and 6-year limitations in ERISA for taking action on violations.

In February 1982 the former Solicitor directed SOL to analyze all ERISA cases referred by OPWBP for litigation to determine the earliest date that the statute of limitations would run. The former Solicitor also directed SOL that, for all future ERISA cases, the staff must determine within 10 days of the case assignment the earliest date the statute will run. Also, in February 1982, the former Administrator of OPWBP directed the Office of Enforcement to develop a system for tracking the statute of limitations.

In a memorandum to the Associate Solicitor of SOL in March 1982, the former OPWBP Administrator requested SOL to provide guidance on the general applicability of the statute of limitations. The former Administrator stated that OPWBP was developing procedures to monitor ERISA investigations in both the field and national office to minimize future statute-of-limitations problems.

By memorandum dated April 15, 1982, the Associate Solicitor of SOL presented a detailed discussion of the issues and actions by Labor officials, including investigators, that would trigger the running of the statute under each section of ERISA. The Associate Solicitor's memorandum also made several recommendations which it said will help assure that the statute

(1) does not run when it can be prevented and (2) to the extent possible, does not become an issue in Labor's litigation.

First, the Associate Solicitor recommended that OPWBP include certain information and documents in investigation reports forwarded to SOL for consideration. These included:

--All annual reports, including attachments filed and relating to the subject plan, together with the dates filed.

--The dates of any national office audits of the plan's annual reports and copies of the audits.

--The date Labor's investigation began.

--The dates Labor personnel communicated Labor's view of a particular transaction to anyone outside Labor.

--The dates on which documents bearing the alleged violation were first provided Labor and the dates of the first substantive review.

The Associate Solicitor also stated that, apart from providing certain information with reports sent to SOL, certain procedures will also help in avoiding statute problems. Specifically, she recommended that, to the extent possible, OPWBP refer cases for litigation at least 6 months before the earliest of the following dates: (1) 6 years after the earliest date on which an action or omission took place on the alleged violation; (2) 3 years after the filing of an annual report identifying the transaction which is the alleged violation, regardless of whether it is concluded that such report gives notice of a violation; (3) 3 years after any Labor employee had knowledge of the existence of a transaction which is later alleged to have violated the act; and (4) 3 years after the receipt of documents by Labor giving notice of the existence of a transaction which is the alleged violation of the act.

On May 21, 1982, OPWBP's former Acting Assistant Administrator for Enforcement sent the Associate Solicitor's memorandum to LMSA's six regional administrators, along with a form OPWBP was using to establish case priorities to minimize the occurrence of statute problems. The former acting assistant administrator said the OPWBP's form is consistent with the SOL memorandum and should help OPWBP and the field offices avoid statute-of-limitations problems whenever possible. He said the form uses the "safe dates" approach mentioned in SOL's memorandum for analyzing issues and determining whether the statute has run or will run on an allegation under investigation.

According to an OPWBP official, all six LMSA regional offices have established and implemented procedures, as suggested by the former acting assistant administrator.

Also, on February 1, 1983, LMSA issued a notice transmitting changes in reporting instructions, milestone codes, and docketing procedures for its computerized Field Activities Reporting System for OPWBP activities. As part of the revised instructions, LMSA established statute-of-limitations control codes for ERISA cases. The instructions require LMSA area offices, when opening and docketing a case (i.e., entering it into the reporting system), to include the date when Labor will be barred from taking corrective action on the alleged violations because of the expiration of the statute of limitations.

## LABOR'S EFFORTS TO IMPROVE ERISA ENFORCEMENT

As noted previously, the Secretary of Labor in May 1984 separated OPWBP from LMSA and designated it a separate office reporting directly to the Secretary. The Secretary's order also provided for the realignment of LMSA field offices into separate entities, one for OPWBP and one for a newly established Office of Labor-Management Standards. Labor anticipates completing the reorganization and realignment of LMSA field offices by January 1985.

According to the OPWBP Administrator, the separation was made to give enforcement of ERISA greater prominence within Labor and help enhance the efficiency and effectiveness of OPWBP operations. The Secretary also established an Executive Steering Group, composed of officials from LMSA, OPWBP, the Solicitor's Office, the Secretary's Office, and the Assistant Secretary for Administration and Management, to assure an orderly and equitable implementation in establishing OPWBP.

### ERISA Enforcement Working Group

Also, as part of the reorganization, the Administrator of OPWBP, in March 1984, established an ERISA Enforcement Working Group composed of representatives from the Solicitor's Office, the Inspector General's Office, and OPWBP. The group is charged with making a full-scale evaluation of Labor's role in enforcing ERISA. It will analyze what has taken place in the past, where Labor is now, how Labor should be structured, and how Labor should undertake its enforcement obligation in the future. The working group is to prepare a report at the conclusion of its study.

## Inspector General's study on LMSA reorganization

In addition to the ERISA Enforcement Working Group, Labor's Inspector General's Office made a limited survey of LMSA to identify major audit issues and evaluate areas of concern to determine if they merit additional audit effort. The Inspector General concentrated on two LMSA major enforcement programs: (1) the Labor-Management Reporting and Disclosure Act and (2) ERISA. On April 11, 1984, the Inspector General transmitted a March 1984 survey report to the OPWBP Administrator and the Deputy Assistant Secretary for Labor-Management Relations.

