RETIREMENT SECURITY FOR AMERICAN WORKERS: EXAMINING PENSION ENFORCEMENT AND ACCOUNTABILITY

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE

HOUSE OF REPRESENTATIVES

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HEARING ON RETIREMENT SECURITY FOR AMERICAN WORKERS: EXAMINING PENSION ENFORCEMENT AND ACCOUNTABILITY

Tuesday, September 10, 2002

Subcommittee on Employer-Employee Relations

Committee on Education and the Workforce

U.S. House of Representatives

Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:35 a.m., in Room 2175, Rayburn House Office Building, Hon. Sam Johnson, Chairman of the Subcommittee, presiding.

Present: Representatives Johnson, DeMint, Boehner, Ballenger, McKeon, Tiberi, Wilson, Andrews, Payne, Kildee, Rivers, McCarthy, and Tierney.

Staff present: David Connolly, Jr., Professional Staff Member; Kristin Fitzgerald, Professional Staff Member; Dave Thomas, Senior Legislative Assistant; Ed Gilroy, Director of Workforce Policy; Jo-Marie St. Martin, General Counsel; Christine Roth, Professional Staff Member; Loren Sweatt, Professional Staff Member; Kevin Smith, Senior Communications Counselor; Heather Valentine, Press Secretary; Patrick Lyden, Professional Staff Member; and, Deborah L. Samantar, Committee Clerk/Intern Coordinator.

Mark Zuckerman, Minority General Counsel; Michele Varnhagen, Minority Labor Counsel/Coordinator; Camille Donald, Minority Counsel, Employer-Employee Relations; Peter Rutledge, Minority Senior Legislative Associate/Labor; and, Dan Rawlins, Minority Staff Assistant/Labor.

Chairman Johnson. Good morning. In view of it being almost a year since September the 11th, I'd like us all to stand and pledge allegiance to our flag.

Let's pledge allegiance to the flag of our great nation.

[Pledge of Allegiance recited.]

Good morning. I'm glad you all are here. A quorum being present, the Subcommittee on Employer-Employee Relations will come to order.

OPENING STATEMENT OF CHAIRMAN SAM JOHNSON, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Today's hearing focuses on retirement security for American workers. You know, wave after wave of accounting scandals have rocked America. However, little attention has been paid to the big labor pension problems. That's why we're holding our fourth hearing on the safety of workers' pensions. Earlier hearings focused on boardroom bandits cooking the books and resulting pension losses.

Today, we're going to hear about the Department of Labor's efforts to protect pension funds as well as some other recent cases of corruption resulting in pension losses.

I'm pleased that Assistant Secretary Ann Combs is joining us today, and she will highlight the efforts of the Department of Labor's Pension and Welfare Benefits Administration, (PWBA), to protect the integrity of pensions, health plans, and other employee benefits for more than 150 million people. This agency's work is vital to workers, assisting them in getting the information needed to protect their benefit rights. PWBA has a good story to tell on pension plan enforcement and outreach.

The Department of Labor's Office of Inspector General is charged with conducting audits, investigations, and evaluations to improve the effectiveness of Department programs and operations. Through these activities, the OIG detects and prevents labor racketeering in the workplace. Within the OIG, the Office of Labor Racketeering and fraud investigations administers programs to identify and reduce labor racketeering and corruption in employee benefit plans. Last March, the OIG reported there were 357 ongoing investigations, 44 percent of which involved pension and welfare plans.

This is workers' retirement and health benefits that we're talking about here. It's their livelihood. It's no laughing matter. That's why Stephen Cossu will tell us why multi-employer

union pension funds are particularly vulnerable to corruption and pension losses.

Then we'll hear testimony from Ken Boehm, from the National Legal and Policy Center about cases where this type of corruption had led to pension losses. An example of this is Ullico. This is a union-owned insurance company that handles union pensions, among other things. Dubbed big labor's Enron by the Wall Street Journal, this little-known firm is now reported to be the focus of a federal grand jury and the Labor Department, as well. The DOL needs to determine whether labor leaders who sit on the board of Ullico made Martha Stewart-type maneuvers and profited from insider trading while rank-and-file workers were stuck with egg on their face. This is not a good thing.

Regardless of the Ullico facts, we will hear plenty today about labor union corruption cases that have been closed and people who are sitting in jail. I know my subcommittee members will join me in condemning illegal actions that profit a privileged few at the expense of workers. As in the case of Enron, such actions are never acceptable. This subcommittee stands united in its concern for workers regardless of who the offenders are union bosses or corporate bosses.

To root out corruption in pension plans and to further protect workers' pensions, the President proposed an increase in the enforcement budget for both the PWBA and the OIG. I cannot believe the United States Senate has proposed cutting the budget for pension cops on the beat. That's wrong. As my colleagues will remember, the House passed the Pension Security Act in April of this year, and this bipartisan bill gives workers the tools they need to protect and expand their retirement savings. As we are holding this hearing, we in the House are still waiting for Senate action on pension protections.

With that in mind, I look forward to working with my colleagues as we shed further light on this issue and move ahead with safeguards to protect America's pensions.

WRITTEN OPENING STATEMENT OF CHAIRMAN SAM JOHNSON, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE – SEE APPENDIX A

Chairman Johnson. Right now, I'd like to welcome all of our witnesses. We look forward to your testimony and the guidance it will offer as we address the critical issue of pension security.

At this time, I'd like to recognize Mr. Andrews for whatever comments he'd like to make.

OPENING STATEMENTOF RANKING MEMBER ROBERT ANDREWS, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AN THE WORKFORCE

Thank you, Mr. Chairman. Good morning to our colleagues, good morning to our witnesses, and other ladies and gentlemen.

Let me first begin by reporting that one of the very valued Members of our Committee, Mrs. Mink, has been hospitalized with a rather serious illness. She is resting comfortably. We're hoping that she will be recovering and returning to us very soon. I would ask that each one of us, in our own way, express our support and hope that she will be returning to us very soon, and if her staff is present that they would pass these wishes along from each one of us to Mrs. Mink.

In all my years in public service, I have never heard the degree of anxiety about pensions and the future that I heard in my district during the August district work period. People from all walks of life, all backgrounds, all ages are severely worried that the future they thought they had secured may not, in fact, be secure.

This anxiety stems from two sources. One, very clearly, is the difficult times we've experienced in the equity markets and the impact that has had on the self-directed accounts of many of our constituents. I believe it is $1.5 trillion worth of pension savings now in those 401K accounts, and the effect that equity market downturns have had on the assets of more traditional plans, as well. People are worried that the money they thought was going to be there is either already gone or will not be there when it comes time to retire.

The second source of anxiety is the seeming rash of irresponsible behavior by people who have been given the legal responsibility to care for the pension assets of their employees. This Committee, about six months ago, spent quite a bit of time hearing about perhaps the most egregious example thus far of that irresponsible behavior in the Enron Corporation.

I share the Chairman's assessment that no pensioner in any plan at any time should be subject to that kind of stress and anxiety. I think he's correct in asserting that whether the fund is run by management or a combination of labor and management, since all union funds include management participation on the boards as well, that wherever the wrongdoing has taken place, we should identify it and we should act legislatively to correct it where necessary.

I'm interested in hearing from the Assistant Secretary this morning and from the other witnesses about how well we're doing under existing laws in dealing with the anxieties I heard about in New Jersey this August.

I believe that its 28-year history has shown ERISA to be a success. The fact that until very recently we didn't hear these kind of stories about pension plans is a testament to the basic strength of that statute, but it's a statute that governed a world that doesn't exist anymore. When ERISA was enacted in 1974, we didn't have $1.5 trillion worth of pension assets in self-directed accounts. It's a very new area. We didn't have the confluence of firms in the financial services industry where

banks and insurance companies and brokerage houses and financial advising firms are very often the same firm, under the same roof.

So we always need to be looking at whether the law should be updated to redress those problems, and I hope that's an effort that will continue. We also need to be focused on whether the tools that we presently have given the executive branch are working. I look forward to the Assistant Secretary's testimony about this issue this morning and I thank the Chairman for this opportunity.

Chairman Johnson. Thank you, Mr. Andrews.

I'd like to go ahead and get to the witnesses. Before I do that, if any other Members have statements, they will be included in the record. I ask unanimous consent for the hearing record to remain open 14 days to allow Members' statements and other extraneous material referenced during the hearing to be submitted in the official hearing record. Hearing no objection, so ordered.

We have two panels of witnesses today, and I'll begin by introducing our only witness in the first panel, the Honorable Ann Combs. She's the Assistant Secretary, Pension and Welfare Benefits Administration at the United States Department of Labor. Ms. Combs is no stranger to this Subcommittee, and I would like to welcome her back and thank her for taking time out of her busy schedule to testify before us today.

The Assistant Secretary, I might add, is under a time constraint. We anticipate that all the Members will have an opportunity to ask questions, however I'm going to try to get her out of here by 11:15, if possible. So before we begin, I would like to remind Members, we will be asking questions after the Assistant Secretary has testified and we will impose a strict five-minute limit rule on all questions.

You understand the lights, Ms. Combs. You may begin your testimony. Thank you for being here.

STATEMENT OF ANN L. COMBS, ASSISTANT SECRETARY, PENSION AND WELFARE BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C.

Thank you. Before I begin, please express my best wishes to Mrs. Mink, and I hope that she has a speedy recovery.

Good morning, Chairman Johnson, Ranking Member Andrews, Chairman Boehner and other Members of the Subcommittee. Thank you for inviting me today to discuss the Department's role in enforcing the fiduciary provisions of ERISA and to provide an overview of the Department's compliance and participant assistance programs.

Over the past 28 years, ERISA has fostered the growth of a voluntary employer-based benefit system that provides retirement security and health benefits to millions of Americans. I am

proud to represent the Department, PWBA, and its employees who work diligently to protect the interests of plan participants and to support the growth of our private employment-based system.

With the recent corporate scandals that have rightfully prompted concerns from American workers and retirees, PWBA has been challenged as never before to safeguard the retirement security of millions of plan participants. I'm especially proud of the work that PWBA's staff has done in investigating pension losses and in providing assistance to thousands of workers who have found themselves in the untenable position of losing a portion of their retirement savings, and sometimes losing their jobs, as well.

I recognize that this Committee may have many concerns and questions about our agency's ongoing specific investigations. Therefore, I want to thank you in advance for respecting the limitations that I have in discussing those cases until we've taken public action, such as filing a lawsuit. We have made really only one major exception to that rule given the high level and the importance of the case in confirming our investigation into Enron. In general, however, we have a policy at the Department of neither confirming nor denying the existence of an investigation or discussing the specific facts.

Before proceeding further, I also want to reaffirm the President's support for the Pension Security Act of 2002 that the House passed on April 11th. As you know, the President announced his retirement security plan in February of this year after forming a Cabinet-level task force, in order to improve the current pension rules and regulations by taking into account the changes in plan design that Mr. Andrews alluded to. Indeed, the bill that passed out of this Committee included many of the President's recommendations.

I believe this bill would strengthen workers' abilities to manage their retirement funds more effectively by giving them freedom to diversify their accounts, by increasing disclosures, and by giving them better access to professional investment advice. The administration encourages the Senate to pass this legislation and to provide workers with these additional protections as soon as possible.

Turning now to our current enforcement program, ERISA governs approximately 730,000 private pension plans and 6 million private health and welfare plans. These plans cover approximately 150 million workers and their dependents, and they hold assets of more than $4.6 trillion.

PWBA's top priority is to ensure that pension, health, and welfare plans are operated in accordance with the law. To do this, we administer a multi-faceted program to ensure compliance. This includes education, outreach, compliance assistance, individual participant assistance and a strong enforcement program.

PWBA conducts both civil and criminal investigations of ERISA fiduciary violations through our 10 regional offices and five district offices, which are located throughout the country. We investigate both corporate and union-sponsored employee benefit plans. Of PWBA's 850 staff, 491 are investigators. An additional 108 are benefit advisors who assist the public with individual benefit questions and disputes. Nearly 80 percent of our agency's current $111 million budget is

dedicated to enforcement.

PWBA operates under a national strategic enforcement plan, which requires our regional offices to focus their investigative activity on three national priorities: plan service providers, health-care plans, and defined contribution plans.

To carry out these priorities, PWBA has designated five national enforcement projects. These projects focus on employers who fail to remit employer or employee contributions to plans in a timely manner. Our REACT program protects participants who are exposed to the greatest risk of loss from companies that are facing bankruptcy, abandoned or “orphan” plans; unscrupulous promoters of fraudulent MEWA health insurance scams; and fiduciary violations relating to health benefit plans. Finally, the regional directors, subject to approval by our national office, select regional projects, focusing on specific types of plans or transactions that are prevalent in a particular geographic area. These regional projects may become the basis of nationwide projects if they prove to be successful.

PWBA is also a major player in criminal investigations involving employee benefit plans, and we work closely with other federal law enforcement agencies, including the Department of Labor's own inspector general, the FBI, the IRS, the Department of Justice, the SEC, and the postal inspectors. We bring a tremendous amount of expertise to these cases, based on our experience with employee benefit plans and with the benefits industry in general. Our criminal investigations cover a wide variety of pension and health plans sponsored by both corporations and joint-trustee plans sponsored by unions and management.

In fiscal 2001, PWBA opened 4,862 civil cases and we closed 4,762 of those cases. This was an increase of 407 cases opened and 545 closed, compared to the year before. Over 57 percent of our civil cases were closed with results, meaning a monetary or other fiduciary remedy was achieved during fiscal 2001. That is a very high percentage for an enforcement agency.

As for criminal cases, we opened 124 and closed 143 investigations in fiscal 2001. Forty-nine of those criminal cases resulted in convictions or guilty pleas and an additional 15 were closed with other restitution or alternative sentencing.

The financial success of PWBA's investigations on plans and participants is impressive. Total monetary recovery for all investigations in fiscal 2001 was $652.4 million. This consisted of nearly $330 million in prohibited transactions that were corrected; $139 million in plan assets that were restored; $114 million in future losses prevented; and $69 million in benefits that were restored directly to individual participants.

PWBA's outreach, education, and assistance activities are also important to protect the health and retirement benefits of American workers. We assist workers and employers nationwide through our toll-free phone line and web site, and distribute publications to assist workers and employers in understanding their rights and responsibilities under ERISA. We conduct and participate in outreach events nationwide to provide assistance in person and to increase awareness of the Department as a resource for individuals and for companies.

Finally, our benefit advisors are part of the initial response team for employees facing job layoffs, by answering their questions and concerns about their health and retirement plans. Last year alone, our benefit advisors handled over 170,000 inquiries from individual participants and recovered over $64 million in benefits on behalf of those individual workers through informal resolution of complaints from individuals.

In addition, 1,251 enforcement investigations were opened as a result of referrals from our benefit advisors. This accounted for nearly 25 percent of the cases we opened last year, and an additional recovery of $111 million in benefits paid to those participants. This close coordination between our benefit advisors and the enforcement office is a critical part of our overall integrated strategy and it's why we are opposed to legislative proposals that would separate benefit advisors and create an office of participant advocacy outside of PWBA's structure. We think that would harm our enforcement efforts.

Mr. Chairman, this completes my statement. I would ask that my full written statement be included in the record, and I would be pleased to answer any questions you and other Members of the Subcommittee may have.

WRITTEN STATEMENT OF ANN L. COMBS, ASSISTANT SECRETARY, PENSION AND WELFARE BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C. – SEE APPENDIX B

Chairman Johnson. So ordered. Your written statement will be included in the record.

Ms. Combs. Thank you.

Chairman Johnson. Thank you. I think the workers in America are well protected by the efforts of your agency.

What specific areas of the PWBA have served to protect and enhance the security of worker pensions, and how have outside organizations, such as the GAO, evaluated your agency?

Ms. Combs. In terms of the specific areas of our mission, I would say the combination of our traditional enforcement program, both civil and criminal, and the new emphasis on benefit advisors assisting individual participants have really helped to enhance the security of workers. We've given individuals a place to come to deal with their individual benefit situations, and many times those have resulted in good enforcement leads.

Also through our enforcement program we have identified national projects called the employee contribution program, which is a program designed to make sure that employee and employer contributions to 401(K) plans are remitted in a timely fashion. This has proven to be a very successful program and in fact an area where we find the most violations.

Our REACT program, dealing with bankruptcy, is another example where I think we move in quickly to help secure people's benefits in the event of a pending bankruptcy or deal with a

bankruptcy trustee in order to make sure that benefits are secure.

The second part of your question dealt with the GAO and others who have evaluated us. GAO did a large study of our enforcement program just recently, and concluded that we were a well-managed and well-run organization. I believe that the bottom line was that we have an effective, comprehensive, integrated enforcement program.

They did point out areas where they thought we could do a better job of measuring our results so that we can target our resources and some areas of human capital management more effectively. We agree with many of the GAO's findings and have been working on those same problems. We're instituting some changes in response to their points, which are laid out in the GAO report. We have a good relationship with them and I think they respect the program.

Chairman Johnson. Did they in any way indicate that you could reduce the level of your law enforcement operation?

Ms. Combs. No, not at all. In fact several years ago, the Brookings Institution identified this agency as the most highly leveraged agency in the Federal Government. I've never heard anyone call for a reduction, with one recent exception.

Chairman Johnson. Thank you. The Chair recognizes the gentleman from New Jersey, Mr. Andrews.

Mr. Andrews. Thank you, Mr. Chairman. Thank you, Madam Secretary, for your testimony.

I would ask unanimous consent that the GAO report that the secretary just referenced be entered into the record at this point.

Chairman Johnson. Without objection, so ordered.

Mr. Andrews. I thank you.

Madam Secretary, about six months ago, this Committee had a hearing in which we heard from a sitting fiduciary of the Enron employee benefits plan. During that hearing, evidence was developed that at the same time that fiduciaries themselves were selling large amounts of their own personally held stock in the Enron company, none of these fiduciaries shared with the beneficiaries of the Enron retirement plan rather damaging but truthful information about the company's financial status. In fact, the opposite was true.

The record of those hearings will show that the company management on an ongoing basis was promoting purchase of the stock and encouraging employees to purchase the stock. That hearing was as I said nearly six months ago. To date to my knowledge the Department has not filed suit against any of the fiduciaries that were part of the Enron plan.

I know the Department arranged for the appointment of an independent trustee for the fund in February, but I'm curious as to why litigation enforcement action has not commenced against the

Enron plan and/or the Enron fiduciaries.

Ms. Combs. Certainly. As I mentioned in my testimony, we generally don't talk about open investigations. However, we did make an exception in the Enron case. Given the importance of it, the nature of its profile, and the fact that these employees had lost their jobs, as well as their retirement benefits. We can't discuss the details specifically of what we may or may not be finding.

As you referenced, we've been very active in this case. We opened it up in November, immediately upon hearing about the financial difficulties of Enron. We did work to have an independent trustee replace the fiduciaries who had been responsible for overseeing the Enron benefit plans. That is State Street Corporation, and they have been there since April. The Bankruptcy Court approved that, and they've been running the plan since then.

We recently filed an amicus brief in the private litigation. The defendants had asked to have the plaintiffs' lawsuit dismissed, and we filed an amicus brief opposing that.

Mr. Andrews. Let me interrupt you. I read on Page 16 of your testimony about the amicus brief that was filed in the private class action suit. Here's what I don't understand.