The report stated that, although good has come from OPWBP's efforts to protect employee benefit plan members and plan assets, several factors have reduced the effectiveness of what may have been achieved. It stated that OPWBP has not adequately defined its enforcement strategy or objectives, and as a result, enforcement priorities and audit selection criteria are inconsistent and their effectiveness has not been properly evaluated.

The report recommended that (1) the enforcement needs, resource requirements, and strategies of OPWBP be reevaluated and (2) OPWBP's computer-assisted targeting experiments, which have been proven ineffective, be limited pending the results of the evaluation of the report's recommendations. The report also recommended that the Executive Steering Group and the Enforcement Working Group evaluate the enforcement strategies of OPWBP with the goal of determining how agency staff could be best used.

## CONCLUSIONS

Misanalysis of the statute-of-limitations provision by SOL and delays in OPWBP had the effect of halting Labor's plans to litigate one case to recover plan losses and settling another case limiting the amount of plan losses recovered. In several other cases, delays in OPWBP contributed to statute-of-limitations problems which SOL cited as a reason for not taking litigative action. As a result, alleged violations were not pursued, and Labor may not have protected the interests of plan participants and beneficiaries.

SOL and OPWBP have acted to establish systems for reviewing cases for statute-of-limitations problems or tracking potential expiration dates under the 3- and 6-year provisions of ERISA. LMSA regional offices have also established case priorities to minimize the occurrence of statute problems during ERISA investigations. OPWBP has also established "safe dates" for analyzing issues and determining whether the statute has run or will

run on an allegation under investigation and referring the case to SOL for considering litigation.

We have not reviewed OPWBP's, LMSA's, and SOL's handling of cases under the new procedures. However, in our view, if Labor's new procedures and guidelines for identifying possible statute-of-limitations expiration dates are properly implemented in Labor's field and national offices and in SOL, they should reduce the likelihood of statute-of-limitations problems occurring in the future.

Also, the Executive Steering Group and ERISA Enforcement Working Group are evaluating LMSA's reorganization and Labor's future role and goals in the enforcement of ERISA. The Inspector General's survey report also suggested ways to improve the effectiveness of OPWBP's enforcement efforts. In our view, the two groups' efforts and the Inspector General's report should be helpful to Labor in implementing improvements and changes in OPWBP's ERISA enforcement program.

# CHAPTER 4

## REFERRAL OF CASES TO OTHER LABOR OFFICES OR FEDERAL AGENCIES

We used our random sample of 50 cases OPWBP referred to SOL from 1976 through 1981 and the sample of 33 cases (7 of which were included in the random sample of 50 cases) that SOL closed and returned to OPWBP in 1981 to determine to whom, and why, SOL made the referrals.

Our review of the 76 sample cases showed that SOL referred 2 of the 76 cases to other divisions in the Solicitor's Office and 1 case to the Pension Benefit Guaranty Corporation. SOL also recommended that OPWBP refer nine cases to other federal agencies--seven to IRS and two to the Justice Department--and OPWBP, after receipt and review of SOL's legal analyses, referred three additional cases to IRS.

Our review of the 15 cases showed no evidence that SOL referred or recommended referral of any case to another Labor element, such as the Office of the Inspector General, or another federal agency to avoid responsibility for the cases. Rather, SOL and OPWBP referred the cases because the Labor elements or federal agencies have responsibility for the issues or alleged ERISA violations referred.

For example, OPWBP referred the 10 cases to IRS because the alleged violations involve the sections of ERISA and the Internal Revenue Code that IRS is responsible for enforcing. OPWBP referred the two cases to the Department of Justice for review to determine whether the alleged violations of ERISA warranted criminal prosecution by Justice under the criminal provisions of ERISA or title 18 of the U.S. Code. Also, under an agreement between Labor and Justice, any evidence of criminal violations obtained by Labor must be referred to Justice for consideration for investigation and prosecution.

SOL referred the one case to the Pension Benefit Guaranty Corporation because the alleged violation involved title IV of ERISA--plan termination insurance--which the Corporation administers. SOL referred 1 of the 2 remaining cases (of the 15 case referrals) to the Solicitor's Office Division of Special Litigation and the other to the General Legal Services Division since the cases involved matters under these two divisions' jurisdictions.

## DID REFERRALS DO ANYTHING TO RESOLVE THE CASES?

To determine whether the SOL and OPWBP referrals led to resolving the cases, we followed up on 10 of the cases in our 33-case sample and the 2 cases referred to other Solicitor's Office divisions. The 10 cases included 1 case referred to the Justice Department, 1 referred to the Pension Benefit Guaranty Corporation, and 8 cases referred to IRS. We limited our follow-up to a review of Labor's files on the 12 cases and discussions on their final dispositions with Labor and Corporation officials in Washington, D.C., and Labor officials in the selected LMSA regional and area offices we visited.[1] We did not review IRS records or interview IRS officials in light of the restrictions imposed by section 6103 of the Internal Revenue Code on the disclosure by IRS of any information concerning IRS' investigation of a single taxpayer. IRS considers a pension fund as an individual taxpayer.

Of the 12 cases, we were able to determine the final resolution on only 7--the 2 referred to other Solicitor's Office divisions, the 2 referred to Justice and the Pension Benefit Guaranty Corporation, and 3 of the 8 cases referred to IRS. For the five remaining cases, the LMSA area office did not follow up to determine whether IRS had taken the recommended enforcement action. Also, Labor files, both in Washington, D.C., and the area offices, contained no information on what action, if any, IRS had taken on the cases.

One of the two cases referred to the Solicitor's Office went to the Division of Special Litigation, which is responsible for handling Labor's civil cases against the Teamsters' Pension Fund. The referred case involved an alleged prohibited transaction--the purchase of an airplane for $2.9 million by the Teamsters' Pension Fund trustees from the Central Conference of Teamsters--a union organization (i.e., a party in interest). ERISA prohibits a pension plan from engaging in a transaction with a party in interest. After Labor filed a civil suit, the union organization agreed to repurchase the airplane and settle the case for $4.3 million, which includes the $2.9 million purchase price of the airplane plus interest.

The other case referred to the Solicitor's Office involved an inquiry from an attorney representing a company regarding the

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[1]We did not follow up on the (1) 2 remaining cases referred to IRS because they involved LMSA field offices not covered in our review and (2) second case referred to Justice because it was not part of our 33-case sample.

applicability of a U.S. Supreme Court decision. The decision concerned the rights of veterans to have their military service credited toward the length of time required to be eligible for a pension from the employer to which they returned. SOL referred the case to the General Legal Services Division[2] in the Solicitor's Office since the matters relating to the Veterans Reemployment Program appeared to fall more properly within that division's jurisdiction. According to a memorandum in SOL's files, the General Legal Services Division answered the attorney's inquiry by a telephone call and closed the case in January 1978.

The case referred to Justice involved an LMSA area office's investigation of a pension plan which disclosed alleged violations of the prohibited transaction provision of ERISA in that the plan extended credit totaling $127,700 to people--who were unable to obtain conventional financing--to buy homes. In the process, commissions amounting to $9,310 were received by a party in interest, a subsidiary of the sponsor. LMSA also found that the plan owned and operated a farm that sold sod to the contractor of the plan sponsor for less than the fair market value, causing a loss to the plan of about $50,000.

LMSA also found that the plan administrator misrepresented the facts on a June 6, 1975, application it filed with Labor for an exemption from ERISA's prohibited transaction provisions. The plan purchased three parcels of unimproved real estate and applied for Labor's permission to sell the land to the plan sponsor within 18 months after the date that Labor granted the exemption. However, the plan sold land to the sponsor in 1976 and 1977 for $171,582. Labor granted the exemption in April of 1978, but it was not retroactive to 1976 and 1977, when the plan sold the land.

On June 20, 1980, OPWBP referred the case to SOL and recommended that Labor initiate legal action against the plan. On January 26, 1981, SOL returned the case to OPWBP with a recommendation that the misrepresentation in the exemption application be referred to Justice for consideration of criminal prosecution. SOL believed the misrepresentation may have been a violation of section 1001 of title 18 of the U.S. Code, which covers making false statements and concealing facts. SOL recommended also that OPWBP make an independent determination as to whether it wishes to attempt to obtain voluntary compliance regarding the other aspects of the case.

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[2]This division was abolished in 1981 and its functions transferred to other elements in Labor.

On January 18, 1982, OPWBP, as SOL recommended, referred the misrepresentation in the plan's exemption application to Justice. On April 19, 1982, Justice responded and told OPWBP the case does not merit further investigation and/or prosecution under 18 U.S.C. 1001 or 1027 (section 1027 covers making false statements and concealment of facts in relation to documents required by ERISA) because of the following factors:

--Statute-of-limitations problems.

--Apparent lack of monetary loss to the government or the plan.

--Availability of alternative remedies.

--Difficulty of proving criminal intent because there was no significant variance between the description of the proposed transaction in the exemption application and the facts of the transaction as it actually occurred.

--The long time between the date of filing the application for the exemption and its final approval.

OPWBP referred the other alleged violations to the LMSA regional office with a recommendation that it attempt voluntary compliance on the alleged prohibited transaction violations and perform an additional investigation to determine whether ERISA violations had occurred on the sod sales. The area office initiated an investigation to update the case, but in its preinvestigative analysis discovered that the sponsor had terminated the plan in 1979 and distributed all of the plan's assets. In view of this, the region terminated the investigation.

Another case involved a small pension plan, with about $35,000 in assets, cosponsored by three related corporations. The LMSA area office's investigation completed in May 1978 revealed the plan sponsors had not filed any plan documents or financial disclosure reports required by ERISA and stopped paying benefits to participants because the plan sponsors claimed the plan was terminated. OPWBP referred the case to SOL on March 16, 1979, with a recommendation for enforcement action, including the possibility of litigation in view of plan's virtual disregard of the act.

SOL declined because the case did not raise significant ERISA issues and because the plan had terminated and distributed assets. ERISA's plan termination provisions are administered by the Pension Benefit Guaranty Corporation. Therefore, SOL on February 20, 1980, referred the case to the Pension Benefit Guaranty Corporation.

The Corporation official handling the case told us that he had contacted the plan attorney and administrator several times during 1980 requesting they submit a notice of intention to terminate the pension plan. Although the plan's attorney had promised to submit the required notice by December 15, 1980, the official told us that, as of September 27, 1984, the Corporation has not received the notice. The official also told us that based on our inquiry, he will again follow up with plan officials to request the termination notice.