If the Department felt confident that it could oppose the dismissal of the plaintiffs' claim in that class action suit, that there was a sufficient reasonable basis to take that position, why isn't there a sufficient reasonable basis to file your own litigation? I assume sworn representations of fact accompanied the amicus brief. It seems to me that if the Department is willing to go on record supporting that legal position in a private suit, why hasn't there been an enforcement action by the Department?

Ms. Combs. You've just put your finger on it. This was a motion to dismiss, it was not a fact-finding, and so we had to assume that all the facts alleged by the plaintiff were true. We took no position on the facts. That's exactly what we're doing in the investigation, nailing down the facts, and that is time-consuming.

We have taken 60 depositions; we've issued over 50 subpoenas; we have millions of documents that we must go through, and I'm committed to making sure that if and when we bring litigation, we do it on the basis of a solid record so that it holds up.

Mr. Andrews. I can appreciate that. My concern is that the Enron bankruptcy took place, if I recall, early in December of 2001.

Ms. Combs. Yes.

Mr. Andrews. The independent trustee was not appointed until April of 2002. Is that right?

Ms. Combs. We struck the deal to have them brought in, in February. By the time they were approved by the bankruptcy court, it was early April.

Mr. Andrews. When did they start running the show?

Ms. Combs. Early April.

Mr. Andrews. All right. There's a period there of about five months between the bankruptcy and the appointment of the independent trustee. I would wonder if all the money and all the problems aren't gone? Is there anything left that an enforcement action will be effective against?

Ms. Combs. Well, much of the loss in the price of the stock had taken place before the bankruptcy. As you know, the price of the stock was dropping prior to the bankruptcy being filed.

Mr. Andrews. But what about a lien against the individual assets of the fiduciaries if there is a judgment against them? That gives them plenty of time to purge their assets and make them litigation-proof, doesn't it?

Ms. Combs. Well, I think we're working closely with all the agencies to make sure that does not happen. You've seen the Justice Department move against one of the defendants in Enron to basically put his assets in escrow. The government is doing everything we can to make sure that we recover assets for these workers.

But I'm relying on the judgment of my professional staff to tell me if and when we're ready to go, and then we will move as quickly as we feel that we have a solid case.

Mr. Andrews. Thank you.

Chairman Johnson. Thank you.

I'd just remind Mr. Andrews that I think it's the Justice Department that's dragging their feet more than Labor is, and she has to work with them. Is that not true?

Ms. Combs. We're on parallel tracks. We're coordinating with them.

Mr. Andrews. Isn't the enforcement of the ERISA statute under the Secretary of Labor's jurisdiction though?

Ms. Combs. It is, but we're coordinating closely in terms of facts and documents, and it's a matter of scheduling depositions and witnesses. Everybody wants to talk to the same people, and so we do have to work closely with them, but we're proceeding on our own track on the ERISA case.

Mr. Andrews. We're just hopeful it's not a matter of shutting the barn door after the horse has already left.

Chairman Johnson. The Chair recognizes the gentleman from North Carolina, Mr. Ballenger.

Mr. Ballenger. Thank you, Mr. Chairman.

I happen to sit on the board of my company's pension plan, and I always figured the fiduciary responsibility that I had was enough to scare me out of doing something bad. When the Enron thing happened, people at home asked me over and over again, "Why isn't something happening," and I answer them sort of the same way the Congressman from New Jersey said. As he knows, I don't have a great love for lawyers, but my answer to people is, "if you have enough money and you can buy enough lawyers, you can almost postpone your case forever."

Having read the description that you have in your statement, I was wondering why the penalties seem to be mighty small for people who are stealing funds from pension plans and so forth? I mean, 10 months to 13 months? I don't know whether that's because you "cop a plea" or "cut a deal" or whatever, but having read that, I just wondered why the penalties are so small. Doesn't that set a precedent in the courts generally speaking? We don't go for everything? Sometimes you try to replace it all and sometimes you don't, but nobody is going to be terribly punished? Am I mistaken there?

Ms. Combs. Well, there's a difference in civil cases where people are personally liable for losses. You're talking about the criminal side, where people are convicted of money laundering or embezzlement for example. In those instances the penalties are set in statute, and they're generally a maximum of five years subject to the judges' sentencing.

The Sarbanes-Oxley corporate governance bill increased some the criminal penalties for reporting and disclosure violations. They didn't address some of the other criminal penalties. But those are generally what the judges have imposed. Sometimes those are coupled with community service, or with being barred from serving as a fiduciary in the future, and restoring assets.

The U.S. attorneys prosecute our criminal cases for us. They can make sentencing recommendations. It's up to the judge.

Mr. Ballenger. Let me ask you a question, because I'm not a lawyer. What if I were at Enron and I actually stole about $10 million or something, which they have done, and could afford to get the best legal advice and the best legal firms in the country to defend me, and the staff to work on the case? It just appears to me that our legal system allows people to postpone and postpone all kinds of things like that.

People at home are asking me, "Why isn't somebody from Enron in jail?" And I keep saying, "they have a lot of money and they can buy all the best lawyers in the United States, and they can fight the government forever."

Ms. Combs. There's no doubt about that, sir. People can drag out litigation. We can file a suit, and I don't doubt that we'll be in court for an extended period of time as people exercise all the rights that they have to defend themselves. This is the largest bankruptcy in U.S. history. I have no doubt that this will be a long and hard-fought legal battle, and there's not much we can do about that.

Mr. Ballenger. But if the gentlemen that stole the money didn't have the money to defend themselves with, it wouldn't take so long.

Thank you, Mr. Chairman.

Chairman Johnson. Thank you, Mr. Ballenger.

The Chair recognizes the gentlelady from New York, Mrs. McCarthy.

Mrs. McCarthy. Thank you, Mr. Chairman; and thank you again for your testimony.

In light of what the DOL has learned from Enron, and hopefully they've learned a lot, what is DOL doing differently to prevent other abuses?

And a follow-up question: Has DOL contacted other plans as far as pensions and employer stock?

Ms. Combs. We take this whole issue of employer stock extremely seriously. I can't comment on specific investigations, but we're well aware of a number of situations involving employer securities with similar fact patterns to Enron, and we are focusing all the resources at our disposal on them. That's a priority for the agency.

We also have been working closely with your Committee on legislation to prevent another Enron, and things that will make people better prepared to diversify their accounts, to better understand more the need to put not as much of their retirement income in employer stock perhaps in order to prevent the kind of concentration that led to these large losses.

We will continue to emphasize this area and to enforce the law. We think we've got enough tools, and we're on the case.

Mrs. McCarthy. How long do you think it will be before we'll have any of the answers as far as your investigation of Enron goes?

Ms. Combs. I can't give you a deadline. As I said the investigation is being run out of our Dallas regional office. It's their highest priority. They are spending an extraordinary amount of time on it, and we're working as quickly as possible.

My goal is to do it sooner rather than later, but we'll move as soon as they tell me we've got the case and we can succeed. I can't really put a deadline on it, but hopefully we'll do it as soon as possible.

Mrs. McCarthy. Certainly with the Enron case, there are also other cases involved. Are you investigating those?

Ms. Combs. Well, as I said, we are aware of a number of situations. I can't confirm or deny the existence of other investigations specifically, but we are aware of several situations where there are similar fact patterns, and we're taking our responsibilities seriously.

Mrs. McCarthy. Thank you.

Chairman Johnson. Thank you, Mrs. McCarthy.

Ms. Combs, as you know, the House runs on an uncertain time schedule, and it looks like we could be back here at 20 minutes of, possibly earlier than that. Would you mind? Would you be able to stick around until noon?

Ms. Combs. Yes, I can make a phone call. You all are leaving for a few minutes?

Chairman Johnson. Yes.

Ms. Combs. Yes, I can do that.

Chairman Johnson. Thank you very much. The Committee stands recessed until after the last vote.

[Recess.]

Chairman Johnson. The Committee will come to order.

Ms. Combs, our votes took longer than we thought they would, but we'll still get you out of here at noon. I'd just like you, if you don't mind, to describe the connection between the Departments of Labor and Justice on these investigations, in particular Enron, because that was one of the questions that was asked.

Ms. Combs. Well, there are different allegations involving Enron, and I may need to get my counsel to come up and make sure I don't misstate this. The Justice Department is leading a governmental task force to look into the accounting irregularities, the securities issues, and all of the allegations involving Enron. And we are looking at whether there were any ERISA violations in terms of Enron's dealings with the retirement plans.

But our investigations involve some of the same targets since many of the same people are involved, and a lot of our cases depend on whether officials knew they were misleading the public or cooking the books. We would consider, when they knew how it affected their behavior, were they fiduciaries of the plan, and should they have done something to protect the interests of the plan, among the issues.

So there's an intersection between the two Departments, but the Justice Department is focused more at this point, as I understand it, on the underlying case.

We also work with the Justice Department on cases other than Enron as well, but routinely in criminal cases. When we complete a criminal investigation and recommend it for litigation, it's the U.S. attorneys that obviously prosecute those cases for us. But this is Tim Hauser, Associate

Solicitor of Labor, who is in charge of plan benefits security, so he may have a more eloquent explanation of the Justice Department's role.

Chairman Johnson. I thought she was pretty eloquent, didn't you?

Mr. Hauser. I could not top her answer.

The real distinction is just that we at PWBA and at the Department of Labor are primarily responsible for the civil enforcement of ERISA, and that's what our focus is on in the Enron investigation. The Justice Department's focus, presumably, is on criminal activities and whatever other assistance they are providing to the SEC.

Chairman Johnson. Yours is civil, theirs is criminal.

Mr. Hauser. Right.

Chairman Johnson. We've had other Members come in now. I'd like at this time to recognize the gentleman from South Carolina, Mr. DeMint.

Mr. DeMint. Thank you, Mr. Chairman.

Thank you, Ms. Combs, for waiting the extra time. I do appreciate the investigative oversight that you are doing, and I think you have given the American people confidence that their opportunity to create wealth is still very much viable.

A lot of what we're doing is the long-term result of moving from defined benefit to defined contribution pension plans. However, I'm particularly interested to know if the Department is already working on ideas that perhaps will apply some of the regulations and oversight processes for defined contribution pension plans to the health insurance market? I think, although this is a related but different subject, there will be a relatively short-term explosion in the desire to have defined contribution health plans as many employers and many insurance companies rush to develop them what with the recent IRS ruling that allows rollovers.

Is that something you've even considered at this point?

Ms. Combs. Well, we're aware of the developments that are taking place in the marketplace in terms of keeping up the interest in these new defined contribution health plans, which I think is largely fueled by the ongoing increases in costs.

As I understand it, the companies that were interested in doing this were primarily unsure of the tax treatment, which is why they went to Treasury to get guidance as to how they would be taxed and to my knowledge at this point, and I've asked this question, there are no specific ERISA rules that would require guidance or interpretation.

Of course, any of these plans, like any employer-provided health plan, would be subject to ERISA and its fiduciary requirements, and we will enforce those laws and make sure that they

comply with them and also with COBRA, HIPPA; all of the rules that are in ERISA that apply to health plans would apply to these defined contribution health plans.

As I understand it, there are still relatively few companies that have actually adopted them. There's a lot of interest in them, and as the market matures we'll keep our eyes on it and make sure that the employees who participate in those plans are safeguarded.

Mr. DeMint. Thank you very much.

Mr. Chairman, I yield back.

Chairman Johnson. Thank you. The Chair recognizes the gentleman from Michigan, Mr. Kildee.

Mr. Kildee. Thank you, Mr. Chairman.

What kind of scrutiny can PWBA give heavily invested employer stock plans, such as P&G, where about 95 percent of the employer stock is in the 401K plan? What kind of scrutiny can or do you give that, or is that fact alone a red flag?

Ms. Combs. I wouldn't describe that fact alone as a red flag. I mean, the law specifically permits defined contribution plans to invest in employer securities and if they're designed correctly, they can put up to 100 percent in employer securities, so there's nothing illegal, on its face, about that.

We do make efforts to educate participants about the need to diversify their accounts. We have proposed, and you have passed legislation to give individuals rights to diversify, which they don't enjoy in some plans now, so that they could sell employer stock after three years. I think that's a very important change in the law that will help people, and we want to get them better investment advice so that they understand the need to diversify their accounts.

But there's nothing under the law that makes it illegal to have a high concentration of employer stock, so we don't open investigations because there is a high concentration, but we certainly listen to participant complaints.

We do bring cases on how the stock is valued, particularly in the ESOP area with privately held companies. We bring a lot of those cases to make sure that the plan doesn't pay too much for the stock. That is something that we look at.

Mr. Kildee. P&G is an older company, but suppose you saw a company where 95 percent or a high amount of the stock was employer stock and it was accelerating in price very quickly. Would that give you some concern, and would you take any precautionary action at that time?

Ms. Combs. If the price of the stock was going up?

Mr. Kildee. By rapidly I mean in an accelerated fashion. I don't know how you would even judge that.

Ms. Combs. I don't know that we would consider that a danger sign. I think market manipulation is something the SEC is obviously looking at, and if they think that there's something going on with the stock price then they may want to open an investigation.

Then we would, of course, look to see whether the plan was affected in any way, but I don't think just targeting stocks whose price is doing well would be a good use of our resources. We look for other factors, where we think the plan may be at risk.

Mr. Kildee. But SEC would have the primary responsibility?

Ms. Combs. They look at the markets and at investors, and if there were something aberrant about a stock's behavior, I believe it would be within their jurisdiction to make an inquiry about the price of a stock.

Mr. Kildee. Okay. Thank you very much.

Chairman Johnson. Thank you for staying with us, Ms. Combs. We appreciate it, and we appreciate your valuable testimony. You can step down now if you wish.

Ms. Combs. I appreciate the opportunity. Thank you very much.

Chairman Johnson. Thank you for being with us.

I would ask the second panel to come forward and take their seats. I'll introduce you in a moment, but first, I'd like to draw your attention to the chart on your left.

It illustrates Ullico and Global Crossing, and points out that in 1997 Ullico invested over $7 million in Global Crossing, which was 7.7 percent of their stake. Ullico earned $127 million by selling Global stock, and insiders figured that would lift the annual valuation of the shares from $54 to $146. That happened in 1999. In December, each director was allowed to buy Ullico shares at $54. The union pension funds that owned Ullico weren't given the same offer.

In December and January of 2001, Ullico bought back some of its shares at $146 and shareholders or stockholders with fewer than 10,000 shares could sell their holdings, so officers and directors took full advantage. The pension funds couldn't, and the true value was only $75. In December and January of 2001, Ullico bought back 200,000 shares and allowed officers and directors to cash out at $75, knowing that the stock price was only $44.

The Wall Street Journal reported that Ullico is under grand jury investigation and that's why our previous witness couldn't talk about it, but it looks like, according to their comments, that Ullico directors profited at the expense of their own unions. I think we'll find that out.

Our first witness on the second panel is Mr. Stephen Cossu, Deputy Inspector General, Office of Labor Racketeering and Fraud Investigations, U.S. Department of Labor, Office of Inspector General, Washington, D.C.

The second witness is Ms. Karen Ferguson, Director, and Pension Rights Center, Washington, D.C. She is accompanied by John Hotz, who is the Deputy Director.

Our third and final witness for today is Mr. Ken Boehm, who is the Chairman of the National Legal and Policy Center, Falls Church, VA.

We appreciate you all being here and thank you for appearing. I don't have to remind you about the light system we have here. You all know it, I think.

Mr. Cossu, please begin your testimony.

STATEMENT OF STEPHEN J. COSSU, DEPUTY INSPECTOR GENERAL, OFFICE OF LABOR RACKETEERING AND FRAUD INVESTIGATIONS, OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C.

Good morning, Mr. Chairman and Members of the Subcommittee. Thank you for inviting me to testify today on the Office of Inspector General's labor racketeering program, and in particular on our investigative activities in the pension arena. The OIG conducts labor racketeering criminal investigations in three general areas; employee benefit plans, labor-management relations, and internal union affairs.

In the pension arena, the OIG's focus has been on criminal investigations of multi-employer plans, which are substantially composed of union-sponsored, jointly administered plans. During the latest 5-year period, our benefit plan investigations, which include both pension and health care plans, have resulted in 253 indictments, 237 convictions, and have recovered over $271 million in monetary recoveries.

Currently, we are conducting investigations of pension plans with nearly $1 billion in total assets suspected of being at risk. Given the size of this universe and recognizing a growing problem, the OIG has, since 1996, been engaged in a nationwide initiative designed to combat abuses of pension plan assets.

Building on the Attorney General's Pension Abuse Initiative, which sought to increase criminal enforcement and enhance coordination among federal agencies to combat pension abuse, we felt there was a need for a proactive examination of mob-controlled and influenced union pension plans, and the service providers supporting them.

Such plans are especially vulnerable because of the potential for substantial dollar losses since abuses can affect more than one plan, management is often concentrated in only a few individuals, and plan trustees are often appointed because of their position rather than their financial expertise

For example, a Queens, New York, case investigated in conjunction with the FBI, revealed that a Teamsters Local 875 fund attorney induced the fund to divert pension assets to high-risk offshore investments in exchange for kickbacks from two investment brokers. As a result, $9.3 million from the fund's total assets of $40 million, roughly one-quarter, were transferred into a third-party account and subsequently embezzled by the brokers. Those funds, unfortunately, were never recovered.

Also, the OIG, along with other federal agencies, including PWBA, is actively involved in the criminal investigation of one of the largest pension frauds of all time, involving Capital Consultants, Inc.

CCI defrauded their clients, including many union pension funds, of hundreds of millions of dollars. This investigation disclosed that a former Laborers' union business manager retained CCI to make investments for the union's pension, health, and vacation plans. In return, the manager received secret cash payments.

As a result of this investigation, plea agreements were reached with CCI's president, the former CEO and founder of CCI, and the Laborer's union business manager. In recent developments, two union pension fund trustees and a former CCI salesman were indicted. Similarly just last week, two other trustees pled guilty for failing to disclose gifts given to them by CCI.

Mr. Chairman, these are just two examples of how vulnerable multi-employee plans can be. It is our intention to increase our presence in the pension arena on a number of fronts. As resources permit, we plan to be even more proactive in our effort to combat labor racketeering relative to pension plan corruption and organized crime, and corruption affecting industries, unions, and boardrooms.

The OIG also plans to expand its investigate probe of service providers controlled or influenced by organized crime, or retained by pension plans that have had a history of corruption. Abuses by service providers are especially egregious because, as the cases I cited demonstrate, they have the potential for substantial dollar losses, since they can affect more than one plan.

The Justice Department supports our effort, and has asked us to work even more closely in a partnership with them on labor racketeering and organized crime cases, given the FBI's new focus on anti-terrorism in the wake of September 11th and our expertise in this area.

Based on the work we have done in the pension arena, there are several recommendations Congress may wish to consider that we believe would further safeguard pensions. First is strengthening and making more consistent the criminal penalties under Title 18 of the U.S. Code to better protect employee pension plans subject to ERISA, and second by requiring direct reporting of any ERISA violation to the Department of Labor.

Mr. Chairman, the OIG will continue to build on our pension casework by engaging in proactive investigations of union-sponsored plans that are at risk, so the hard-earned benefits of workers are there when needed.

This concludes my prepared statement. I would be pleased to answer any questions you have.

WRITTEN STATEMENT OF STEPHEN J. COSSU, DEPUTY INSPECTOR GENERAL, OFFICE OF LABOR RACKETEERING AND FRAUD INVESTIGATIONS, OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C. – SEE APPENDIX C

Chairman Johnson. Thank you, Mr. Cossu. We appreciate your testimony.

Ms. Ferguson, you may begin your testimony now.

STATEMENT OF KAREN FERGUSON, DIRECTOR, PENSION RIGHTS CENTER, WASHINGTON, D.C

Thank you, Mr. Chairman. I'm Karen Ferguson, Director of the Pension Rights Center, and with me is John Hotz, the Center's Deputy Director. The center is a 26-year-old consumer organization dedicated to protecting and promoting the pension rights of American workers, retirees, and their families. Thank you for inviting us to testify today on ERISA enforcement and accountability.

The Labor Department's Pension and Welfare Benefits Administration has worked long and hard over the years to try to make sure that the $4 trillion in private retirement assets are well-managed and that individuals receive the information about their plan finances and other rights to benefits that they need.

We have been particularly pleased that, during the past five years, PWBA has gone beyond its original almost exclusive focus on mismanagement of plan money, and has significantly expanded its efforts to provide pension assistance and information to plan participants.

As recently as 1997, there was only a small 10-person office in Washington to respond to tens of thousands of queries from employees and retirees. Now, there are more than 100 benefit advisors in 15 field offices around the country to help individuals with their pension and health insurance concerns.

We are also pleased that the PWBA has supported efforts to develop an even more comprehensive pension assistance system. Most recently, they supported development of Pension Help America, which will be the nation's first pension assistance web site.

But there are also shortcomings in the ERISA enforcement and accountability scheme. From our perspective, the most serious shortcoming is the result of an accident of history. It is

traceable to the fact that there is no government agency with a mandate to advocate for the pension policy concerns of workers and retirees.

Although early versions of the bills that became ERISA included a single agency, which had such a focus, these provisions were dropped in favor of a structure in which the Labor Department and the Department of the Treasury shared jurisdiction over most of the law's major provisions. Then, four years after the enactment of the law, a 1978 executive order known as "Reorganization 4"provided for a division of authority.

The Labor Department was assigned responsibility for administering the fiduciary and the reporting and disclosure provisions of the law; and the Treasury took over regulation of the minimum standards, those provisions that determine who gets a pension, how much they get, and when and how it is paid.

According to its most recent annual report to Congress, PWBA sees its mission as protecting the pension and other employee benefits of American workers. Although protection of benefits is an absolutely critical function, it is also a limited function. It does not help the many millions of individuals who, often because of changes in the economy or the development of new types of plans, have no benefits to protect because Congress and the administrative agencies have not yet acted to afford them the protections they need. Stated differently, there is no reference in the PWBA mission statement to a commitment to promote sound pension policies for participants.

At the same time, although the Treasury Department has jurisdiction of all the law's key benefit provisions, its principal concerns in the pension area are with avoiding tax abuse. Its policy actions are motivated by revenue concerns, not advancing employee interests.

In this regard, pension regulation differs from many other areas of the law. For individuals adversely affected by loopholes in consumer, food and drug, environmental, or securities laws, there are agencies that have mandates to review their situation and determine whether new policies should be developed to close the loopholes.

As we see it, the absence of a government agency with a mandate to advance participants' pension policy interests has been ERISA's, quote, "fatal flaw", and it goes a long way to explaining why our private retirement laws are so frustrating and often appear so unfair to employees and their families.

We believe that this flaw could be easily addressed by creating a small ombuds-type office within the Labor Department similar to the Office of Advocacy in the Small Business Administration. This office of Pension Participant Advocacy would serve as a voice for employees and retirees within the Federal Government. The role of this Office of Pension Participant Advocacy would be solely advisory. Its most important function would be to identify gaps in the laws, develop reform recommendations, and serve as an advocate for current and prospective pensioners before Congress and the other government agencies.

There are countless examples of why such an office is needed, and I have addressed two of them in my written statement. So I will conclude by saying an Office of Pension Participant

Advocacy would be crucial to helping employees. It could examine their situations, determine whether it reflects a pattern that should be of concern to policy-makers, and if so, develop an appropriate solution and recommend its adoption within the administration and to Congress. Such an office would also be helpful to this Subcommittee in developing your policies to address constituent concerns.

We would be pleased to answer any questions you may have.

WRITTEN STATEMENT OF KAREN FERGUSON, DIRECTOR, PENSION RIGHTS CENTER, WASHINGTON, D.C – SEE APPENDIX D

Chairman Johnson. Thank you, ma'am. We appreciate your testimony.

Mr. Boehm, you may begin your testimony now.

STATEMENT OF KENNETH BOEHM, CHAIRMAN, NATIONAL LEGAL AND POLICY CENTER, FALLS CHURCH, VA

Mr. Chairman, Members of the Subcommittee, thank you for this opportunity to testify on this important subject.

Union pension funds are increasingly vulnerable to corruption. All too many American workers whose retirement security depends on union pension funds have already recently found out the hard way that these pensions do need greater enforcement from corruption problems.

One reason for the increased vulnerability is the dramatic increase of the number and size of defined contribution plans generally. In 1975, there were 12 million participants with assets totaling $74 million. By 1998, there were 58 million participants, with the assets in the plans grown to something like $2 trillion.

The size and complexity of the pension plans, along with the complexity of the legal oversight system alone, make it vulnerable to mistakes, mismanagement, and corruption. Earlier this year, the Department of Labor Inspector General noted he had 357 pending labor racketeering investigations and of those, 39 percent involved organized crime and 44 percent involved pension and welfare funds. He also noted in that report that more than $1 billion in plan assets were at risk in cases that involved violations of fiduciary duties.

But statistics alone cannot tell the whole story. The picture of how corruption and mismanagement affect union pension funds can best be seen in recent major cases. In one recent New York case, the FBI arrested 120 individuals as part of “Operation Uptick”, an investigation of organized crime's influence on Wall Street. One of those convicted was an alleged associate of the Luchese crime family. The conviction stemmed from a scheme to pay illegal kickbacks to union leaders with a goal of getting as much as $300 million in union pension funds under the control of dishonest investment advisors.

In a recent Oregon case that has just been cited, well in excess of $100 million, several hundred million, in fact, in union pension funds was lost. A money management firm, Capital Consultants, mismanaged huge sums of pension funds in what the government called a “Ponzi-like scheme”, in which fresh infusions of cash were needed to cover the earlier losses. Gifts of travel, gratuities, and contracts were used as inducements to get union pension fund trustees to put pension funds with Capital Consultants. One of the indictments involved a $200,000 payment to a union trustee.

Notably, the pension trustees repeatedly watered down guidelines restricting risky investments. Instead of placing pension funds in marketable securities, the funds increasingly went to risky investments, such as collateralized notes. Some funds even went to a company linked to a businessman with a long association with the late mob financier, Meyer Lansky, hardly the type of individual you want looking after pension funds. Equally disturbing is that trustees repeatedly ignored warnings from their outside financial monitors that the investments by Capital Consultants were high risk, low return.

In another major case, the United Association of Plumbers and Pipefitters National Pension Fund bought a dilapidated beach hotel at a beach where there wasn't much of a beach, in South Florida, as an investment, despite no previous history with hotels. The original plan was to spend $100 million. That rose to $250 million, then $400 million, then $600 million, and finally to $800 million, making it the most expensive hotel, at a cost per room of $755,000, approximately 75 percent over what the industry standard was. The plan was plagued with shoddy construction, leaks, tilting walls, floors, ceilings, long delays, and one of the contracts for construction went to a company with ties to organized crime. The union president involved accepted an illegal trip to Italy from one of the contractors. That's a violation of ERISA.

The Department of Labor has had an ongoing investigation into numerous irregularities associated with this boondoggle, but in the end, the pensioners with the Pipefitters and Plumbers ended up with a hotel that is assessed at being worth about $587 million, even though they've paid $800 million for it.

As you pointed out Mr. Chairman, as we're having this hearing today, one of the biggest pension fund scandals is unfolding. A federal grand jury meeting not far from this hearing room is investigating an insider stock case affecting the pensions of millions of union members, as is the Department of Labor. The focus is on Ullico, former Union Labor Life Insurance Company, an insurance company owned by union pension funds. Its board includes the top union officials in the country, and according to Wall Street Journal and Business Week stories, these board members secretly bought and sold stock in a privately held company in such a way as to enrich themselves at

the expense of the pensions that owned the company. In short, they took a disproportionate share of the profits and the pension fund holders/participants took a disproportionate share of the losses.

What can be done? We need to first recognize the scope of the problem. We need to make sure that those who enforce the restrictions, PWBA and the Department of Labor Inspector General's Office, have adequate resources, because there's a very good cost/benefit to be obtained from that. Legislatively, we need to make sure there's far more disclosure.

We can strengthen ERISA by making sure that, for example, union officials, especially those who serve as pension fund trustees, do have to disclose their outside income much the way that the Ethics in Government Act requires senior government officials to do it.

Further disclosure is helpful, including the disclosure mentioned by the representative from the IG's Office. People, such as accountants, who know about ERISA violations, should be legally required to report those violations to Department of Labor. That's currently not the case, and there's no good policy reason for it not to be the case.

In conclusion, millions of hard-working Americans are counting on the integrity of their union pension funds being protected. What could be more non-controversial than protecting pension funds from criminals?

Thank you.

WRITTEN STATEMENT OF KENNETH BOEHM, CHAIRMAN, NATIONAL LEGAL AND POLICY CENTER, FALLS CHURCH, VA – SEE APPENDIX E

Chairman Johnson. Thank you for your testimony. I appreciate it. I guess we do have some problems out there. Maybe we could go stay in that hotel that you mentioned and wake up with a nightmare!

At this time, I'd like to recognize the gentleman from South Carolina, Mr. Wilson, for questions.

Mr. Wilson. Thank you.

For Mr. Boehm, in your testimony attachment, you mention the case of Capital Consultants. What is particularly troubling in this case is that pension fund limits were continuously changed in order to allow trustees to make risky investments. Clearly, these trustees were not watching out for the best interests of the plan participants.

What was the resulting impact on the workers?

Mr. Boehm. The resulting impact on the workers was that because it was concentrated in the Pacific Northwest, literally hundreds of millions of dollars were lost. And for people that work in

the blue collar types of occupations there, it meant that people who were planning to retire won't be able to retire at the time they planned, much the same as with some of the recent bankruptcies. So it had a real impact.

Mr. Wilson. How many millions of dollars?

Mr. Boehm. It was a tangled web. Maybe Mr. Cossu knows. Even though the prosecution and the plea bargains and so forth are complete, there are still things being thrashed about, so I want to say about $200 million.

Mr. Cossu. Mr. Congressman, that is still being evaluated at this stage, but the estimates are running anywhere between $300 and $500 million as a potential loss. CCI was controlling almost $900 million of plan assets.

Mr. Wilson. Thank you very much.

Additionally, Mr. Boehm, you summarized some of the fiduciary duties for union leaders, and based on information available from the Ullico situation, how did the union leaders violate their fiduciary duty to the pension plan participants?

Mr. Boehm. Fiduciary duty is a very high level duty of trust. One of the most important and the strictest areas of this is financial duty. When someone personally enriches themselves, which is what happened in this case, through insider trading at the expense of the people who own the pensions, then that in my view is a very, very clear violation of the fiduciary duty.

What they were able to do is buy and sell the stock from the company, because it's not a publicly listed company, and the company was owned by the pension fund. When they knew that the stock was going to go up, it was only changed once a year, they bought for $54 what soon became worth I believe $146. They disproportionately got the profit from the deal. The losses, when Global Crossing was tanking, went to the pension fund holders.

What made it particularly egregious was they set up the rules for insider stock dealing only for stockholders of certain amounts of stock, meaning the directors. In one case those with less than 10,000 shares could do this, and the pension funds that had much more than that could not. So it was a very calculated way to enrich themselves at the expense of the pension holders.

Mr. Wilson. Mr. Cossu, after hearing your testimony, I think I fully understand why the President asked for additional funds for the pension enforcement programs administered by the OIG. Your office seems to administer some novel and very critical enforcement programs in terms of protecting the pension assets of union members that might otherwise go unattended.

What kind of specificity would you provide us about the President's request that would increase the pension protection for these assets?

Mr. Cossu. Mr. Congressman, as my statement indicated, our investigative program is extremely diverse. It deals not only with pensions, but also with union corruption and labor management

issues, so we can't abandon one over the other. Pension investigations remain an extremely strong element in our program, in light of the concern that everyone has when that retirement benefit is needed and it's not there.

With the added resources and with the ongoing joint efforts with the Justice Department's organized crime and racketeering section, if we receive the resources, they would be put to very specific functions that would support the overall program.

Mr. Wilson. Thank you, Mr. Chairman.

Chairman Johnson. Thank you.

The Chair recognizes the gentleman from New Jersey, Mr. Andrews.

Mr. Andrews. Thank you, Mr. Chairman. I thank the witnesses for their testimony.

First, I want to acknowledge, of course, that your discussion of the Ullico case is based on news accounts at this point, is that not correct?

Mr. Boehm. And a number of folks involved who have said that, yes, they did involve themselves, and in some cases had regrets about involving themselves.

Mr. Andrews. I assume they said that to journalists?

Mr. Boehm. That's correct.

Mr. Andrews. Okay. And the other cases that you mentioned in your testimony are, in fact, cases that have been brought through the court system with prosecutions and convictions and so forth?

Mr. Boehm. That's correct.

Mr. Andrews. I notice that you recommend annual financial disclosure by union officials of all outside income, especially those who oversee pension funds.

Mr. Boehm. Right.

Mr. Andrews. And I understand your reasoning that one of the abuses that is identified in these prosecuted cases is the use of contracts of dubious value with the funds that appear to funnel money back to certain entities that may, in fact, benefit the trustees; is that correct?

Mr. Boehm. That's correct, yes.

Mr. Andrews. Would you favor the extension of that same principle to members of boards of ERISA plans in single-employer plans?

Mr. Boehm. Yes, I would.

Mr. Andrews. So, in other words, if we had a situation where in a single-employer plan, an ERISA trustee was an investment banker and the person was a principal in an investment-banking firm, how much disclosure should that investment banker have to give?

For example, should the investment banker have to list all of the clients that her firm receives fees from, or just the fact that she herself receives an income from that firm? What should she have to list?

Mr. Boehm. The model I was citing there was the ethics in government model, which is not the strictest model, as you know. Congressmen, and federal judges fill it out, and there is a certain amount of leeway. I think if you follow that model, it would be much better than what you have now, and I think it would have actually stopped what you have in the Ullico case.

Mr. Andrews. My only concern, and I applaud you for the even-handedness with which you apply it, is that if we know that a trustee receives her income from investment firm X but we don't know which entities are paying fees to investment firm X, we can't really make an evaluation of whether that trustee's decision, perhaps, to invest pension funds into the clients of investment firm X is there.

Do you understand what I'm saying?

Mr. Boehm. Yes, I do, and there has been some discussion among our folks in town about policy, and what to do about the exact example that you gave.

One of the possible ways to handle that might be a series of questions that go to the more common ways that these sophisticated contracting kickback and bribery schemes work, where the individual must certify, under penalty of perjury, that certain types of transactions involving investments done by their firm did not take place.

That doesn't get into the heavy volume of paperwork that would naturally occur if somebody is a multi-millionaire investment banker with lots and lots of clients, but it may give them pause if they were going to come up with something that, for lack of a better word, was cute.

Mr. Andrews. I think the other problem with that approach, besides its self-policing aspect, which is troubling, is that one of the real problems across these funds is the use of a fund as a rainmaking device to raise business for those who serve the fund in some way. That's not really a kickback in the criminal sense.

Mr. Boehm. Right.

Mr. Andrews. It's certainly a breach of fiduciary duty. If you use your trustee control of assets to generate good will that then brings in clients for your law firm or customers for your bank or customers for your investment bank, that is a division of loyalty that the fiduciary laws really don't

permit.

Mr. Boehm. I agree with you totally, and that is, if anything, a more substantial problem, because it's so subtle. Yet, in the end, the fiduciary responsibility is that your first duty should be to the people who benefit from the fund, not yourself.

Mr. Andrews. The question I'll close with is similar proposals have been made by people in the past, and the reaction has been that corporate boards across America and trusteeships across America couldn't get accountability to serve, because a lot of people who are in the private sector would not want to make those kind of disclosures.

Do you think people would still be willing to serve on fiduciary boards under ERISA if they had to file a form, like each one of us files, which discloses our source of income?

Mr. Boehm. I think they would, I really do. Because if you don't do that, then you have the situation that you have now where all too often hundreds of millions of dollars are at risk because somebody has figured out a very roundabout, very complicated way to bribe a pension fund board in effect.

Mr. Andrews. Shall we just close and ask if the Department would care to comment in writing, after the hearing, on its position on that change, whether it would prefer amending ERISA so that all ERISA trustees would be covered by that disclosure?

Chairman Johnson. Thank you.

Excuse me. Did you have a response?

Mr. Cossu. I just wanted to reiterate that the nature of our investigations is generally criminal investigations. This is more of a policy issue, which would be best addressed by PWBA.

Mr. Andrews. Which is why I asked for a written response from the Department. I appreciate that. Thank you.

Chairman Johnson. Thanks for your questions. That was a good interchange.

I recognize the gentleman from New Jersey, Mr. Payne.

Mr. Payne. Thank you very much, Mr. Chairman.

I'm sorry that I missed all of the testimony, but I do believe that this whole issue of retirement security for American workers is something that's very important, especially in light of what we've heard recently with the Enrons and WorldComs and many of those companies, where the pensions of workers have certainly been compromised.

I just have a question for Ms. Ferguson. I was trying to catch up and go through the testimony, but I just have a general question. In your opinion, do you believe there is a greater risk

of fraud with pension funds of union workers or employees who are unionized as opposed to employees who are not union workers, sort of the corporate, and the Enron-type situation? What do you think?

Ms. Ferguson. I would say no. To my knowledge, there's no statistical basis for that. Of course, the percentage of the workforce that is unionized is, of course, very small.

In our own experience, the Pension Rights Center works with pension counseling projects around the country that are funded by the administration on Aging, and we haven't seen any particular difference between the union plans and the corporate plans in that respect.

First, I'm reminded in hearing this testimony how pleased we are that the inspector general's office does such an excellent job in its work in protecting participants, and also the critical role that disclosure plays in it.

For example, in the Capital Consultants case that we've been hearing about, it was actually individual participants who read their summary annual report, the one-page document that they get. Everybody says, "Oh, employees never read," but they read this. They saw these discrepancies. They brought them to the attention of the Labor Department, and that's how this whole thing started.

There's been an effort over the years to cut back on disclosure, and to cut back on summary annual reports, and what these situations show is how important it is that employees continue to be given valuable information about their rights.

Mr. Payne. And I guess you would strongly urge that employees sit on pension boards. There's always been a question about employees sitting in on pension boards, and I don't know what the practice is now. Do many of them have employees on the committees, to your knowledge?

Ms. Ferguson. The typical, so-called Taft-Hartley Fund, the multi-employer plan, where a union negotiates with a group of employers, always has a joint trusteeship arrangement with an equal number of employer and employee representatives, and most state retirement funds also have joint trusteeship. In the single employer area, where the company runs the fund, we have not had joint trusteeship, although Great Britain, which has a very similar system, does.