Labor's referral of cases to IRS

In our review of 8 of the 10 cases referred to IRS, we were able to determine the final results for only 3. We were unable to determine the final action on the other five cases because Labor did not follow up to determine what enforcement action, if any, IRS took on them.

Labor and IRS share the responsibilities for enforcing ERISA. In recognition of this overlap of responsibilities, Labor and IRS on November 22, 1978, entered into an agreement, as permitted by ERISA, to coordinate their enforcement efforts. Under the agreement, Labor and IRS could refer cases to each other involving fiduciary and prohibited transaction violations as well as funding and plan benefit matters.

Also, section 3003(c) of ERISA requires the Secretary of Labor to transmit to the Secretary of the Treasury information indicating that a prohibited transaction occurred. The Congress, in enacting ERISA, added section 4975 to the Internal Revenue Code, which imposes an excise tax on persons (generally the same as parties in interest under title I of ERISA) who engage in prohibited transactions with employee retirement benefit plans.

Pursuant to the agreement and/or section 3003(c) of ERISA, OPWBP refers cases to IRS for further enforcement action. Of the eight cases, two involving plan participant benefit dispute issues and one involving a funding issue were primarily under IRS' jurisdiction. In four cases, involving prohibited transactions, Labor concluded that no further action by it was warranted and referred the cases to IRS for possible imposition of an excise tax under the Internal Revenue Code.

The final case, which involved the valuation of the plan's employer stock and also a prohibited transaction, was referred to IRS because of its expertise in valuation problems and for possible imposition of an excise tax.

From our review of Labor's case files and discussions with Labor area office officials, we found that the LMSA area office officials did not follow up on seven of the eight cases to determine whether IRS had taken any enforcement action. Appendix IV shows the alleged violation, reason for referral to IRS, and enforcement action, if known, taken by IRS on the eight cases. In only three of the eight cases were we able to determine the enforcement action taken by IRS or corrective action taken by the plan. These three cases, all of which involved alleged prohibited transaction violations, are the first three listed in appendix IV.

In case one, the LMSA area office did follow up and found that IRS concluded, based on its investigation of the plan's stock valuation procedures, that no enforcement action was deemed necessary. Labor wrote to the plan in March 1982 suggesting that it correct the other alleged violation, lack of bonding, but the plan refused. Area office officials told us they closed the case because they did not want to pursue the bonding matter after the case was delayed for such a long time, about 2-1/2 years.

In case two, the LMSA area office did not follow up with IRS and was not aware of its action, if any. The plan, however, notified Labor it had taken action to correct the prohibited transaction involving loans made to a party in interest. Labor then closed the case.

In case three, the LMSA area office did not follow up and was not aware of IRS' enforcement action. A memorandum in the SOL files concerning a call from an attorney representing the controlling shareholder of the plan sponsor indicated that IRS was imposing an excise tax on the plan based on Labor's legal opinion. Labor had closed the case at the time of its referral to IRS.

## Revised coordination agreement requires notice of enforcement action

In September 1981, Labor and IRS convened a combined task force to (1) review the 1978 coordination agreement and regional agreements and (2) recommend changes to improve the coordination between the two agencies. The task force found that while most IRS and Labor regional and district/area offices were actively coordinating, they were not following closely either the original 1978 agreement or later regional agreements.

According to the task force, IRS and Labor employees had little knowledge of how each other's agency functioned procedurally on pension plan examinations, and the original agreement

did not consider these differences adequately. As a result, the task force recommended that the agencies adopt a revised agreement.

Consequently, on April 18, 1983, IRS and Labor entered into a new agreement establishing more specific procedures and uniform standards for coordinating the two agencies' enforcement activities under ERISA. One significant revision was an addition of a procedure requiring each agency to notify the referring agency (within 10 days of the referral) what enforcement actions it had taken to correct the identified problems.

## WHAT RECOMMENDATIONS DOES GAO HAVE AS TO HOW AND WHERE THESE REFERRALS SHOULD BE MADE?

We found no evidence indicating that SOL referred or recommended OPWBP refer cases to other Labor elements or other federal agencies to avoid the responsibility for the cases. SOL referred the two cases to other divisions in the Solicitor's Office because these cases came under their responsibility.

Also, the other 13 cases SOL or OPWBP referred to IRS, the Department of Justice, and the Pension Benefit Guaranty Corporation were referred because they involved issues or alleged violations of ERISA provisions for which these agencies have primary enforcement responsibility.

Labor made most of its referrals to IRS and did not generally follow up to determine whether IRS took enforcement action on the alleged violations. Under their 1978 coordination agreement, neither agency was required to notify the other of the action taken on referrals. However, the Labor/IRS 1983 coordination agreement now requires the agencies to respond to referrals within 10 days and to notify the referring agency of the enforcement action taken or planned.

Labor generally made the referrals pursuant to the requirements of ERISA or interagency agreements. The 1983 Labor/IRS agreement should improve the coordination of referrals. Accordingly, in response to question 6 of the Chairman's letter, we do not have any recommendations as to how and where Labor's referrals should be made.

## SCOPE AND METHODOLOGY

We made the review at (1) SOL in Labor's headquarters in Washington, D.C.; (2) OPWBP's Office of Enforcement in Washington, D.C.; (3) 3 of LMSA's 6 regional offices--those in Kansas City, Philadelphia, and San Francisco; (4) 6 of LMSA's 24 area offices--those in Kansas City, Los Angeles, Philadelphia, Pittsburgh, St. Louis, and San Francisco; and (5) Labor's San Francisco Regional Solicitor's Office.