With the advent of Enron and WorldCom, we're suddenly seeing a situation where you have acute conflicts of interest. In WorldCom and Enron, it was particularly dramatic.

The company, which was wearing two hats, wanted to make sure the stock would continue to be held by the employees and not be sold as a way of saving the company, was touting the value of the stock to the individuals in the 401K plan, when this was their own savings. And it seems to us that in that kind of situation where you have employees' money and acute conflicts of interest, unless you're willing to have independent fiduciaries running these plans, you have to have some kind of check in the form of employee representation.

Mr. Payne. There's no question about it in those situations where the employees are very loyal to the company. They've been there all their lives, they work hard, they believe in the company. They work hard so that their future is ensured. However, as you've indicated, they're going to be inclined to want to stay and hang in there during the tough times.

However, the employer is being less than honest when they said that, for example, at Enron, they would post the value of the stock each day so employees knew it was dropping. However, the officers were saying, "Well, even though it's going down, you should hang in there with us," while they were bailing out. So I think that that was certainly unfortunate.

But anyway, thank you very much. I appreciate your response. Thank you.

Chairman Johnson. Thank you, Mr. Payne.

I wonder if you could, Mr. Cossu, explain to me what you mean by the return on investment that American taxpayers accrue from OIG's efforts.

Mr. Cossu. Mr. Chairman, when we began the pension initiative, coming off the Attorney General's Pension Abuse Initiative, we decided to take a look at the method in which we were going to be deploying our investigative resources, and almost run it like a business. The pension arena presents us with some of the higher profile cases, not only in dollars but also in the complexity of the crime.

When we examine the nature of the investigation and the resources that are devoted to prosecute individuals which have abused that particular pension plan, our return on investment is substantially high, in that the government may be able to recover tens of millions of dollars on behalf of the plan and the corrupt actions that were taken against them by plan officials, union officials, and trustees.

The sentencing at the conclusion of the prosecution generally is pretty heavy in plans like this. We have seen cases where restitution comes in almost to the same amount of dollars that the plan has lost, forcing the individuals to come up with that money.

When we match up how many hours an investigation has taken, and calculate the cost of that investigation and we then put it up against the dollars that are being ordered to be recovered, or at least charged at the time of sentencing, it's an extremely high return for that type of an investigation.

Chairman Johnson. Do those dollars go back into the pension plan?

Mr. Cossu. Yes in some cases. For investigations that are conducted by both the OIG or PWBA, if there are plan assets, the court generally will order that the plan be restored.

Chairman Johnson. Can you, any of you, tell me what you think the level of funding is in our pension plans now, on the average, across the board? Is it 80 percent?

Ms. Ferguson. We can certainly get back to you on that.

Chairman Johnson. How about the union-sponsored plans?

Ms. Ferguson. They have been traditionally very well funded.

Chairman Johnson. That's what I thought. Even with some of the fraud that's been alleged, is that true?

Ms. Ferguson. Yes. I'm always reminded of the Doonesbury cartoon, you know, the pension fund was just sitting there.

The instances of fraud are very serious, and I'd like to add to something that the inspector general statement said. There isn't always restitution, because we have a very low level of bonding for criminal activities, and no requirement for fiduciary insurance. So often, despite the best efforts of the enforcement agencies, there is inadequate restitution, and this is a very, very serious problem. In a traditional defined benefit plans, there is usually the Pension Benefit Guarantee Corporation safety net, but in the 401K plan, there's nothing.

Chairman Johnson. Mr. Boehm, would you advocate more bonding, a higher level?

Mr. Boehm. I think it would address the problem of what happens when the money goes and there's no other way to recoup it. Bonding, I think, does work in a lot of other instances in society, and I think it would be a good thing to at least consider it here for just the reasons cited.

Chairman Johnson. Combined with full disclosure?

Mr. Boehm. Right, a combination of disclosure and bonding. You need sunshine and you need insurance.

Mr. Cossu. Mr. Chairman, to address the funding level of the union plans, the advantage that a multi-employer plan has is the fact that it's linked with a collective bargaining agreement, so that pension asset, that pension contribution is part of the collective bargaining agreement that the union makes with the employer. If the individual employer fails to make their contribution, he could be voided of any labor that would be required to run his business. So there is a level of pressure coming from the collective bargaining agreement to keep that funding up there.

Chairman Johnson. In the IG area, has your investigative and enforcement mission changed any since last September the 11th?

Mr. Cossu. After September 11th, as a result of the refocusing of the FBI's efforts on terrorism, we've been asked by Justice Department to fill the void that has occurred in the enforcement arena with respect to labor racketeering and organized crime.

There has been an all-out effort this year to work with Justice. As I indicated earlier, we plan to focus in on areas where the deficiencies may occur, and if given the resources and the

budget, we will exercise that plan with Justice.

Chairman Johnson. Did Justice lose some resources as a result of the 11th?

Mr. Cossu. I'm not certain, Mr. Chairman.

Chairman Johnson. Yeah. Well, I want to thank all of you for your valuable time and testimony. This has been an interesting conversation. I appreciate the Members' participation, and Mr. Andrews' in particular.

Mr. Andrews. Mr. Chairman, before we adjourn, I did have a unanimous consent request of Mr. Cossu.

I know the office of the OIG is conducting a review of cash balance plans and some of the payment issues surrounding it. We would ask if the office could give us an update on the status of that investigation, whatever findings you have made, and whatever you can share with us for the Committee's record.

Chairman Johnson. Thank you. So ordered.

The Subcommittee now stands adjourned.

Whereupon, at 12:40 p.m., the Subcommittee was adjourned

APPENDIX A - WRITTEN OPENING STATEMENT OF CHAIRMAN SAM JOHNSON, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

OPENING STATEMENT OF
REP. SAM JOHNSON (R-TX), CHAIRMAN

SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS

September 10, 2002

Today's hearing focuses on retirement security for American workers. Wave after wave of corporate accounting scandals have rocked America. However, little attention has been paid to the big-labor pension problems. That is why we're holding our fourth hearing on the safety of workers pensions. Earlier hearings focused on boardroom bandits cooking the books and the resulting pension losses.

Today we'll hear about the Department of Labor's efforts to protect pension funds as well as some other recent cases of corruption resulting in pension losses.

I am pleased that Assistant Secretary Ann Combs will be joining us today. She'll highlight the efforts of the DOL's Pension and Welfare Benefits Administration (PWBA) to protect the integrity of pensions, health plans, and other employee benefits for more than 150 million people. This agency's work is vital to workers, assisting them in getting the information needed to protect their benefit rights. PWBA has a good story to tell on pension plan enforcement and outreach.

The Department of Labor's Office of Inspector General (OIG) is charged with conducting audits, investigations, and evaluations to improve the effectiveness of Department of Labor programs and operations. Through these activities, the OIG detects and prevents labor racketeering in the workplace. Within the OIG, the Office of Labor Racketeering and Fraud Investigations administers program to identify and reduce labor racketeering and corruption in employee benefit plans. Last March, the OIG reported that there were 357 ongoing investigations, 44 percent of which involve pension and welfare plans.

This is workers' retirement and health benefits we're talking about here. This is their livelihood. This is no laughing matter. That is why Stephen Cossu will tell us why multi-employer union pension funds are particularly vulnerable to corruption and pension losses.

Then we'll hear testimony from Ken Boehm of the National Legal and Policy Center about cases where this type of corruption has led to pension losses. An example of this is Ullico. This is a union owned insurance company that handles union pensions, among other things. Dubbed "big labor's Enron" by the Wall Street Journal, this little-known firm is now reported to be the focus of a federal grand jury and Labor Department investigation. The DOL needs to determine whether labor leaders who sit on the board of Ullico made Martha Stewart maneuvers and profited from insider trading while rank-and-file workers were stuck with egg on their face.

This is NOT a good thing.

Regardless of the Ullico facts, we will hear plenty today about labor union corruption cases that have been closed and people who are sitting in jail. I know that my subcommittee members will join me in condemning illegal actions that profit a privileged few at the expense of workers. As in the case of Enron, such actions are never acceptable. This subcommittee stands united in its concern for workers – regardless of who the offenders are – union bosses or corporate bosses.

To root out corruption in pension plans and to further protect workers' pensions, the President proposed an increase in the enforcement budget for both the PWBA and the OIG. I can not believe the United States Senate has proposed cutting the budget for pension cops on the beat at this time. That's just wrong! As my colleagues will remember, the House passed the Pension Security Act in April of this year. This bipartisan bill gives workers the tools they need to protect and expand their retirement savings. As we are holding this hearing, we in the House are still waiting Senate action on pension protections.

With that in mind, I look forward to working with my colleagues as we shed further light on this issue and move ahead with safeguards to protect America's pensions.

APPENDIX B - WRITTEN STATEMENT OF ANN L. COMBS, ASSISTANT SECRETARY, PENSION AND WELFARE BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C.

Testimony of Ann L. Combs

Assistant Secretary, Pension and Welfare Benefits Administration
U.S. Department of Labor

September 10, 2002

Introductory Remarks

Good morning, Chairman Johnson and Members of the Subcommittee. Thank you for inviting me here today to share information about the Department's role in enforcement and regulation of the Employee Retirement Income Security Act (ERISA). Over the past 28 years, ERISA has fostered the growth of a voluntary, employer-based benefits system that provides retirement, health and other benefits to millions of Americans. I am proud to represent the Department, the Pension and Welfare Benefits Administration (PWBA), and its employees, who work diligently to protect the interests of plan participants and support the growth of our private benefits system.

My testimony will describe ERISA's background and regulatory framework; the Department's role and success in enforcing the fiduciary provisions of ERISA; the reporting and disclosure rules under ERISA; compliance assistance for plan sponsors and service providers; and an overview of the Department's participant assistance programs for employees, retirees and their families.

Before proceeding, however, I want to reaffirm the President's support for the "Pension Security Act of 2002" (H.R. 3762) that the House passed on April 11. As you know, the President announced his "Retirement Security Plan" in February of this year after forming a task force to analyze the current pension rules and regulations following the Enron scandal. Indeed, the bill passed out of this committee included many of the President's recommendations. The bill strengthens workers' ability to manage their retirement funds more effectively by giving them more freedom to diversify, increased disclosures, and better access to professional investment advice. The Administration continues to encourage the Senate to pass this legislation and provide workers with these additional protections as soon as possible.

Background

ERISA prescribes uniform minimum standards to ensure the integrity and fairness of the private employee benefit plan system in the United States. The law covers most private sector employee benefit plans, both retirement and health, that are voluntarily established and maintained by an employer, an employee organization, or both.

The provisions of Title I of ERISA, which generally are administered by the Labor

Department, were originally enacted to address public and congressional concern that the existing standards for participation, funding, vesting and management of plan assets were inadequate. ERISA's enactment was the culmination of a long line of legislative proposals concerned with the labor and tax aspects of employee benefit plans. Since its enactment in 1974, ERISA has been strengthened and amended to meet the changing retirement and health care needs of workers, retirees, and their families.

The broad provisions in Title I protect not only retirement and health benefits, but other employee benefits as well. The core of Title I of ERISA consists of provisions that address the conduct of persons (fiduciaries) who are responsible for operating pension and welfare benefit plans (including group health plans, life insurance, disability, dental plans, etc.). Fiduciaries are required to discharge their duties solely in the interest of plan participants and beneficiaries for the exclusive purpose of providing benefits, and defray reasonable expenses of plan administration. In discharging their duties, fiduciaries must act prudently and in accordance with the documents governing the plan, to the extent such documents are consistent with ERISA. Certain transactions between an employee benefit plan and "parties in interest," including fiduciaries and others who may be in a position to exercise improper influence over the plan, are prohibited by ERISA. If a fiduciary's conduct fails to meet ERISA's standards, the fiduciary is personally liable for plan losses attributable to such failure.

The Department's Pension and Welfare Benefits Administration (PWBA) is charged with administering and enforcing this statute, together with the Treasury Department, which is generally responsible for the tax provisions in ERISA, and the Pension Benefit Guaranty Corporation (PBGC), which provides insurance to protect the retirement benefits of participants in defined benefit plans when the corporate plan sponsor fails and the plan is inadequately funded. ERISA governs approximately 730,000 private pension plans and six million private health and welfare plans. These plans cover approximately 150 million workers and their dependents and hold assets of more than $4.6 trillion.

PWBA's top priority is to ensure that pension and health plans are operated in accordance with the law. PWBA administers a multi-faceted program that includes education, outreach, and individual assistance for plan participants, backed by strong enforcement.

ERISA provides the Secretary with substantial authority to interpret and enforce its provisions. The Secretary has the authority to conduct investigations and seek appropriate remedies to correct violations of the law. PWBA's jurisdiction extends to both the civil and criminal provisions of federal law relating to both corporate and union sponsored plans. PWBA regularly works in coordination with other federal and state enforcement agencies, including the Department's Office of Inspector General, the Internal Revenue Service, the Federal Bureau of Investigation, the Securities and Exchange Commission, the PBGC, the federal banking agencies, state insurance commissioners and state attorneys general.

Investigative Process

The Secretary of Labor is given broad authority to conduct investigations of potential

violations of ERISA's provisions under Title I of ERISA. PWBA conducts investigations through its 10 regional offices and 5 district offices located in major cities around the country. Under the leadership of its Regional Director, the investigative staff in each of PWBA's field offices conducts investigations to detect and correct violations of Title I of ERISA and related criminal laws. The Regional Directors report to PWBA's Deputy Assistant Secretary for Program Operations through the Office of Enforcement in Washington, which is responsible for coordinating the agency's enforcement activities. In FY 2003, PWBA will devote $93.2 million or 79% of its $120 million budget to enforcement. Of our 861 staff, 502 are investigators. There are an additional 108 Benefit Advisors who assist the public with individual benefit disputes. This direct interaction with the public is one of our best sources of investigations. The Solicitor's Office, a separate agency within the Department of Labor that provides the legal representation for the entire Department, provides litigation and other legal support with their national and regional offices. The Solicitor's Office has about 74 attorneys devoted to ERISA in the national office and the regions at this time.

PWBA field offices manage their investigative activity within broad guidelines identified by the agency's Strategic Enforcement Plan (StEP), and generally exercise broad discretion in determining when investigations are to be opened and which entities or individuals are to be investigated. Investigations are identified through a variety of sources, including complaints from participants or others, referrals from the national office or other government agencies, computer targeting, reviews of the Form 5500 annual report, and media reports. PWBA's primary goal in its investigations is to determine if violations of the law occurred, and if so, restore any plan benefits and assets to the plan and its participants that were lost. We also seek to ensure the future security of the plan.

As a general rule, a significant percentage of each region's investigations is directed to larger plans; however, investigations of plans with fewer than 100 participants are often appropriate, particularly where mishandling of employee contributions to 401(k) plans is alleged or where the plan is abandoned or adversely affected by bankruptcy of the plan sponsor. Regions also seek to cover their entire geographic jurisdiction and review the full range of potential violations contemplated by ERISA.

The type of records examined during the investigation varies depending on the nature of the case and the issues identified. Records are requested at the outset of the investigation and are generally identified in a letter sent to the Plan Administrator. For example, all plan records relating to the maintenance of the plans are reviewed, including the plan document, trust agreement, collective bargaining agreement (if any), summary plan description, summary annual report, 5500s, fidelity bond, and plan financial records. In addition, depending on the type of plan and the reason for the case opening, written and electronic records specific to a particular issue are requested. PWBA has broad authority to issue administrative subpoenas to compel the production of documents or testimony.

The amount of time it takes to complete an investigation varies widely, depending on the complexity of the issues, the size of the plan, the cooperation of the parties, and other factors. An investigation may be completed in a few weeks or, if contentious litigation is involved, may last several years. Procedurally, when violations are detected, the Regional

Director will determine whether to pursue corrective action through Voluntary Compliance (VC). If so, the region will issue a VC notice letter that advises plan fiduciaries or other responsible parties of the results of the investigation and the sections of ERISA violated and invites the recipients to discuss how the violation will be corrected and losses restored to the plan. In the alternative, where settlement efforts have failed, or complex or novel issues are involved, cases may be forwarded to the appropriate Solicitor's Office with a recommendation that litigation be initiated.

Each PWBA field office coordinates civil investigations and case referrals with its local Regional Solicitor's Office or with the Plan Benefits Security Division of the Solicitor's Office in Washington, D.C. In cases where voluntary compliance efforts have failed to obtain appropriate correction, an investigation will be referred to the appropriate Solicitor's Office with a recommendation that litigation be initiated.

PWBA 2001 Enforcement Results

In FY 2001, PWBA opened 4,862 civil cases and closed 4,762 civil cases. This is an increase of 407 civil cases opened and 545 civil cases closed over FY 2000. Over 57% of civil cases closed (or 2,724 civil cases) were closed with results during FY 2001). During that year, PWBA made 109 referrals to the Solicitors Office for litigation. After a referral for litigation is made, we are often successful in obtaining voluntary compliance, so some of these referrals will not result in contested litigation. In FY 2001, litigation was filed on 73 cases, an increase of 12 filings over the prior fiscal year.

In FY 2001, there were 124 criminal cases opened and 143 criminal cases closed. Eighty-seven individuals were indicted in connected with PWBA's criminal investigations during the fiscal year. Forty-nine criminal cases were closed with convictions/guilty pleas during FY 2001, and an additional 15 criminal cases were closed with other restitution or sentencing results.

The financial impact of PWBA's investigations on plans and participants is impressive. Total monetary recoveries for all investigations in FY 2001 were $652.4 million. These recoveries include the value of corrective actions which PWBA obtained to correct prohibited transactions (nearly $330 million returned to plans), money restored to the plan or plan participants to correct losses resulting from a fiduciary breach ($139 million), assets which were protected from significant risk by PWBA intervention which resulted in securing appropriate safeguards to protect the plan assets and reduce the risk of future losses ($114 million), and benefits recovered on behalf of individual plan participants (nearly $69 million).

Criminal Enforcement

Under the Comprehensive Crime Control Act of 1984, the Secretary of Labor is given responsibility to enforce the criminal provisions of ERISA and Title 18 of the United States Code that relate to employee benefit plans. To fulfill that responsibility, PWBA conducts criminal investigations as part of its enforcement program. Field managers consult with local U.S. Attorneys as early as possible in a criminal investigation to

determine whether there is prosecutorial interest in the case and to receive any necessary direction.

PWBA's investigators evaluate the facts of every case for possible criminal violations. Many of our civil investigations turn into criminal investigations when facts indicating possible criminal misconduct are uncovered and we refer the case to the appropriate U.S. Attorney for consideration of criminal prosecution. Some cases are referred to state and local authorities for criminal prosecution. In some instances, a civil and criminal investigation will be conducted at the same time using separate field investigators and supervisory oversight. In other instances, the investigation will be conducted as a criminal investigation only.

Since October 1990, PWBA has closed over 1,200 criminal investigations that have resulted in over 1,000 indictments of individuals and 676 pleas and convictions. PWBA dedicates approximately 15% of its investigative resources to criminal cases that cover a broad range of entities, including 401(k) plans, union sponsored employee benefit plans, Multiple Employer Welfare Arrangement (MEWA) cases and other health plans.