### REVIEW OF ERISA CASES AT LABOR'S HEADQUARTERS

At OPWBP, we reviewed pertinent sections of ERISA; OPWBP's strategy, policies, and procedures for carrying out its enforcement responsibilities and achieving compliance to correct ERISA violations through voluntary compliance or litigation; and its criteria for referring cases to SOL. We also discussed the enforcement strategy and referral criteria with current and former OPWBP officials.

At SOL, we reviewed the Solicitor's Office policies, procedures, and criteria for processing, handling, and reviewing ERISA cases referred by OPWBP. We also discussed SOL's enforcement and litigation strategy and policies with current officials, including the Solicitor, Associate Solicitor for SOL, and other officials in SOL and former officials, including the former Solicitor who headed the office from March 1981 to April 1983.

### REVIEW OF BACKLOG

From 1976 through 1981, OPWBP referred 620 ERISA cases to SOL for legal assistance and/or review. To determine the backlog, we reviewed a SOL report for (1) 620 cases received from OPWBP, (2) cases considered for or placed in litigation, and (3) cases closed and referred back to OPWBP. We defined "backlog" as cases awaiting completion of legal analyses at the end of each year--cases that SOL had not yet decided to litigate or had not provided its legal analyses to OPWBP.

We also evaluated SOL's timeliness in processing the ERISA cases from 1976 through 1981. To determine this, we computed the average time SOL took to complete its legal analyses of the cases and return them with its recommendations to OPWBP.

We also reviewed the status of ERISA cases in SOL during 1982 and 1983 to determine whether the backlog had been reduced and what length of time cases were pending legal analyses during these years.

To gain an insight into the types of cases and the reasons OPWBP referred them to SOL as well as SOL's recommendation on the cases, we reviewed a random sample of 50 ERISA cases OPWBP referred during 1976 through 1981.

Effect of backlog

To respond to the Chairman's third question (i.e., what effect did the delay have on the enforcement action on cases) we selected and reviewed a sample of 33 cases (7 of which were included in the random sample of 50 cases) that SOL had closed during 1981. We considered a case closed by SOL when it completed the legal analysis and returned the case to OPWBP.

As stated earlier, the Committee Chairman, during February 1982 hearings, had expressed concern with cases backlogged in 1981. Thus, we agreed with the Committee's office to restrict the scope of our work to cases closed by SOL during 1981. Also, our preliminary examination had shown that when SOL reduced its backlog in that year by returning 163 cases to OPWBP, on many cases it recommended that OPWBP seek voluntary compliance or no enforcement action at all.

The 33 selected cases, 32 of which were eventually returned to LMSA field offices for further enforcement action or closing, involved 3 of LMSA's 6 regional offices (6 area offices, 2 within each region) that had performed the initial investigation. The area offices and the number of cases reviewed are shown on the following page.

| Region/area offices | Cases reviewed |
|---|---|
| Kansas City Region: | |
| Kansas City | 6 |
| St. Louis | 7 |
| | 13 |
| Philadelphia Region: | |
| Philadelphia | 5 |
| Pittsburgh | 5 |
| | 10 |
| San Francisco Region: | |
| Los Angeles | 5 |
| San Francisco | 5 |
| | 10 |
| Total | 33 |

We selected the Kansas City Region because it had the largest number of ERISA cases closed by SOL in 1981. We selected the Philadelphia, Pittsburgh, Los Angeles, and San Francisco Area Offices to provide geographic coverage. Also, we selected the San Francisco Region so that we could review the status of the pilot project established in the San Francisco Regional Solicitor's Office to decentralize ERISA litigation.

Our objective in reviewing these cases was to determine what effect time delays may have had on Labor's enforcement actions. For each case, we reviewed OPWBP's case file, which contained (1) the area office's report of investigation, (2) the area and regional offices' recommendations on the enforcement action, (3) OPWBP's referral letter requesting SOL legal assistance, (4) SOL's legal analysis and its recommended enforcement action, and (5) OPWBP's letter returning the case, along with its recommended enforcement action, to the region and area offices.

We also discussed the cases with responsible OPWBP and SOL officials.

To determine the final disposition of the 33 cases, we visited the three regional and six area offices. At these

offices, we reviewed the case files and discussed the cases with key field officials, including the investigator and area administrator, to determine what corrective action, if any, was achieved by the field offices. We also obtained LMSA regional and area administrators' and investigative officials' views on the effect the long-term delays in Labor's headquarters have had on their ERISA enforcement activities.

We also discussed the one case referred to the Pension Benefit Guaranty Corporation with Corporation officials.

Referrals to other Labor offices or federal agencies

We used our random sample of 50 cases and a sample of 33 cases that SOL closed and returned to OPWBP in 1981 to determine whether (as the Chairman's letter asked in question 4) the Solicitor's Office referred cases to the Inspector General's Office or another Labor element to be rid of formal responsibility for the case. We also used the samples in our review of question 5 of the Chairman's request, which asks whether the Solicitor's Office's "referrals do anything to finally resolve the cases."

Except for the Pension Benefit Guaranty Corporation, we did not contact the agencies to determine whether they took any action on the referrals. Rather, we obtained information on the agencies' involvement from Labor's case files and discussed the disposition of the cases with Labor officials. Also, we did not review IRS records for the cases referred to IRS or interview IRS officials in light of the restrictions imposed by section 6103 of the Internal Revenue Code on the disclosure by IRS of any information concerning IRS' investigation of a single taxpayer. IRS considers pension funds as individual taxpayers.

Because of the limited numbers of cases in our two samples and the sampling methodology used in our sample of 33 cases, we cannot statistically project our sample results to OPWBP's universe of cases referred to SOL. Nevertheless, we believe that, in the aggregate, our review work was sufficient for us to achieve our objectives--that is, responding to the third, fourth, fifth, and sixth questions in the Chairman's letter.

At the request of the Committee's office, we did not follow our usual policy of obtaining written or oral advance agency comments on this report. However, we discussed the matters contained in the report with Labor officials and

considered their comments in finalizing the report. Except for the above, our work was performed in accordance with generally accepted government auditing standards.

DECENTRALIZATION OF ERISA LITIGATION

We also visited Labor's San Francisco Regional Office to review the Solicitor's Office's pilot project--initiated in March 1982--to determine the feasibility of decentralizing ERISA litigation from the national office to Labor's regional solicitors. During our visit, we reviewed and evaluated the project's progress, its problems, and improvements needed and discussed its status with SOL, OPWBP, and LMSA headquarters and field officials.

INTERNAL LABOR REPORTS

We also reviewed the following two internal Labor reports dealing with Labor's enforcement of ERISA.

1. A May 1982 report entitled Report, Evaluation and Recommendations, ERISA Enforcement, prepared by a task force headed by the former Deputy Assistant Secretary for Program Operations, LMSA.

2. A March 1984 survey report entitled Recommendations for LMSA Reorganization, prepared by the Office of the Inspector General.

The May 1982 report included findings similar to those we found in OPWBP's ERISA enforcement efforts and SOL's handling of ERISA cases. The March 1984 report[1] also discusses problems with OPWBP's enforcement of ERISA. Therefore, we have included pertinent references in our report, including Labor actions to implement the recommendations relating to SOL and OPWBP.

[1]The report also discusses LMSA's enforcement of the Labor-Management Reporting and Disclosure Act, which regulates private labor unions.

## PRINCIPAL DEPARTMENT OF LABOR

## OFFICIALS RESPONSIBLE FOR THE

## ACTIVITIES DISCUSSED IN THIS REPORT

| | Tenure of office | |
|---|---|---|
| | From | To |
| **Office of the Secretary of Labor** | | |
| Secretary of Labor: | | |
| Raymond J. Donovan[1] | Feb. 1981 | Present |
| Ray Marshall | Jan. 1977 | Jan. 1981 |
| Under Secretary of Labor: | | |
| Ford Barney Ford[1] | July 1983 | Present |
| (Vacant) | Apr. 1983 | July 1983 |
| Malcolm R. Lovell, Jr. | Sep. 1981 | Mar. 1983 |
| (Vacant) | Feb. 1981 | Aug. 1981 |
| John Gentry | Oct. 1979 | Jan. 1981 |
| (Vacant) | Sep. 1979 | Sep. 1979 |
| Robert J. Brown | Mar. 1977 | Aug. 1979 |
| **Office of Solicitor** | | |
| Solicitor of Labor: | | |
| Francis X. Lilly | Mar. 1984 | Present |
| Francis X. Lilly (Delegated)[2] | May 1983 | Mar. 1984 |
| Timothy Ryan | Mar. 1981 | Apr. 1983 |
| (Vacant) | Feb. 1981 | Feb. 1981 |
| Carin A. Clauss | Mar. 1977 | Jan. 1981 |
| Alfred Albert (Acting) | Jan. 1977 | Mar. 1977 |
| William J. Kilberg | Apr. 1973 | Jan. 1977 |
| Deputy Solicitor for National Operations: | | |
| Frank White (Acting) | June 1983 | Present |
| (Vacant) | Apr. 1983 | May 1983 |
| Francis X. Lilly | Jan. 1982 | Apr. 1983 |
| (Vacant) | Apr. 1981 | Dec. 1981 |
| Alfred G. Albert | Sep. 1970 | Apr. 1981 |
| Associate Solicitor, Division of Plan Benefits Security:[3] | | |
| Robert Eccles (Acting) | Aug. 1982 | Present |
| Monica Gallagher | Nov. 1977 | Present |