PWBA's criminal investigations are often worked jointly with agents from the OIG, FBI, IRS, Postal Inspection Service and the Office of Labor Management Standards in the Department's Employment Standards Administration. The types of investigations cover a wide variety of pension and health plans and also include service providers such as investment managers and third party administrators.

Enforcement Strategy

PWBA has a strong track record in protecting employee benefits through the identification, correction, and deterrence of violations. This has been accomplished in the face of limited resources, multiple priorities, expanded responsibilities, and growing sophistication in the marketplace. PWBA's Strategic Enforcement Plan (StEP), which was published in the *Federal Register* on April 6, 2000, establishes a general framework to focus PWBA's enforcement resources on achieving the agency's policy and operational objectives as efficiently and effectively as possible.

The StEP assists PWBA in leveraging its enforcement resources by emphasizing targeting, the protection of at-risk populations, and deterrence. Targeting allows PWBA to focus its resources on issues and individuals where the most serious potential for ERISA violations exists and on situations that present the greatest potential for harm. PWBA emphasizes the protection of at-risk populations by seeking to identify situations and to apply enforcement resources where there is the greatest danger of harm as a result of violations of the law. Deterrence is obtained through the continuing effectiveness of PWBA's enforcement program.

The StEP identifies and describes PWBA's national enforcement priorities and is used by the Regional Offices in structuring their individual investigative programs. Under the current StEP, there are three national investigative priorities: plan service providers, health care plans, and defined contribution pension plans.

Investigations of plan service providers offer the opportunity to address abusive practices that may affect more than one plan. Because such investigations generally result in larger recoveries for more plans and more participants, this approach allows PWBA to leverage its resources and obtain the maximum impact for the benefit of plan participants and beneficiaries.

Rising health care costs have contributed to a growing incidence of health care fraud, making the agency's efforts to ensure the sound management and administration of ERISA-covered health plans a matter of vital national importance. PWBA seeks to ensure that participants and beneficiaries are protected, and has applied substantial resources to addressing abusive practices that violate ERISA.

In recent years, there has been tremendous growth of 401(k) and other defined contribution plans in terms of the number of plans, number of participants, and amount of assets in these types of plans. This growth and the related administrative and investment practices which have developed to accommodate these plans warrant scrutiny to ensure the safety of this large volume of assets. PWBA has identified defined contribution plans as a national enforcement priority because the risk of loss in such plans rests entirely on the plan participants.

National Projects

In order to ensure the most effective use of our resources and assure implementation of the national enforcement priorities, PWBA annually identifies National Projects that address current issues within the scope of the national priorities. These projects focus on areas that have been or may become particularly problematic. The process for determining national enforcement projects is dynamic. The national projects are reviewed on an annual basis in order to insure that we continue to appropriately concentrate our efforts.

PWBA has currently identified five national projects discussed below. The amount of investigative time required on these national projects depends upon the targets included in the project and the complexity of the issues involved.

1. Employee Contributions Project (ECP)

In 1995, PWBA launched its 401(k) Employee Contribution Enforcement Project to hold employers accountable for failing to promptly deposit employees' contributions in the employees' accounts. These cases were opened under our civil program. Since 1995, PWBA has also conducted over 200 criminal investigations involving delinquent employee contribution. Since 1995, PWBA has obtained 132 indictments of individuals resulting in more than 100 guilty pleas and convictions.

In some cases, employers do not promptly forward the contributions to the appropriate funding vehicle; in other cases, the employer simply converts the contributions to other uses, such as business expenses. Both scenarios may occur when the employer is having financial problems and turns to the plan for unlawful financing.

The ECP has generated considerable attention from Congress, participants, service providers, and the media. By raising public awareness, the project has generated an increase in participant complaints that provide extremely valuable leads. An intended impact of the publicity was to put employers on notice that the Department would vigorously pursue recoveries of diverted contributions.

Examples of ECP cases are:

Chao v. Gateway Data Sciences Corp: A Phoenix software company and two of its former executives were ordered to restore more than $180,000 to the Gateway Data Sciences Corporation 401(k) Plan, according to a settlement agreement and a consent judgment entered on April 10, 2002, by the United States District Court in Phoenix.

The judgment resolved a lawsuit filed by the U.S. Department of Labor on November 13, 2001, against Gateway Data Sciences Corporation; Michael Gordon, the company's former chief executive officer; and Vickie Jarvis, the former chief financial officer, for violations of ERISA that occurred when Gateway, Gordon and Jarvis failed to forward contributions withheld from employee paychecks to the 401(k) Plan, enabling the company to use the funds to pay operating expenses.

Under the terms of the judgment, Gateway Data Sciences Corporation, currently undergoing Chapter 11 bankruptcy reorganization, is to pay $80,972 to the 401(k) Plan upon confirmation of the reorganization plan. Gordon and Jarvis have already paid $100,088 to the Plan, none of which was allocated to their individual accounts. The judgment also bars Gordon and Jarvis from serving as trustees or fiduciaries to any employee benefit plan.

U.S. v. Craig Jay Nelson: Craig Nelson pleaded guilty on January 23, 2001, to unlawfully converting the assets of an employee benefit plan. Nelson operated a struggling business in Des Moines, Iowa, called Nelson Development Services, Inc., that was in the business of installing sewer mains and water and sewer lines. From 1993-1999, he failed to deposit $35,000 to $40,000 into the plan despite the fact that these amounts were withheld from the employees' paychecks. He also converted almost $15,000 of 401(k) money belonging to an employee. He used this money to try to keep his company afloat. He was sentenced to 3 months in a halfway house, 3 months home confinement, a $2,000 fine, and 3 years probation. He was ordered to make restitution in the amount of $62,400.

U.S. v. McCarthy: Robert J. McCarthy, majority owner of Lloyd's Shopping Centers, Inc., Middletown, New York, was sentenced on September 13, 2000 to 6.2 years imprisonment and ordered to make restitution of $1.6 million. The company has replenished the stolen 401(k) funds.

McCarthy owned a business that provided accounting and other financial services. When Lloyd's filed for Chapter 11 in December 1992, McCarthy was retained by Lloyd's to assist in the bankruptcy reorganization. This allowed McCarthy to gain control of the company in 1994. After that, through a series of transactions, he looted the plan accounts.

McCarthy was found guilty on October 13, 1999 by a federal jury for his role in the embezzlement of $2,107,000 from the Lloyd's Pension Plan and the 401(k) Saving Plan. He was charged on December 18, 1998 with the embezzlement. The 401(k) plan suffered a loss of $650,000. It covered 288 participants. The pension plan covered 311 participants. McCarthy was also charged with laundering of monetary instruments, engaging in illegal monetary transactions, conspiracy to create false ERISA documents, and embezzlement of bankruptcy assets.

The false record conviction resulted from his distribution and maintenance of false earning statements to the participants of the 401(k) plan. At trial, Lloyd employees testified that in response to inquiries, McCarthy falsely told them that their retirement savings had been moved into new funds where they were making higher earnings. McCarthy's theft left both funds effectively bankrupt. This case was jointly investigated by the PWBA, OIG and the IRS.

2. Rapid ERISA Action Team (REACT)

The Rapid ERISA Action Team (REACT) enforcement program is designed to assist vulnerable workers who are potentially exposed to the greatest risk of loss, such as when their employer has filed for bankruptcy. The new REACT initiative enables PWBA to respond in an expedited manner to protect the rights and benefits of plan participants. Since introduction of the REACT program in FY 2001, we have initiated over 800 REACT investigations and protected approximately $49 million in plan assets.

Under REACT, PWBA reviews the company's benefit plans and the rules that govern them, and takes immediate action to secure the plan's assets. We also advise those affected by the bankruptcy filing, and provide rapid assistance in filing proofs of claim to protect the plans, the participants, and the beneficiaries. PWBA investigates the conduct of the responsible fiduciaries and evaluates whether a lawsuit should be filed to recover plan losses and secure benefits.

An example of a successful REACT case is:

> DataProfit Corporation 401(k) Profit Sharing Plan in Holyoke, Massachusetts in which the Secretary filed an adversary proceeding against a fiduciary of the DataProfit Corporation 401 (k) Profit Sharing Plan, in his Chapter 7 bankruptcy proceeding. The complaint asserted that the fiduciary had breached his duties and sought an order stating that certain debts that arose from the fiduciary's embezzlement were nondischargeable. On November 6, 2001, the Secretary filed a complaint based on the same allegations seeking monetary damages from the fiduciary. At the same time, PWBA assisted the Bankruptcy Trustee in obtaining a recovery for the Plan on its fidelity bond. On February 22, 2002, consent judgments were executed ordering the fiduciary to pay restitution totaling $43,000 to five participants and was permanently enjoined from acting in a fiduciary capacity.

3. Orphan Plans

The Orphan Plans project began in FY 2000 to deal with situations where plans have been abandoned by plan sponsors and fiduciaries, or fiduciaries have abdicated their responsibilities as a result of death, neglect, bankruptcy, or incarceration. The project is part of the agency's enforcement strategy to protect at-risk populations.

In PWBA's FY 2002 budget, $500,000 was earmarked to pay the costs associated with the hiring of independent fiduciaries to accomplish the administration and termination of orphan plans where the asset base of the plan is insufficient to allow the plan to bear these expenses without causing substantial reductions in individual account balances. PWBA is also working closely with the Internal Revenue Service to assist both individuals and financial institutions who have found themselves to be *de facto* caretakers of orphan plans by providing a streamlined process to terminate the plan and distribute assets to the participants.

The objectives of the project are to: 1) locate orphan plans which have been abandoned by fiduciaries; 2) determine if the fiduciary is available to make fiduciary decisions such as the termination of the plan and the distribution of plan assets; 3) require fiduciaries to fulfill their duties, file appropriate compliance forms, and ensure that proper actions are undertaken to protect and deliver promised benefits; and 4) where possible, identify and penalize plan officials that do not fulfill their responsibilities to plan participants.

An example of an Orphan case is:

> On May 14, 2001 PWBA succeeded in having a federal court appoint an independent fiduciary to manage, terminate, and distribute the assets of the pension plan of the International Brotherhood of Law Enforcement and Security Officers (IBLESO). The independent fiduciary has full authority to collect

assets owed to the plan, pay benefits to participants, pay creditors and terminate the plan. The pension plan has been "orphaned" since 1987 after the criminal conviction of its trustees. IBLESO violated ERISA by leaving the plan without a trustee, failing to appoint successor trustees to administer the plan, and failing to terminate the plan and distribute its assets to participants. The plan covered 65 participants and had $235,944.50 in assets.

4. Multiple Employer Welfare Arrangements (MEWAs)

PWBA continues to focus its enforcement efforts on abusive and fraudulent MEWAs created by unscrupulous promoters who sell the promise of inexpensive health benefit insurance, but default on their obligations. MEWAs provide health benefits to employees of two or more unrelated employers who are not parties to *bona fide* collective bargaining agreements. They often provide lower cost alternatives to individual or single employer health care arrangements. However, these arrangements sometimes illegitimately seek to avoid state insurance requirements for reserves, contributions, mandated health benefits and other requirements applicable to insurance companies, thereby enabling the MEWA to market health benefits at substantially cheaper rates but without the protections contemplated by law.

Regions continue to work closely with their Regional Solicitor's Offices to identify those egregious situations where benefits are not being paid and which require aggressive litigation support, including enforcing subpoenas, obtaining Temporary Restraining Orders (TROs), appointing independent fiduciaries, and obtaining injunctive relief. In addition, PWBA works closely with the National Association of Insurance Commissioners (NAIC) to identify fraudulent MEWAs.

To combat MEWA fraud and corruption, PWBA has implemented a two-pronged approach using its dual enforcement, civil and criminal, authority. The circumstances of each case determine which way investigations are pursued.

Most of the criminal MEWA investigations have been jointly conducted with other agencies including the OIG's Office of Labor Racketeering and Fraud Investigations, the FBI and the United States Postal Inspection Service. As with all criminal investigations, MEWA criminal investigations are conducted in a decentralized fashion, working in coordination with the relevant United States Attorney's Office. Frequently these investigations employ the use of search and seizure operations in order to get the records. Such action includes agencies such as the FBI, OIG and U.S. Postal Inspection Service. In some instances, evidence of criminal intent is found in fraudulent solicitations advertising the product mailed to the membership, thus constituting possible mail fraud violations and the assistance of the Postal Inspectors is helpful in establishing these types of violations.

Since October 1990, PWBA has conducted 74 criminal MEWA-related investigations. Thus far, 84 individuals in 69 cases have been indicted.

Some examples of our successful MEWA prosecutions are:

U.S. v. Pereira: Paul Pereira of Fall River, Massachusetts, was sentenced March 30, 2000, to 24 months imprisonment, 3 years of supervised release, and ordered to make restitution of $880,746 after being charged on July 21, 1999, with health care fraud, embezzlement and making false statement relating to a Federal health program. The defendant established a phony insurance plan called Ameri-Med and collected premiums through his company. Pereira was not a licensed insurance carrier, and Ameri-Med was not a licensed insurance product, yet Pereira sold the Ameri-Med product largely to small businesses and self-employed individuals throughout Massachusetts, New Hampshire and Rhode Island. In the scheme, he fraudulently represented 60 Ameri-Med subscribers as his own employees in an attempt to get legitimate health insurance coverage through Blue Cross/Blue Shield of Rhode Island.

Between August 1996 and May 1998, Pereira collected more than $1.6 million in premiums but only paid $360,000 in claims and diverted more than $900,000 in premiums to his personal use or to support businesses that he owned. Pereira pled guilty on January 7, 2000, to health care fraud and to embezzlement from a health care benefit program. PWBA served as the lead investigative agency on this case, with assistance from the FBI.

On December 13, 2001, the court granted the Department's Motion for a Temporary Restraining Order, followed by a preliminary injunction, against Employers Mutual, LLC, an abusive multiple employer welfare arrangement, and sixteen related associations, and the individuals who operate them. Employers Mutual offered health benefits in all fifty states and the District of Columbia.

Between January and October 2001, these entities collected over $14 million in employer contributions but used less than $3 million to pay claims. Nearly fifty percent of the contributions have been diverted to the personal accounts of the principals and to pay administrative expenses. It is estimated that there are approximately $4.5 million in unpaid health claims. The TRO removed the defendants from control of the health plans, appointed an independent fiduciary to marshal the assets of the plans, and froze defendants' assets. On April 30, 2002, the court granted the Independent Fiduciary's motion to put the plans through a quasi-bankruptcy that will provide for an orderly method of resolving the medical providers' claims for the money collected in this case and will protect the plan participants from being pursued by the providers.

Of course, the best outcome would be for small businesses to avoid purchasing health coverage from fraudulent MEWA operators in the first instance. In an effort to educate small businesses about these risks, Secretary Chao recently wrote to over 80 business leaders and associations requesting them to distribute and follow simple tips entitled "How to Protect Your Employees When Purchasing Health Insurance." These tips, drafted by PWBA, encourage small businesses to exercise caution by doing such things as comparing coverage and costs, checking with state insurance commissioners, and asking for references of other employers enrolled with a health provider. Checking such simple information before signing up for coverage could save a considerable amount of distress later. In her letter, Secretary Chao reiterated her commitment that the Department will continue to devote significant resources to enforcing existing health laws and to work with state insurance departments in vigorously pursuing insurance scams and risky MEWAs to protect workers and their families.

At this point, I would like to take a moment to express support for a proposal that responds to the problem of fraudulent MEWAs. The Department strongly supports legislation that would allow *bona fide* associations to sponsor group health plans under federal jurisdiction. Association Health Plans (AHPs) would be required to comply with significant financial safeguards to protect consumers, including maintenance of reserves to pay claims, additional surplus capital of up to $2 million, stop-loss insurance against unexpectedly high claims, and indemnification insurance to pay outstanding claims in the event the AHP becomes insolvent.

> To prevent fraud, AHPs would be limited only to associations that are formed for purposes other than purchasing health insurance, and they would be restricted from "cherry picking" good risks. Finally, AHPs would be subject to federal authority (including ERISA's fiduciary requirements), instead of the confusion of federal and state jurisdiction that currently applies to MEWAs. The Department, through its certification and oversight of AHPs, will see to it that consumers receive the benefits that they and their employers have paid for.

5. Health Disclosure and Claims Issues (HDCI)

Because of the critical importance of health benefits, PWBA has in recent years devoted substantial enforcement resources to the targeting and investigation of fiduciary violations, as well as criminal violations, relating to health benefit plans. PWBA's role in the health care area has also expanded as a result of the enactment of health care legislation that includes regulatory and enforcement requirements. Recently, Congress amended ERISA to add a new Part 7, that includes provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Newborns' and Mothers' Health Protection Act of 1996 (Newborns' Act), the Mental Health Parity Act of 1996 (MHPA), and the Women's Health and Cancer Rights Act of 1998 (WHCRA). Each law provides new federal protections in the realm of health care benefits.

In FY 2001, PWBA initiated a special project focusing on health disclosure and claims

issues (the HDCI project). The HDCI project was initiated to establish a statistically valid baseline of compliance with the new requirements under Part 7 of ERISA. During this project, PWBA regional offices conducted nearly 1,300 investigations. The results of these cases are still being analyzed, but when completed we will have a clearer picture of the state of overall compliance with these new laws and specific information about areas that will need special enforcement and compliance assistance attention. Overall, when violations were detected as part of the HDCI project, PWBA investigators were generally able to secure voluntary compliance with the law through their compliance assistance efforts with plan administrators, insurance companies, and other relevant entities. In addition to ensuring corrections on behalf of individual participants and plans, PWBA has had a broader impact on the industry itself by causing large, third party institutions to modify their contracts or plan documents for all of their clients, thus positively affecting numerous plans which were not the original subject of a PWBA investigation.

Complex Cases

Labor intensive cases that involve complex facts and sophisticated transactions have been and will continue to be an important part of PWBA's investigation program, challenging the technical and managerial skills of PWBA staff. Cases involving complex issues such as those surrounding investments in employer securities are becoming more common. Cases dealing with sophisticated investments by multi-employer plans also are particularly challenging and require major resource commitments.

Examples of some of our more complex cases include:

Enron Corporation

PWBA's Dallas region opened its investigation of Enron Corporation's employee benefits plans on November 16, 2001, prior to bankruptcy filing based on information reported in the media concerning financial difficulties of the company. The Department also teamed up with the Texas Workforce Commission to help workers who were laid off in the wake of Enron's sudden December 2, 2001 bankruptcy. PWBA is currently examining Enron's employee benefits plans to determine if there have been any violations of ERISA in connection with the plans' investments in Enron stock. On February 12, 2002, the Secretary announced that the Department succeeded in negotiating an agreement to appoint an independent fiduciary, State Street Global Investors, to replace the Enron Corporation's Administrative Committees, whose members were Enron officials and served as fiduciaries of the company's three retirement plans. The investigation, which was opened under the REACT program, is continuing.

On August 30, 2002, Secretary Chao filed a "friend of the court" brief in federal district court in Houston, arguing that the court

should not dismiss a private class action lawsuit filed by current and former Enron employees. The private lawsuit contends that Enron and a number of its senior officials and others violated ERISA in failing to protect their retirement plans, which were heavily invested in Enron stock, from the loss of millions of dollars when the company collapsed last year.