APPENDIX II

| | Tenure of office | |
|---|---|---|
| | From | To |
| **Labor-Management Services Administration**[4,5,6] | | |
| Assistant Secretary for Labor-Management Relations: | | |
| (Vacant) | Mar. 1983 | Present |
| Donald L. Dotson | May 1981 | Mar. 1983 |
| (Vacant) | Feb. 1981 | Apr. 1981 |
| William Hobgood | July 1979 | Jan. 1981 |
| (Vacant) | Feb. 1979 | June 1979 |
| Francis X. Burkhardt | Mar. 1977 | Jan. 1979 |
| Deputy Assistant Secretary for Labor-Management Relations: | | |
| Ronald J. St. Cyr | May 1981 | Present |
| Hilary M. Sheply (Acting) | Jan. 1981 | May 1981 |
| (Vacant) | Sep. 1980 | Dec. 1980 |
| Rocco C. DeMarco | Apr. 1979 | Aug. 1980 |
| J. Vernon Ballard (Acting) | Mar. 1979 | Mar. 1979 |
| Jack Warshaw | May 1976 | Mar. 1979 |
| Deputy Assistant Secretary for Program Operations: | | |
| (Vacant) | Jan. 1984 | Present |
| John J. Walsh[7] | Nov. 1982 | Jan. 1984 |
| **Office of Pension and Welfare Benefit Programs**[4,6] | | |
| Administrator, Office of Pension and Welfare Benefit Programs: | | |
| Robert A.G. Monks | Jan. 1984 | Present |
| Alan D. Lebowitz (Acting) | Sep. 1983 | Jan. 1984 |
| Jeffrey N. Clayton | Dec. 1981 | Sep. 1983 |
| Ian D. Lanoff | May 1977 | Dec. 1981 |
| J. Vernon Ballard (Acting) | Jan. 1977 | May 1977 |
| Deputy Administrator, Pension and Welfare Benefit Programs: | | |
| Morton Klevan | Mar. 1980 | Present |
| (Vacant) | Jan. 1980 | Feb. 1980 |
| J. Vernon Ballard | Dec. 1974 | Dec. 1979 |

| | Tenure of office | |
|---|---|---|
| | From | To |
| Assistant Administrator, Office of Enforcement: | | |
| Charles L. Lerner | Sept. 1984 | Present |
| Lary F. Yud (Acting) | Mar. 1984 | Aug. 1984 |
| Charles M. Williamson | Jan. 1983 | Feb. 1984 |
| Charles M. Williamson (Acting) | Apr. 1982 | Dec. 1982 |
| Mervyn A. Schwedt (Acting) | Mar. 1982 | Apr. 1982 |
| Allen D. Lebowitz (Acting) | Apr. 1981 | Feb. 1982 |
| Mervyn A. Schwedt (Acting) | July 1980 | Mar. 1981 |
| Ricki Cury (Acting) | Mar. 1980 | June 1980 |
| Edward F. Daly | Jan. 1976 | Feb. 1980 |

[1]On October 2, 1984, Secretary Raymond Donovan took a leave of absence, and the Under Secretary assumed responsibility for the Secretary's duties.

[2]After Timothy Ryan resigned as Solicitor in April 1983, the Secretary of Labor delegated the Solicitor's duties to Francis X. Lilly. In March 1984, Mr. Lilly was appointed Labor's Solicitor.

[3]According to Solicitor Office officials, in August 1982, Monica Gallagher, Associate Solicitor, Division of Plan Benefits Security, was assigned to perform other duties and Robert Eccles was appointed Acting Associate Solicitor of the Division.

[4]On January 20, 1984, the Secretary of Labor signed an order removing PWBP from LMSA and making it a separate unit within Labor--OPWBP--reporting directly to the Secretary. The transfer took effect at the national level on May 12, 1984.

[5]The Secretary also issued another order on May 3, 1984, which abolished LMSA's national office and realigned its remaining components to (1) a newly established Office of Labor-Management Standards, under an Assistant Secretary for Labor-Management Standards, and (2) the Office of Labor-Management Relations Services, under a Deputy Under Secretary for Labor-Management Relations and Cooperative Programs. These transfers took effect at the national office level on May 12, 1984.

[6]Labor is also realigning LMSA field offices into separate entities, one for OPWBP and one for the newly established Office of Labor-Management Standards. The separation at the field offices level is undergoing a transition period which Labor anticipates completing by January 1985.

[7]Position established in November 1982.

## ANALYSIS OF ERISA CASE BACKLOG FIGURE CITED BY SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES DURING FEBRUARY 1982 HEARINGS

During the February 23, 1982 hearings,[1] the Chairman, Senate Committee on Labor and Human Resources, cited 247 ERISA cases as backlogged in the Labor's Solicitor's Office during 1981. In a December 29, 1981, letter to the Committee Chairman, the former Solicitor provided information on ERISA cases which constituted the backlog during 1981. The information shows that SOL closed out 163 cases during 1981. The computation below is our reconciliation of the two figures.

Part I[2]

| | | | |
|---|---|---|---|
| Cases pending or authorized for litigation in the Solicitor's Office as of December 11, 1981. | | | |
| A. | Enforcement cases | 45 | |
| B. | Defensive suits | 12 | |
| C. | Litigation authorized but not yet filed | 13 | |
| D. | Amicus curiae cases | 3 | 73 |
| Part II | | | |
| Investigative files open and pending in the Solicitor's Office as of December 11, 1981 | | | 26 |
| Part III | | | |
| Closed matters--open on January 1, 1981, or opened during 1981--i.e., Labor's backlog figure | | | 163 |
| Total number of cases and matters | | | 262 |
| Less: Nonenforcement cases in part I | | | |
| | Defensive suits | 12 | |
| | Amicus curiae cases | 3 | 15 |
| Total enforcement cases in Solicitor's Office | | | 247 |

[1]See hearings on "Labor Department ERISA Compliance" before the Senate Committee on Labor and Human Resources, 97th Cong., 2nd sess., pages 1 to 164 (Feb. 23 and 24, 1982).