Without prejudging the facts (which are still in dispute), the Secretary's brief makes a number of important legal points: (1) fiduciaries responsible for monitoring the Administrative Committee, which had direct responsibility for protecting the plans' assets, have a duty under ERISA to ensure that the Administrative Committee was properly performing its duties, and that it had the tools and the information necessary to do so; (2) fiduciaries may not deceive plan participants or allow others to do so, and thus have the obligation to take appropriate action to protect plan assets where financial misstatements threaten the kind of injury at issue in the Enron case, which may include investigating, disclosing the true facts, and stopping further investment in company stock, as prudence would dictate; (3) even if the fiduciaries had "inside information" about the true value and vulnerability of the company stock, nothing in the federal securities laws would have prevented them from taking some action as ERISA fiduciaries to protect the plans, which could have included a public disclosure of the true facts, a decision to suspend further purchases of the stock, or a disclosure to the appropriate regulatory agencies; (4) fiduciaries have an obligation to ensure that investments in employer stock, whether in a 401(k) plan or an Employee Stock Option Plan, are prudent, notwithstanding plan provisions that contemplate or favor such investments in employer stock; (5) directed trustees cannot follow directions that they know or, because of "red flags," should know are imprudent or otherwise violate ERISA; (6) the participants may recover monetary relief if they can prove that the fiduciaries breached their duties with regard to a cash balance plan; and (7) even if it is a non-fiduciary, a service provider, including an accounting firm, may be liable for equitable relief if it knowingly participated in the fiduciary breaches of others.

Capital Consultants and Related Litigation

PWBA has conducted both civil and criminal investigations of Capital Consultants, LLC ("CCL"). The Secretary filed a civil suit on September 2000 against CCL, an Oregon investment management firm that served more than 60 ERISA plans in the Pacific Northwest, most of which are union-sponsored. The ERISA violations arise from CCL's investment of plan assets in a

series of imprudent loans. Estimated losses to CCL's clients total as much as $500 million, with ERISA plans losing at least $285 million. The Secretary reached agreement on an order appointing a receiver who, to date, has recovered $149 million.

In addition, settlements totaling $112.85 million have been reached in private litigation, resolving claims brought by the court-appointed receiver, trustees of ERISA plans and other investors against parties which provided services to or had business relationships with Capital Consultants. Defendants have agreed to pay an additional $15.8 million in private litigation against the trustees of certain ERISA plans.

The Secretary filed suit in April 2002 against the trustees of ten union-sponsored ERISA plans that were among Capital Consultant's larger plan clients. They are: the Oregon Laborers-Employers Defined Contribution and 401(k) Plan, its Health and Welfare Plan, and its Pension Trust Fund (Chao v. Abbott); the Office & Professional Employees International Union Local No. 11, 401(k) Plan and its Health & Welfare Plan (Chao v. Kirkland); the Idaho Signatory Employers-Laborers Pension Plan (Chao v. Hazzard); the United Association Union Local 290 Plumber, Steamfitter and Shipfitter Industry Pension Plan (Chao v. Fullman); and the Eighth District Electrical Pension Fund, its Benefit Fund and the Electrical Industry Benefit Vacation and Paid Holiday Fund (Chao v. Legino).

The principal allegation against the trustees is that they violated ERISA's requirement of prudence by authorizing Capital Consultants' investment of plan assets in collateralized mortgage obligations and failing to monitor Capital Consultants' performance of its obligations. The Secretary's cases resulted in consent orders imposing relief that will provide long-term benefits to plan participants and beneficiaries. The consent orders, which have been approved by the court, provide for the resignation of 23 trustees and permanently enjoin 27 trustees (including one who resigned in 1998) from serving as ERISA fiduciaries or service providers. They also provide for plan reforms, including internal controls and procedures relating to plan investments. The Secretary continues to investigate the trustees of other ERISA plans that invested with CCL.

In addition, PWBA and OIG conducted a criminal investigation of Capital Consultants. On April 23, 2002, Jeffrey Grayson pleaded guilty to mail fraud and aiding in the preparation of a false tax return. Grayson was a principal owner of Capital Consultants. Grayson admitted that between 1994 and September

2000 he engaged in a scheme to defray Capital Consultant's clients, mostly union pension plans and benefit plans. Grayson admitted to receiving financial benefits in connection with loans to Wilshire Credit Corporation (WCC). Between 1994 and 1998, Grayson caused Capital Consultants to loan approximately $160,000,000 to WCC.

In another aspect of this investigation, Grayson admitted to advising and aiding John Abbot, a union trustee, in the filing of a false 1997 individual federal income tax return. Abbot falsified his return by failing to disclose approximately $76,000 of gratuities received from Grayson in 1997. Abbot served as trustee of the Idaho Laborer's Pension Plan, Oregon Laborer's Defined Benefit Plan, Oregon Laborer's Defined Contribution Plan and Oregon Laborer's Health and Welfare Plan. Between 1990 and 1998, Grayson secretly paid Abbott approximately $200,000 for his continued influence and access to the union investment boards. Abbot pleaded guilty in February 2001 to receipt of gratuities, and to filing a false tax return for failing to report the gratuity income. He was sentenced to 15 months imprisonment. Two other union trustees pleaded guilty to charges that thy caused false reports to be filed on behalf of the union funds.

Most recently additional indictments were returned in the on-going criminal investigation involving Capital Consultants. On August 21, 2002, Dean Kirkland, Gary Kirkland and Robert Legino were charged in a 41-count indictment on charged relating to the giving and receiving of gratuities in connection with the administration of employee pension benefit plans and welfare benefit plans.

Dean Kirkland was the principal salesperson for the employee benefit plans of Capital Consultants. Gary Kirkland, father of Dean Kirkland, was a trustee of three plan: the 401(k) Retirement Fund of the Office of Professional Employee International Union ("OPEIU"), Local 11; the Western States Local Union Trust Fund of the OPEIU; and the Western States Pension Trust, until earlier this year. Robert Legino, until 2000, was a trustee for the International Brotherhood of Electrical Workers ("IBEW") Eighth District Electrical Pension Fund; The IBEW Eight District Electrical Pension Fund Annuity Plan; and the Electrical Industry Benefit Vacation and Paid Holiday Fund. All three have entered not guilty pleas to the August 21 charges.

Carmelo Sita

U.S. v. Sita: An example of PWBA's criminal investigation of a

union sponsored plan is our investigation of Carmelo Sita, executive manager of the Hudson County District Council of Laborers benefit funds. A 59-count indictment was returned December 10, 2001 charging Sita with conspiracy, employee benefit plan embezzlement, health care fraud and making or causing false records in documents required to be kept by ERISA. Sita allegedly embezzled more than $2 million from the funds. Sita was also charged with embezzlement of the union's general fund. In addition, if convicted, Sita will be subject to criminal forfeiture of any and all property derived from the proceeds obtained as a result of violating the health care embezzlement statute.

During the period of the alleged violations, Sita served as the business manager and secretary treasurer for the Hudson County District Council of Laborers # 16 (Union), headquartered in Jersey City, New Jersey. District 16 is council of local unions of the International Laborers Union of North America (LIUNA) consisting of Locals 21, 31, 202 and 325, all located in New Jersey. Sita also served as the Executive Manager for the fringe benefit plans sponsored by the union. The union represents construction laborers employed by companies operating in New Jersey. There are approximately 2,000 union members.

Prosecution is ongoing. The PWBA's New York Regional Office, the DOL's OIG and the FBI jointly investigated this case with significant assistance provided by PWBA's Chief Accountant.

Reporting and Disclosure Enforcement

PWBA's Office of the Chief Accountant (OCA) is responsible for enforcing ERISA's reporting and disclosure provisions. PWBA has developed a set of traditional and voluntary enforcement initiatives involving civil penalties imposed against plan administrators for their failure to submit timely, complete, and accurate Form 5500 Series annual reports with the Department.

PWBA has established core enforcement programs that target deficient and non-filers. Deficient filers are identified and selected from the ERISA Form 5500 Database. Non-filers usually are identified through referrals from other PWBA offices, the Internal Revenue Service, or computer targeting. Late filers are identified in large part through computer targeting.

In FY 2002, PWBA investigated 916 Deficient Filer cases, assessing $1,414,100 in penalties. In FY 2001, there were 98 non-filer cases opened, with PWBA assessing $6,724,800 in penalties. Also, six late filer cases were opened, assessing $99,600.

PWBA maintains an ongoing quality review program for employee benefit plan audits.

This program involves a random selection of plan audits that are reviewed to ensure that the level and quality of audit work performed supports the opinion rendered by the Independent Qualified Public Accountant (IQPA) on the plan's financial statements and that such work is adequately documented in the IQPA's work papers as required by established professional standards. For FY 2002, PWBA performed 82 on-site reviews and analysis of audit workpapers, which support the accountant's report. In FY 2003, we plan to conduct a comprehensive review of employee benefit plan audits. Once the review is finished, we should have a much clearer picture of the baseline measures of how plan audits comply with applicable professional standards.

Participant Assistance & Outreach

In addition to our investigators, PWBA has 108 dedicated staff who serve as Benefits Advisors to assist participants and beneficiaries who are experiencing a problem with an employee benefit plan. This program has proven to be very effective in resolving individual participant benefit disputes. Since 1995, Congress has approved incremental increases in PWBA's number of Benefits Advisor FTE from 24 to 108 nationwide. As a result, we have been able to reach more participants and provide more hands-on assistance. Since 1995 the volume of inquiries handled by the Benefits Advisors has increased nearly 80%. Last year alone, Benefits Advisors handled over 170,000 inquiries and we expect to handle well over 180,000 in 2002.

Last year our Benefits Advisors recovered over $64 million in benefits on behalf of participants and beneficiaries through informal resolution of individual complaints. This represents an increase of over 400% in the amount of annual dollar recoveries since 1995. Over $250 million has been recovered in benefit payments by the Benefits Advisors during the last six years. Although our Benefits Advisors handle the full range of employee benefit inquiries, the vast majority of monetary recoveries involve pension benefits. While the Benefits Advisors have been very successful in assisting individuals in restoring health benefit coverage that had been denied, through enrollment in COBRA or reinstatement in their employer's plan, unless there were unpaid medical bills involved, these type of recoveries can not be quantified in dollars.

It is important to note that our Benefits Advisors recover benefits on behalf of participants and beneficiaries as part of an informal resolution process. They are often able to resolve disputes and obtain promised benefits on behalf of a participant or beneficiary by explaining the requirements of ERISA to a plan administrator or other responsible party. Other times they serve as an independent source of reliable information about ERISA by answering questions posed by plan sponsors, plan administrators, and service providers to plans.

While Benefit Advisors seek the informal resolution of benefit disputes, if they become aware that repeated complaints have been made with respect to a particular plan, or when there is information indicating a suspected fiduciary breach, the matter is referred to the Office of Enforcement for investigation. Last year, 1,251 investigations were opened as a result of referrals from Benefits Advisors, which accounts for 25 percent of the 4,862 cases opened. During the same period, a recovery of nearly $111 million in benefits to

participants resulted from these investigations. Close coordination between Benefits Advisors and investigative staff enhances PWBA's ability to resolve benefit disputes.

PWBA's outreach and education activities include a nationwide effort to assist workers facing job loss. Plant and business closings, downsizings and reductions in hours affect employees in numerous adverse ways, including impacting their retirement benefits. Assisting dislocated workers is an agency priority that PWBA accomplishes through coordinated activities, including:

· Participating in nationwide outreach activities, including rapid response activities to assist workers at their employer's facility or in their community by providing answers to questions and distributing PWBA's publications. In the first three quarters of FY 2002, PWBA participated in over 693 sessions, reaching over 32,000 workers.

· Assisting employers by providing information and answering questions in advance of plant closings.

· Developing and issuing publications addressing the issues facing dislocated workers in English and Spanish which are available free of charge.

· Providing "train-the-trainer" sessions for state agencies and other officials involved in assisting unemployed workers including congressional staff in district offices.

To make it easier for workers and employers to reach PWBA, on February 12,

2001, Secretary Chao announced the activation of a new toll free participant assistance and compliance assistance number, 1-866-275-7922 (1-866-ASKPWBA). The toll free number is equipped to accommodate English, Spanish and Mandarin speaking individuals. In addition the Benefits Advisors have access to a contracted service that can interpret more than 140 different languages.

Participants, beneficiaries, plan sponsors and service providers who call this number are automatically linked to a Benefits Advisor servicing the area from which they are calling. Use of this toll free number will mean that persons with questions about pensions or health benefits will quickly be in contact with a Benefits Advisor who can answer their question.

In addition, PWBA has improved its Internet abilities to accept complaints and inquiries electronically. The new website, www.askpwba.dol.gov, was launched on Labor Day, 2001, and has handled over 2,300 electronic inquiries on a wide range of ERISA issues since its inception. Use of the Internet has improved our ability to swiftly communicate with our customers.

In addition to these technology-based activities, PWBA is actively engaged in more traditional public outreach efforts. PWBA now has over 45 publications available free of charge through the toll-free number and the agency website to assist workers and employers in understanding the federal retirement and health benefits law. Last year, PWBA distributed 1.1 million copies of these brochures to participants, beneficiaries, plan sponsors and other interested parties. Other activities, ranging from publishing contact information about our Field Offices in local phone books to the placement of public service announcements in local media, are all intended to help workers know who we are and how to contact us.

PWBA frequently hears from participants that we have been able to assist. Some examples are provided below:

A women from Draper, Utah wrote a word of thanks to the San Francisco Regional Office and Benefits Advisor, Greg Wilson for assistance she received in obtaining a continuation of benefits from her former employer's health plan:

"I had to write to tell you this because this is actually the very first time I have ever been able to even get through to a federal agency of any kind, never mind actually talking to a real person who had my interests at heart. I have felt terrible distanced from my national government because of the immense bureaucracy... And thank you, too, for making your department accessible and service-oriented to your customers."

A participant from Nashville, Tennessee wrote the following:

"[Benefits Advisor] Gotschall's intervention on our behalf was invaluable in resolving a $20,000 dispute we were having with the fiduciary of a 401K plan from my former employer....We are very thankful to Ms. Gotschall and to the Department of Labor for being our advocate and helping us get to a successful conclusion."

A participant from Fairfield, California wrote Secretary Chao in March 2002 and stated the following:

"Just a note to thank you for the excellent and effective assistance that I received from your Benefits Advisor, Beryl Neurman. I had just lost my employment due to disability and was left without health insurance and in excess of $30,000 in medical bills. Beryl made a few calls for me and everything cleared up in a few days. The bills were paid; my COBRA came through and even my health has improved. I was worried sick about not being able to get treatment without a health plan."

A participant from Mt. Vernon, New York wrote Secretary Chao and stated the following:

"I would like to express my thanks and gratitude to the U.S. Department of Labor for helping me retain my retirement benefits. . . . Jose Castillo of the New York Office responded. . . .On March of 2000, I received my initial benefit and in September 2001 I finally received the balance. Then the disaster came but I was very thankful to hear from him that he was able to get out of the building and was safe. Please give him the recognition he deserves for working on my behalf in a professional and caring manner."

A participant from Horsham, Pennsylvania wrote Benefits Advisor, Pam Wilson, pleased with the assistance she received when she was unable to locate her former employer or any principle of her pension plan:

"I am very grateful for your efforts on my behalf, and I commend your persistence in solving this problem which has lasted for so many, many years."

A participant from North Wales, Pennsylvania wrote to the Director of our San Francisco Regional Office in praise of Benefits Advisor Katherine Era:

"My family tried to wrestle with the large insurance industry and an old employer with no resolve. Then came in Ms Era. . . . We are so glad that your government agency has Katherine and we hope there are more just like her. I once told Katherine if she ran for Governor of California, that we would vote for her."

A participant from Edison, New Jersey wrote to New York Benefits Advisor Toni O'Reilly who assisted her in getting payment for $47,993.91 in outstanding medical claims:

"Without your intervention, I would still be beating my head against the wall trying to get these bills paid. I wanted to thank you from the bottom of my heart. You know how ill I have been throughout this ordeal. I never would have made it without your help. Thanks for being there when I needed you."

These testimonials demonstrate that PWBA is effectively assisting plan participants and they are the reason we strongly oppose legislative proposals that would create a separate Office of Pension Participant Advocacy within the Department of Labor. The President' Budget Proposal for FY 2003 requests $117 million for PWBA. The enhancement is intended for our enforcement program. The Senate Appropriations Committee would

divert $3 million from our budget request to fund this duplicative office. The creation of this office would harm participants by siphoning off resources that are needed to support enforcement efforts and assistance and outreach services to participants and beneficiaries. This proposal would duplicate services already being provided by the agency, but without the existing experience and expertise in providing participant and beneficiary assistance that PWBA has developed over the years.

This legislation would hamper PWBA's existing enforcement structure by separating our most effective source of investigations from the field office structure. Further, there would be confusion as to whom participants should contact for assistance and information. This proposal in unnecessary and harmful to our ongoing enforcement and participant assistance program.

Compliance Assistance & Outreach

Enforcement actions will always be a cornerstone of our mission to assure benefit security. However, a cooperative approach that encourages the regulated community to comply with the law in the first instance is also a critical component of our enforcement program. Compliance assistance is directed to the vast majority of the regulated community that is law-abiding and wants to do the right thing. It is an important part of our mission to assist them in complying with the law. In this regard, we have initiated a number of assistance programs. These efforts will foster compliance with the law and protect participants and beneficiaries from losses.

On March 15, 2000, PWBA published in the *Federal Register* an innovative interim program, the Voluntary Fiduciary Correction (VFC) Program. Under the VFC Program, plan officials who have identified certain violations of part 4 of Title I of ERISA may take corrective action to remedy the breaches and voluntarily report the violations to PWBA, without becoming the subject of a PWBA enforcement action. This program was expanded and improved, effective April 29, 2002, when PWBA published the final VFC Program. The expanded VFC Program provides significant additional incentives for fiduciaries and others to correct certain ERISA violations, by offering excise tax relief in the form of a class exemption for certain transactions and limiting the requirement for a general notice. In addition, another transaction was added to the program, bringing the number of transactions for which relief may be granted to 14, and the documentation requirements were streamlined. The added incentives in the final VFC Program will encourage more participation in the program. PWBA will continue to update and expand the VFC Program as appropriate.

The Delinquent Filer Voluntary Compliance Program (DFVC) provides plan administrators the opportunity to file delinquent Form 5500 filings at greatly reduced civil penalty amounts. This program gives plan administrators who have become aware of their failure to make the necessary Form 5500 filings the opportunity to make such filings without incurring significant penalties. In March 2002, the DFVC program was revised, further reducing the penalties with the introduction of a per plan cap. The revisions capped the maximum per plan penalty at $4,000 for large plans and at $1,500 for small plans. Penalties for small plans sponsored by non-profit 501(c)(3) organizations are capped at

$750. The former penalty structure had no maximum amount. During the first six months of the revised program, over 2,500 filings have been received, compared to just 1,400 during the same period in 2001. The response to these changes has been overwhelmingly positive.

To assist sponsors of pension and health plans with questions related to their annual report filings, PWBA has established a toll-free help line. This "help desk," which is staffed by both PWBA staff and contractors, provides the approximately 1.2 million pension and health plan filers with an opportunity to have their Form 5500 filing questions answered expeditiously. It also helps filers to quickly determine how they should correct filings that have failed the Department's processing edit tests. PWBA's dedicated EFAST website is continuously updated to provide the latest information for filers on the Form 5500 and electronic processing, instructions for filing, frequently asked questions and a calendar of outreach events we are sponsoring and/or participating in around the country. The website also contains a number of educational materials that were created to assist Form 5500 filers, including the recently released updated Troubleshooter's Guide to assist with frequently asked questions about filing. A companion 15-minute videotape was disseminated to the plan community highlighting the components of the new filing requirements.