[2]Source: Letter dated December 29, 1981, from the former Solicitor of Labor to the Chairman, Senate Committee on Labor and Human Resources.

APPENDIX IV

SCHEDULE SHOWING EIGHT SAMPLE CASES

REFERRED TO IRS BY LABOR

| Case | Alleged violations | Reason for referral | Action taken by IRS |
|---|---|---|---|
| 1 | Labor alleged an employee stock ownership plan suffered losses because the plan's assets--company stock--decreased in value during a merger. Labor alleged the plan trustees acted imprudently and engaged in self-dealing action in violation of ERISA's prohibited transaction provisions. Plan also was not covered by a bond. | Because the amount of losses to the plan was uncertain, and because IRS has particular expertise in stock valuation, OPWBP in January 1982 recommended that the area office refer the case to IRS for possible imposition of an excise tax pursuant to the Internal Revenue Code. However, the area office had referred the case to IRS in July 1979 for use in its ongoing investigation of the plan. | LMSA's area office followed up with IRS in early 1982 and found that IRS concluded, based on its investigations of valuation procedures used by the plan, that no action was deemed necessary. Labor wrote to the plan in March 1982, suggesting it obtain bonding coverage, but the plan refused. The area office closed the case and took no further action because of the long delay. |
| 2 | Labor alleged that the plan--a multiemployer plan--made three loans to parties in interest totaling about $576,900 which appeared to violate ERISA's prohibited transaction provisions. | Because the case involved alleged violations of ERISA prohibited transaction provisions, Labor referred the case to IRS in April 1980 for possible imposition of an excise tax. | LMSA's area office did not follow up with IRS and was not aware of action taken, if any. But, plan officials notified Labor it had corrected the prohibited transaction. Labor closed the case. |

| | | | |
|---|---|---|---|
| 3 | Labor alleged that an employee stock ownership plan suffered losses because it paid an excessive price for 400,000 shares of the plan sponsor's stock valued at $4 million. The plan also transferred property valued at $1.8 million to the plan sponsor to pay for the stock, which Labor alleges was prohibited under ERISA. | In September 1981, Labor wrote to the plan advising of the alleged violations and stating pursuant to section 3003(c) it was referring the case and prohibited transaction violations to IRS. Labor, in September 1981, referred the case to IRS, requesting that IRS impose an excise tax on the plan for violations. | LMSA's area office did not follow up to verify that IRS had taken enforcement action. But a memorandum to the file in SOL on a June 1982 call from an attorney representing the plan sponsors' controlling shareholder indicated IRS was assessing an excise tax on the plan. |
| 4 | Labor alleged that a profit sharing retirement plan made several loans to a party in interest of the plan sponsor which violated ERISA's prohibited transaction provisions. | As recommended by OPWBP, the area office in October 1981 wrote to the plan advising of the alleged violations and stating pursuant to section 3003(c) it was referring the case to IRS. However, the area office had referred the case to IRS in November 1980, when its investigation was completed. | LMSA's area office did not follow up to verify that IRS had taken enforcement action and its files had no information on what action, if any, IRS took. |
| 5 | Labor alleged that the trustees of a company's salaried employees' pension plan violated ERISA's prohibited transaction provisions by purchasing from the plan sponsor and trustee--a party in interest--17,000 shares of the employer stock costing about $55,000. | In October 1981, Labor wrote to the trustees advising them of the alleged violation and stating pursuant to section 3003(c) of ERISA it was referring the case to IRS. Labor sent a copy of the letter to IRS. | Labor's area office did not follow up to verify that IRS had taken any enforcement action. Also, its files contained no information on what action, if any, IRS took. |

APPENDIX IV

| | | | |
|---|---|---|---|
| 6 | Labor alleged that the plan sponsor of a profit sharing plan violated the rights of two plan participants--by terminating them on December 18 rather than their requested resignation date of December 31. The sponsor's action deprived the participants of their share of the employer's annual contributions for the year. | Because the case involved plan participants' benefits--which is under IRS enforcement responsibilities--Labor, in April 1982, referred the case to IRS for review regarding possible tax consequences to the plan. Labor notified the two participants and plan administrator of its action. | Labor's area office did not follow up with IRS to determine what enforcement action, if any, was taken on the case. Also, its files contained no information on what action, if any, IRS took. |
| 7 | Labor alleged that the contributing employer to a multiemployer plan violated sections of the Internal Revenue Code and ERISA by requiring a plan participant to retire at age 65. Thus, the participant was precluded from meeting the plan's requirements to qualify for pension benefits. | Because the case involved plan participants' benefits--which is under IRS enforcement responsibilities--Labor in August 1981, referred the case to IRS. Labor also notified the plan administrator it had concluded its investigation and would take no further action on the case. | Labor's area office did not follow up with IRS to determine what enforcement action, if any, was taken on the case. Also its files contained no information on what action, if any, IRS took. |
| 8 | Labor alleged that the employer violated part 3, title I, of ERISA's funding standards by failing to contribute certain moneys withheld from employees' commission to the pension plan. | Because the case involved funding standards, which are under IRS jurisdiction, SOL in February 1981 suggested referral to IRS. However, the area office had referred the case to IRS when it completed the investigation. The area office took no further action on the case. | Labor's area office did not follow up to determine what enforcement action, if any, was taken on the case. Also, its files contained no information on what action, if any, IRS took. |

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