PWBA also engages in various outreach and assistance activities to provide employers, especially small employers, service providers, and other employee benefits professionals information to assist them in compliance with ERISA and related regulations.

Over the last two years, through the Agency's Health Benefits Education Campaign, PWBA has conducted compliance assistance seminars, in conjunction with various State Insurance Commissioners around the country, on HIPAA and other related health benefits laws. The target audience for these conferences is small to mid-size employers who are currently offering health insurance to their employees, third party administrators and insurers. Conferences have been held in New York, Louisiana, Los Angeles, Ohio, Florida, Kansas, and Arizona and are scheduled in Vermont, Washington, DC, Nebraska and Arkansas. These workshops have been well received based on the positive feedback that PWBA has received.

In conjunction with these outreach conferences, PWBA has created a compliance assistance guide to HIPAA and new compliance assistance tools to assist employers, third party administrators and insurers in identifying common mistakes and tips on how to comply with HIPAA and other health laws.

PWBA, PBGC and the Internal Revenue Service are working together to develop a compact disk (CD) to help small employers set up and operate pension and health plans consistent with the requirements of ERISA and related health laws. The CD, which is scheduled for release early next fiscal year, will highlight the voluntary compliance programs offered by each of the agencies. The agencies are partnering in outreach as well to highlight these new materials and provide a one-stop approach to assisting small employers with their questions about retirement plans. This summer PWBA joined the IRS in six IRS-sponsored conferences for small employers.

As mentioned earlier, Secretary Chao recently wrote to over 80 small business leaders and associations providing some simple tips entitled "How to Protect Your Employees When Purchasing Health Insurance." The tips assist small businesses in avoiding scams when selecting health care providers by doing such things as comparing coverage and costs, checking with state insurance commissioners, and asking for references of other employers enrolled with a health provider.

As part of its ongoing Retirement Savings Education Campaign, PWBA, the Small Business Administration, Merrill Lynch and the Chamber of Commerce jointly developed the website www.selectaretirementplan.org. The website helps small business owners to select the best retirement plan for their business. Development of the website is the result of a unique public/private partnership to reach small business owners with information on the basics for providing retirement plan coverage for their employees.

PWBA also participates in a variety of conferences each year sponsored by organizations such as the American Institute of Certified Public Accountants, the American Bar Association, the Southeastern & Western Pension Conferences, Workers in Employee Benefits, the International Foundation of Employee Benefit Plans, American Benefits Council, American Society of Pension Actuaries, ERISA Industry Committee, the Consumer Federation of America and others to update plan officials and practitioners about recent developments in the employee benefits area.

Conclusion

Through its enforcement of ERISA, PWBA is responsible for ensuring the integrity and fairness of the private employee benefit plan system in the United States, a mission we take very seriously. Recoveries from enforcement efforts for all investigations in 2001 resulted in total monetary recoveries of $652.4 million consisting of nearly $330 million in prohibited transactions corrected, $139 in plan assets restored, and $114 million in future losses. In addition, our Benefits Advisors recovered another $64 million in benefit payments for participants as a result of our informal resolution of individual disputes. As transactions become more sophisticated and complex, we are committed to providing the most effective technical and human capital resources needed to protect American workers and their families.

An increasingly important part of our efforts is our initiative to provide compliance assistance. When we are successful in increasing voluntary compliance, violations are avoided altogether or corrected with plan participants and beneficiaries being made whole. We will continue to emphasize compliance assistance, but recognize that a strong enforcement program is necessary to protect workers from abusive practices and to ensure that all plan sponsors, employers and unions, pay attention to their obligations under ERISA. We will not hesitate to use all the tools at our disposal to enhance the health benefits and retirement security of American workers.

APPENDIX C – WRITTEN STATEMENT OF STEPHEN J. COSSU, DEPUTY INSPECTOR GENERAL, OFFICE OF LABOR RACKETEERING AND FRAUD INVESTIGATIONS, OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C.

Testimony of Mr. Stephen J. Cossu

Deputy Inspector General, Office of Labor Racketeering and Fraud Investigations
Office of Inspector General, U.S. Department of Labor

September 10, 2002

Good morning, Mr. Chairman and Members of the Subcommittee. Thank you for inviting me to testify today on the U.S Department of Labor Office of Inspector General's (OIG) labor racketeering program, and in particular on our investigative activities in the pension arena.

The OIG's Labor Racketeering Program

The OIG, an independent agency within the Department, is responsible for conducting audits, investigations, and evaluations of departmental programs and operations; identifying potential problems or abuses; developing and making recommendations for corrective action; and referring cases for prosecution. The OIG at Labor is unique in that it is also responsible for carrying out a criminal investigations program to combat the influence of organized crime and labor racketeering in the workplace. In conjunction with this responsibility, we are active participants in the Justice Department's Organized Crime Program.

Labor racketeering is the infiltration, domination, and use of a union or employee benefit plan for personal benefit by illegal, violent, or fraudulent means. Organized crime is defined as activities carried out by groups with a formalized structure whose primary objective is to obtain money through illegal activities. Traditionally, organized crime has been carried out by *La Cosa Nostra* (LCN) groups, also known as the "mob" or "mafia." However, new organized crime groups are emerging and organizing, such as Asian, Russian, Eastern European, Nigerian, and West African groups.

The OIG conducts labor racketeering criminal investigations in three general areas: 1) employee benefit plans; 2) labor-management relations; and 3) internal union affairs.

Currently, we have 356 pending labor racketeering investigations.

Traditional organized crime entities that employ the use of "strong arm" tactics and intimidation as well as "new generation" racketeers who make use of sophisticated financial schemes, also are investigated by the OIG. However, top priority is given to organized crime influence of labor unions and/or employee benefit plans. Our investigations have shown that the vast sums of money in these plans remain vulnerable to corrupt union officials and organized crime influence. Priority is also given to cases in which a position of trust (e.g. plan trustee, third-party administrator, or union official) is

used for criminal purposes, as illustrated in Figure 2. Service providers to union pension and benefit plans continue to be a strong focus of the OIG's investigations because the large amounts of money associated with these plans make them vulnerable to fraud and corruption.

There is some jurisdictional overlap with the Pension and Welfare Benefits Administration (PWBA) regarding employee benefit plans. However, while PWBA conducts both civil and criminal investigations, its focus has predominantly been on civil cases distributed across the single and multi-employer plan universe. The OIG's focus has been on criminal investigations in the multi-employer plan universe, which is substantially composed of union-sponsored, jointly-administered plans. This arrangement has allowed each agency to utilize its particular expertise, resulting in a working relationship that has been beneficial and productive in the investigative arena. It should be noted that in recent times, we have been invited into a number of single employer plan investigations by prosecutors and other investigative agencies, including PWBA, because of our demonstrated investigative expertise in this area.

The OIG has conducted numerous criminal pension investigations over the years with impressive results. For example, during the latest 5-year period, our benefit plan investigations, which include both pension and health care plans, have resulted in 253 indictments; 237 convictions; and over $271 million in criminal, civil, and administrative fines, restitutions, and recoveries. Currently, we are conducting investigations into pension plan improprieties involving plans with nearly $1 billion in total assets suspected to be at risk.

The OIG's Pension Initiative

Mr. Chairman, according to the latest PWBA figures, there are over 3000 multi-employer plans with over $379 billion in assets and growing. Given the size of this universe and recognizing a growing problem, the OIG has, since 1996, been engaged in a nationwide initiative designed to combat abuses of pension plan assets. This initiative was in response to an increase in private sector plans that were subject to abuse, as well as a proliferation of "white collar" crime in the pension arena dealing in investment activities. At that time, there was no coordinated effort by law enforcement agencies to address the effect organized crime had in this area. Building on the Attorney General's Pension Abuse Initiative in 1997, which sought to increase criminal enforcement and enhance coordination among federal agencies to combat pension abuse, we felt there was a need for a proactive examination of LCN-controlled and influenced union pension plans, and the service providers supporting them.

Our goal relative to the pension initiative was to focus our investigations on pension investment service providers, paying particular attention on the "Big Four" unions identified in the 1986 President's Commission on Organized Crime report (Teamsters, Laborers, Hotel Employees, and Longshoremen International Unions) as being organized crime-controlled, as well as other unions historically under the influence of organized crime. Our objectives were: 1) to coordinate with outside agencies to target criminal activity within the pension investment arena; 2) to utilize the support of the Department of

Justice for the successful implementation of a taskforce investigative program; and 3) to identify and promote legislative change within ERISA to deal with deficiencies regarding service providers.

The strategy behind our pension initiative was twofold. One was to develop targeting profiles that would surface program weaknesses, corrupt union and plan participants, and service providers involved in pension investment criminal activity. The other was to develop an integrated plan with outside agencies, delineating program responsibility to ensure the exchange of necessary information, training of personnel, and the deployment of resources. We have seen significant results and an impressive return-on-investment as a result of this initiative and, as resources permit, we plan to increase our casework in this area.

Our casework has shown that pension fraud schemes involving union officials/plan trustees have some common elements to them, with some variation. Typically, a corrupt union official/pension plan trustee will approve the investment of pension monies through investment service providers who may be associated with organized crime-associates, who in turn may be exerting influence over the pension plan. In exchange for transferring money, service providers will provide kickbacks from fees generated from servicing the plan to the plan trustee or organized crime associate. Figure 3 provides a quick overview of how such a scheme often operates.

OIG Pension Investigations

Mr. Chairman, our investigations have shown that the billions of dollars in assets in multi-employer, union-sponsored benefit plans remain vulnerable to corrupt union officials and service providers, as well as to organized crime elements. Such plans are especially vulnerable because abuses by service providers have the potential for substantial dollar losses since they can affect more than one plan, management of the plans is often concentrated in only a few individuals, and plan trustees are often appointed because of their position rather than their financial expertise. Multi-employer plan investigations compose the vast majority of our pension-related casework.

Teamsters Local Union 875

For example, a case investigated in conjunction with the FBI, became the lead case in the Attorney General's Pension Abuse Initiative announced in 1997, as well as the cornerstone of our own pension initiative outlined earlier. In this case, two investment brokers for Infinity Investment Group were sentenced for their role in the loss of $9.3 million from the pension fund of Teamsters Local Union 875 in Queens, New York. The investigation revealed that a Local 875 fund attorney induced the fund to divert pension assets to high-risk offshore investments in exchange for kickbacks from the two investment brokers. As a result, $9.3 million (roughly one-quarter) from the fund's total assets of $40 million were transferred into a third-party account and subsequently embezzled by the defendants and others. Those funds, unfortunately, were never recovered.

Capital Consultants, Inc.

In one of the largest pension frauds of all time, Capital Consultants, Inc. (CCI), a Portland, Oregon, investment-management company, bilked dozens of union pension funds of hundreds of millions of dollars. Before CCI's collapse in September 2000, the company invested pension and other funds in high-risk private investments and then covered up losses from these investments with new investment funds. At the time CCI was placed into receivership by PWBA and the SEC in parallel civil actions, it had over $900 million under its management. In May, a partial multi-million dollar settlement was reached between dozens of union pension and benefit trusts with 11 parties.

The OIG was actively involved in a joint criminal investigation with other federal criminal law enforcement agencies, including PWBA, of CCI's activities to defraud their clients, including many union plans. The criminal investigation uncovered a complex scheme in which a former Laborers' union business manager retained CCI to make investments for the union's pension, health, and vacation plans. In return, the manager received secret cash payments. Plea agreements were reached with Barclay Grayson, CCI's president; Jeffrey Grayson, Barclay's father and former CEO and founder of CCI; and John Abbott, former Laborers' union business manager.

In the most recent developments surrounding the CCI scandal, two union pension fund trustees and a former CCI salesman were indicted on 40 counts charging that they gave and received illegal payoffs in connection with the administration of two union pension plans. Additionally, two union trustees have pled guilty to filing false reports regarding gifts received from CCI. The investigation into CCI is ongoing.

Todd LaScola

In another joint investigation with PWBA, Todd LaScola, an investment manager and president of CPI Financial Services in Rhode Island, pled guilty in February 2001 to mail fraud and wire fraud charges for embezzling over $6 million from clients to replace losses suffered by the pension fund of the International Brotherhood of Electrical Workers (IBEW) Local 99. Following IBEW's hiring of CPI to manage its $16 million pension fund in 1996, LaScola placed over $6 million of the fund into risky, unauthorized investments for which he received $242,000 in illegal commissions that he did not report to IBEW. When IBEW learned of the prohibited investment and demanded the return of the $6 million, LaScola illegally transferred $6 million from other individual client accounts to the IBEW pension fund account. In May 2001, LaScola was sentenced to 8 years in prison and 3 years' probation, and was ordered to pay over $8 million in restitution for defrauding investors, workers, and IBEW Local 99 of pension funds.

East/West Institutional Services

Finally, in another case worked in conjunction with PWBA, William Close, a trustee for the funds of the International Brotherhood of Teamsters (IBT) Locals 710 and 701 in Chicago, Illinois, pled guilty to charges of receiving kickbacks, money laundering, and aiding and abetting. Close accepted nearly $1 million in payoffs through a money laundering scheme that was conducted in the Cayman Islands, Great Britain, and the Isle of Man from 1994-1997. In return for the payoffs, Close and a now-deceased associate

used their positions as trustees to select investment advisors who would direct pension fund trades for the benefit of East/West Institutional Services (EWIS), a brokerage firm in Harper Woods, Michigan.

In addition, the owners of EWIS were indicted in 2000 on charges of paying kickbacks to Close and of Racketeer Influenced and Corrupt Organizations (RICO) conspiracy, including international money laundering, witness tampering, interstate and foreign travel in aid of racketeering, and extortion allegations concerning threats of physical violence. Plea agreements were recently reached.

Future Investigations in the Pension Arena

Mr. Chairman, it is our intention to build on the success of our pension initiative and increase our presence in the pension arena on a number of fronts as resources permit. From an investigative perspective, we plan to be even more proactive in our effort to combat labor racketeering relative to pension plan corruption and organized crime, or corruption affecting industries, unions, and boardrooms. The industry portion of our effort will focus on corruption in those industries that traditionally have been most vulnerable to the penetration of organized crime influence and labor racketeering, such as the construction, surface transportation, maritime, garment manufacturing, motion picture production, and gambling and hotel services industries. The union leadership portion of this effort will focus on labor racketeering carried out by high-level officials affecting labor unions, benefit plans, and service providers. Areas of concentration would include embezzlement from pension and welfare plans, and kickbacks from union vendors and service providers to union boardrooms. Finally, the OIG also plans to expand its investigative probe of pension plan service providers controlled or influenced by organized crime, or retained by pension plans that have a history of corruption.

Our work in these areas will contribute toward reducing the cost that corruption has on union members, employers, and the public through lost wages and benefits, diminished competitive business opportunities, and increased prices for goods and services. The Justice Department supports our effort and have asked us to work even more closely in partnership with them than we have on labor racketeering and organized crime cases, given the FBI's new focus on anti-terrorism in the wake of September 11th and our expertise in the pension area.

Recommendations for Further Safeguarding Pension Assets

Mr. Chairman, based on the work we have done in the pension arena, there are several recommendations Congress may wish to consider that we believe would further safeguard pension assets. Some of these recommendations include:

· <u>Strengthen and make more consistent the criminal penalties in Title 18 of the U.S. Code to better protect employee pension plans subject to ERISA</u>

Statutes under Title 18 prohibit the embezzlement or theft from

employee pension and welfare plans (18 USC 664), the making of false statements and concealing of facts in documents required by ERISA (18 USC 1027), and the giving or acceptance of bribes or graft payments in connection with the operation of employee pension or welfare benefit plans covered by ERISA (18 USC 1954). These statutes are the primary criminal enforcement tools for protecting the millions of plans under ERISA and their assets. Currently, 664 and 1027 violations are subject to 5 years' imprisonment, while 1954 violations are subject to three years' imprisonment. We believe that raising the maximum penalties to ten years for all three violations would serve as a greater deterrent and further protect employee pension plans than what currently exists.

· Require direct reporting of any ERISA violations to the Department

The public accounting profession has a responsibility to be cognizant of potential fraud and other illegal acts in financial statement audits. However, under current law, a plan auditor who finds a potential ERISA violation is not responsible for ensuring that it is reported to the DOL. Therefore, in the interests of plan participants, we recommend that plan administrators or auditors be required to ensure that any potential ERISA violations are promptly reported to the DOL.

Conclusion

Mr. Chairman, the OIG will continue to build on our pension casework by engaging in proactive investigations of union-sponsored plans that are at-risk so that the hard-earned benefits of workers are there when needed. This concludes my prepared statement. I would be pleased to answer any questions that you or other Subcommittee Members may have.

APPENDIX D – WRITTEN STATEMENT OF KAREN FERGUSON, DIRECTOR, PENSION RIGHTS CENTER, WASHINGTON, D.C

Testimony of Ms. Karen Ferguson

Director, Pension Rights Center

September 10, 2002

Mr. Chairman, Congressman Andrews, Members of the Subcommittee, I am Karen Ferguson, Director of the Pension Rights Center. Accompanying me is John Hotz, the Center's Deputy Director. The Center is a 26-year-old consumer organization dedicated to protecting and promoting the pension rights of American workers, retirees and their families.

Over the years, the Labor Department's Pension and Welfare Benefits Administration has worked hard to try to make sure that the trillions of dollars in private retirement assets are well managed, and that individuals receive information about their plans' finances and their rights to benefits. PWBA has also been an invaluable source of statistical information, and produced a variety of helpful publications.

During the past five years, we have been pleased to see that PWBA has gone beyond its original focus of solely focusing on the protection of plan assets, and has significantly expanded its efforts to provide pension information and assistance to plan participants. As recently as 1997, there was only a small 10-person office in Washington to respond to tens of thousands of

queries from employees and retirees. Now there are more than 100 benefit advisors in 15 field offices around the country to help individuals with their pension and health concerns. Since a number of the PWBA field offices coordinate their activities with those of the Administration on Aging's Pension Counseling and Information Project in their area, we see the effectiveness of their activities first-hand. (The Center provides technical assistance and training to the AoA Projects, which provide personalized, hands-on pension advocacy and assistance in 15 states.)

In addition, we have worked with the PWBA on several activities aimed at developing a more comprehensive nationwide pension assistance service delivery system. These include the National Pension Lawyers Network, "PAL," a national pension actuary referral program and, most recently, PensionHelp America, the Center's nationwide pension assistance website. We have attached information about PensionHelp America, which will serve as a single point of entry for employees, retirees and family members with retirement income concerns, at the end of our statement.

From a participants' perspective, the most serious shortcomings in the ERISA enforcement scheme are the result of an accident of history. Specifically, they are traceable to the fact that there is no government agency with a mandate to advocate for the pension policy

concerns of workers and retirees.

Although early versions of the bills that became ERISA included a single agency which had such a focus, these provisions were dropped in favor of a structure in which the Labor Department and the Department of the Treasury shared jurisdiction over most of the law's major provisions. Four years after the enactment of the law, a 1978 Executive Order, known as "Reorganization 4", provided for a division of authority: The Labor Department was assigned responsibility for administering the fiduciary and reporting and disclosure provisions of the law, and the Treasury took over regulation of the minimum standards of the law – those provisions that determine who gets a pension, how much they get, and when and how it is paid.

According to its most recent Annual Report to Congress, PWBA's mission is "to protect the pension, health and other employee benefits of the over 150 million participants in private sector employee benefit plans." Although protection of benefits is undeniably an absolutely critical function, it does not help the many millions of individuals who have no benefits to protect because Congress or the Administrative agencies have not yet acted to afford them the protections they need. Stated differently, there is no reference in the PWBA mission statement to a commitment to promote sound pension policies for participants.

Although the Treasury Department has jurisdiction of all of the law's key benefit provisions, its principal concerns in the pension area are with avoiding tax abuse by making sure that companies comply with existing laws. Its actions are primarily motivated primarily by revenue concerns, not advancing employee interests.

In this regard, pension regulation differs from many other areas of the law. For individuals adversely affected by loopholes in consumer, food and drug, environmental or securities laws, there are agencies that have mandates to review their situation, and determine whether new policies should be addressed to close the loopholes.

As we see it, the absence of a government agency with a mandate to advance participants' pension policy interests, has been ERISA's "fatal flaw" and goes a long way to explaining why our private retirement laws are so frustrating, and often appear so unfair, to employees and their families. We believe that this flaw could easily be addressed by creating a small ombuds-type office within the Labor Department, similar to the Office of Advocacy in the Small Business Administration, which would serve as a voice for employees and retirees within the federal government.

The role of this "Office of Pension Participant Advocacy" would be solely advisory. Its most important function would be identify gaps in the laws, develop reform recommendations, and serve as an advocate for current and prospective pensioners before Congress and the other government agencies.

To illustrate why such an office is necessary: You may recall, a couple of years back when IBM employees came to Washington to ask the federal government to address their concerns about the extensive benefit cutbacks they experienced when their company

switched to an inferior pension plans. They had to go to four different government agencies, PWBA, the Treasury, the EEOC, and the SEC. Each agency had jurisdiction over different aspects of their problem, but none had a mandate to develop a comprehensive solution.

Recently, we heard from a group of employees in upstate New York who were shocked when they were told that their pension benefits would be a small fraction of the amounts they had expected to receive. They went to a field office of PWBA, which did a fine job of contacting the company on their behalf, but then told them that nothing could be done. The sympathetic PWBA benefit advisor told them that although it was an "inequitable result," what had happened to them was the result of the sale of their division, and, nothing could be done.

According to experts we have consulted, the employees may, in fact, have a valid legal claim because of technicalities in their unique case. But their situation raises broad policy issues that urgently need to be addressed, not just for them, but also for tens of thousands of others similarly affected by the rash of mergers and acquisitions in today's turbulent economy. The problem is that there is simply nowhere within the federal government for these employees to go.

An Office of Pension Participant Advocacy would be crucial to helping employees such as these. It could examine their situation, determine whether it reflects a pattern that should be of concern to policymakers, and if so develop and recommend an appropriate solution both within the administration, and to Congress. Such an office would not only benefit these workers, but could also be helpful to your Subcommittee as you develop measures to address other constituent concerns.

APPENDIX E – WRITTEN STATEMENT OF KENNETH BOEHM, CHAIRMAN, NATIONAL LEGAL AND POLICY CENTER, FALLS CHURCH, VA

Testimony of Mr. Ken Boehm

Chairman, National Legal and Policy Center

September 10, 2002

My name is Ken Boehm and I serve as Chairman of the National Legal and Policy Center (NLPC). My legal center sponsors the Organized Labor Accountability Project which publishes Union Corruption Update, a fortnightly newsletter summarizing union corruption news and legal cases. Our database of union corruption case information is available on the web at www.nlpc.org and is used by the public, media, elected officials and union members as an authoritative archive of union corruption cases.

Vulnerability of Union Pension Funds to Corruption

Union pension funds are increasingly vulnerable to corruption. All too many American workers whose retirement security depends on union pension funds have recently found out the hard way that these pensions need greater protection from corruption.

The corruption problems plaguing union pension funds also need to be understood in the context of the explosive growth of pension funds generally. Secretary of Labor Elaine Chao recently testified before Congress that participants in defined contribution plans have grown from nearly 12 million in 1975 to over 58 million in 1998, with a commensurate increase in assets from $74 million in 1975 to $2 trillion in 1998. The size and complexity of the pension system along with the complexity of the legal and regulatory system governing that system make it vulnerable to mistakes, mismanagement and corruption.

The scope of the problem can be understood by examining some of the statistics associated with the issue as well as examining some of the recent prominent cases in which workers lost millions of pension dollars due to corruption.

A March 25, 2002 BNA Daily Labor Report article based on an interview with Department of Labor Inspector General Gordon S. Heddell provides a good idea of the scope of the problem affecting union pension funds. As of March 2002, there were 357 pending labor racketeering investigations under way by the Inspector General. Of those, 39% involved organized crime and of the 357 investigations, 44 percent involve pension and welfare plans. The IG cited a number of cases in which pensions lost funds because of violations of fiduciary duties by plan trustees and stated that investigations of this type involve plan assets of more than $1 billion which are at risk.

The Department of Labor Inspector General used his Annual Report to Congress filed in January 2002 to emphasize his concern:

Another area of concern involves private pension plans, which serve as an attractive target to organized crime elements, corrupt pension plan officials, and individuals who influence the investment activity of pension assets. Labor racketeering investigations of pension plan monies jointly administered by labor union representatives and management representatives (Taft-Hartley plans) have elevated the OIG's concern over the security of the assets in this segment of the pension plan universe.

Of course, statistics alone cannot tell the whole story. Recent major cases underscore even more troubling aspects of the problem.

In the Ullico case, which I review at greater length later in my testimony, an insurance company owned largely by union pension funds secretly allowed members of its board of directors, which included many presidents and top officials of labor unions, to conduct insider stock deals in such a way as to enrich themselves at the expense of the pension funds. More than six-and-a -half million dollars appears to have been pocketed by the labor leaders. A federal grand jury in Washington is currently investigating as is the Department of Labor.

In a recent New York case, the F.B.I. indicted 120 individuals as part of "Operation Uptick," an investigation of organized crime influence on Wall Street. One of the individuals convicted was John M. Black, Jr., an alleged associate of the Luchese crime family. The conviction was for racketeering conspiracy, bribery and fraud charges stemming from a scheme to pay illegal kickbacks to union leaders in order to get union pension fund assets invested in fraudulent investments. The scheme's goal was to get $300 million in union pension funds to the control of a crooked investment adviser.

Recent cases of union corruption, notably embezzlement, have increased to the degree that the New York Times ("Corruption Tests Labor While it Recruits," Jan. 3, 1999) has termed the phenomena "a wave of union corruption." While most cases involve union funds as distinguished from union pension funds, the cases involving pension funds tend to involve larger amounts of money. Much like bank robber Willie Sutton's classic answer to the question as to why he robbed banks ("That's where the money is."), the pension funds represent a rich target for corrupt union officials.

The ever-growing amounts of money in union pension funds combined with the variety of imaginative ways such money can be vulnerable to criminal schemes calls for increased oversight as a deterrent as well a careful effort to eliminate existing weaknesses in the enforcement system.

Union pension funds have been vulnerable to corruption in various ways. Recent losses due to corruption and/or mismanagement illustrate just how vulnerable union pension funds can be:

The Capital Consultants Case: $100 Million in Pension Funds Lost

In a recent Oregon case, more than $100 million in union pension funds was lost. The case focuses on the conduct of a money management firm, Capital Consultants, which

mismanaged huge amounts of union pension funds in what the government has called "Ponzi-like schemes" in which fresh infusions of capital were needed to disguise earlier losses.

Gifts of travel, gratuities, and contracts were used as inducements to union fund trustees to do business with Capital Consultants. One of the Capital Consultants principal owners was indicted for paying over $200,000 to John Abbott, a trustee of the Laborers Union pension fund.

Guidelines restricting risky investments were watered down. For example, the pension fund of the International Brotherhood of Electrical Workers Eighth District in the early 1990's had a $300,000 limit on the amount Capital Consultants could loan to any one borrower in a private placement. In 1996, the trustees changed this limit to 20% of the fund's assets under management by Capital Consultants. And in 1997 the trustees changed the limit to 50%. By 2000, the fund had $46 million under management, most of it in risky private placements.

Other examples of guidelines being ignored were just as egregious. In the case involving the Oregon Laborers-Employers Health and Welfare Trust, the plan called for investments only in readily marketable securities and real estate. Yet during the 1990s, Capital Consultants invested up to 35% of the fund under its management in collateralized notes.

Similarly, the United Association of Plumbers and Pipefitters Local 290's pension plan was repeatedly warned by its outside financial investment monitor about Capital Consultants private placements. Specifically, the trustees were warned of the private placements' low returns and high risks. The monitor characterized Capital Consultants" nontraditional asset portfolio as "drastically underperforming."

Indeed, in five funds administered by Capital Consultants there was a pattern of trustees repeatedly ignoring warnings from outside investment monitors.

Additionally, a multi-million dollar loan, much of it from union pension funds, was made by Capital Consultants to a company linked to a businessman with a long association to late mob financier Meyer Lansky.

The Diplomat Hotel: $800 Million Money Pit for Plumbers Union Pension Fund

The Plumbers and Pipefitters National Pension Fund, which covers 123,000 union members, had never owned a hotel when it purchased the aging Diplomat Hotel in 1997 in Hollywood, Florida for $40 million with plans to renovate it. What went wrong is a virtual laundry list of almost everything that can possibly go wrong with a pension fund investment.

The Department of Labor was kept in the dark as the project quickly spun out of control. A plan for the pension fund to spend $100 million on renovation with investment partners to pay the rest soon became a $250 million budget with no investment partners. The budget grew to $400 million then $600 million and finally to an estimated $800 million.

Investigative journalism pieces in the Sun-Sentinel, ABC-News, and other media pointed to some of the problems:

- it was a beach-front hotel but it had almost no beach
- despite being owned by a construction union pension, the construction was plagued with problems: uneven floors, tilted walls and leaky pipes
- it became the subject of a lengthy Department of Labor investigation
- there were allegations that a big construction contract went to a company with ties to organized crime
- the over-budget, over-deadline construction project quickly approached 20% of the pension fund's investment assets
- Plumbers Union President Marty Maddaloni was found to have illegally taken a $12,000 trip to Italy from a contractor for the hotel's marble - a violation of the Employee Retirement Income Security Act (ERISA)
- an appraisal of the hotel's value found it to be worth $587 million, far short of the $800 million cost to the pension fund
- the Diplomat's incredible cost per room of about $755,000 was about 75% more than construction costs for comparable luxury hotel rooms in South Florida

By any economic yardstick the hotel was a horrible investment.

Indeed, an assessment by an analyst cited by the Sun-Sentinel ("Members Hope There's Room for a Profit; Analysts Express Doubts About Returns," May 14, 2001, page 15A) found that to return a mediocre 5.5 percent interest on the pension fund's money, the hotel would need to earn almost $44 million a year after expenses. One estimate was that the Diplomat would only earn between $15 million and $25 million a year.

The hotel became an issue with the union's members as the project faced increasing cost-overruns and delays. One of the construction firms involved was Structure Tone, a controversial choice because it had pleaded guilty to a felony bribery count in 1998 in New York, paying $10 million to settle charges, in connection with a bid-rigging scheme.

In a March 7, 2002 letter to members, Plumbers Union President Marty Maddaloni wrote that the Department of Labor may take legal action against the trustees of the Plumbers and Pipefitters Pension fund in connection with the Diplomat Hotel project.

The Ullico Insider Stock Scandals

As a result of a series of recent articles in Business Week and The Wall Street Journal, a whole new controversy linked to Global Crossing has arisen. The focus is on Ullico, a privately held insurance company which is owned largely by unions and their pension funds. It was an early major investor in Global Crossing and its directors used the telecom's volatile stock price history to personally enrich themselves at the expense of the union members and retirees whose pension funds own Ullico. Its board of directors is mostly made up of current or former union presidents and includes AFL-CIO head John Sweeney.

The multi-billion dollar Ullico was one of the original investors in Global Crossing, providing $7.6 million to the company in seed money. Global Crossing chairman Gary Winnick was pleased to get the early money and allowed Ullico directors the opportunity to personally buy the Global Crossing stock at IPO prices. This sweetheart stock investment deal allowed some Ullico directors to make millions off the sale of the stock according to labor officials. ("Global Crossing: Labor's Questionable Windfall," by Aaron Bernstein, Business Week, March 14, 2002) The fact that Gary Winnick offered such a lucrative deal to Ullico directors has raised questions as to the integrity of Ullico's investment decision making with respect to Global Crossing as well as with other Ullico investments of pension funds into deals associated with Winnick during the same time period.

Ullico's directors also benefited personally from an arrangement set up in 1997, the same year Ullico made its original investment in Global Crossing, which allowed Ullico to repurchase its stock from shareholders. Departing from a practice of giving Ullico's stock a fixed value of $25 a share, Ullico began changing its share price annually according to a value determined by an accounting review. Insiders knew in advance of the price change whether the stock would go up or down and set up a system that allowed them to buy or sell to lock in a profit. It was the equivalent of investing in the stock market when you knew for sure which way a given stock would go.

In practice, this scheme allowed directors to make virtually guaranteed insider profits.

Here's the way Business Week labor reporter Aaron Bernstein describes how Ullico directors personally profited from the arrangement they approved for themselves:

Fall, 1999 Ullico is losing money on its operations but earns $127 million by selling some Global stock. Insiders knew those gains would lift the annual valuation of UllicoÕs shares from $54 to about $146 when its books closed on Dec. 31.

December 1999 Ullico offers each director the chance to buy 4,000 Ullico shares at the 1998 valuation of $54. The union pension funds that own almost all of Ullico aren't given the same offer, or even told about it.

Dec. 2000/Jan. 2001 Ullico buys back 205,000 of its 7.9 million shares at $146. Stockholders with fewer than 10,000 shares are allowed to sell all their holdings, so officers and directors can take full advantage, but the pension funds can't. Insiders know the decline of Global Crossing's stock puts the true value of Ullico's shares closer to $75.

Dec. 2001/Jan. 2002 Ullico buys back an additional 200,000 shares, allowing officers and directors who hadn't sold before to cash out at $75. Again, insiders know that the further collapse of Global has again cut Ullico's true value, this time to $44.

March 2002 Ullico's pension-fund shareholders now own a less valuable company. Its Global profits have gone disproportionately to officers and directors, some of whom are trustees of the union pension funds that lost out on the deal. ("Global Crossing: Labor's Questionable Windfall," Aaron Bernstein, Business Week, March 14, 2002)

In a follow-up article to the one above, Mr. Bernstein summed up the Ullico controversy by stating, "The labor movement is being roiled by what could be one of its worst scandals in years."

Just blocks from this hearing room, a federal grand jury has been hearing evidence about the Ullico case. Ullico officials have been subpoenaed to describe how board members bought and sold stock in the privately held Ullico.

The U.S. Attorney's office originally came across the Ullico case while conducting a criminal investigation of Mr. Jake West, former head of the ironworkers union. Mr. West, a Ullico director since 1990, has been indicted on federal charges that he embezzled funds from his union. He is currently awaiting trial on the embezzlement charges.

Union leaders have a fiduciary duty to serve the best interests of their members. This duty is found throughout federal labor law. In reaction to the old-fashioned corruption of sweetheart deals in which management paid labor bosses bribes to betray their union, federal law strictly forbids a whole range of corrupt practices:

- Employers may not contribute to union elections
- Employers may not give union officials money or anything of value
- Union officials have a very strict and very broadly construed fiduciary duty to put their responsibility to their members above their own personal interests, especially their financial interests.

Aside from the federal grand jury currently hearing evidence pertaining to possible criminal liability in the Ullico case, the Department of Labor is investigating whether the Ullico stock schemes violated civil labor laws against conflict of interest. If such a conflict of interest occurred, and evidence is mounting that it clearly did, the result could be fines and removal of offenders from union office.

While the excellent investigative articles in Business Week and The Wall Street Journal have done a fine job of detailing the self-enrichment games played with Ullico stock at the expense of union pension funds, the conflicts of interest associated with Gary Winnick's dealings with the Ullico board were only touched.

So why would Ullico's board of union bosses not only invest more than $7 million in seed money with Winnick, but also get involved in a number of other venture capital deals?

Certainly, the prospect of being cut in on the lucrative IPO stock offer was an inducement that may have made the Ullico board pour union pension funds into Winnick's non-union company.

The Ullico board also jumped into deals with Pacific Capital Group (PCG), an investment firm owned by Winnick. Together with PCG, Ullico invested in the high-flying internet company, Value America, another non-union company which quickly went into bankruptcy. And Ullico went in with PCG on Playa Vista, a troubled Los Angeles real estate deal plagued with environmental and regulatory problems. One of Ullico's top officials, former Democratic National Committee executive director Michael Steed went to Winnick's PGC as a managing director and went onto the Value America board.

As revelations continue to grow about the Ullico case, the most common reaction appears to be how closely the actions of the Ullico board resemble what union chiefs so often denounce as wrong with corporations. Consider this recent comment by AFL-CIO head John Sweeney:

> "Enron exposed what many of us have been saying: the boards of directors that are charged with acting in the interests of investors and the public are riddled with greed, self-dealing and plain selfishness."

Change a few words and you have a perfect description of the Ullico board on which John Sweeney sits. While he has publicly claimed not to have participated in the insider stock schemes, the fact remains that as a director he played a role in letting the schemes continue. Fiduciary duty extends to taking steps to prevent others from violating their fiduciary duties.

It's difficult to imagine the Ullico board going forward with their self-enriching schemes if the head of the AFL-CIO strongly opposed them. Nor is there any evidence that Mr. Sweeney or any of the other directors took any steps to expose the secret deals. Just the fact that the group of union bosses busily enriching themselves at the expense of their own members chose to keep their deals secret speaks volumes about what they considered the deals to be.

What Should Be Done?

Without question, the first step to providing American workers with better protection for their union pension funds is to recognize the scope of the problem. As the baby boom enters retirement age, the amount of money in such pension funds has soared. The size of the pension funds and the sometimes inadequate oversight has already proven to be a tempting target with hundreds of millions of dollars in pension funds stolen in recent years.

The frontline of the effort to ensure the integrity of union pension funds is overseen by the

Department of Labor's Pension and Welfare Benefits Administration as well as the

Department of Labor's Office of Inspector General. Given the tens of billions of dollars currently in union pension funds, a well-funded oversight effort is essential to prevent the often sophisticated schemes used to loot pension funds. From a cost-benefit analysis, the cost of such oversight is miniscule comparative to the amount of funds potentially at risk without such oversight.

Legislatively, much can be done to promote better financial disclosure as a deterrent to corruption affecting pension funds. While the Employee Retirement Income Security Act (ERISA) has very strict standards for fiduciary responsibilities of fund trustees, much more can be done to require public disclosure by union officials of outside income. Any review of union corruption cases underscores that embezzlement schemes of many kinds invariably result in income to corrupt union officials. Historically, this has been true with sweetheart contracts in which union officials are paid off by management to betray the interests of their rank and file but it is also a common phenomena in cases in which union leaders controlling large pension funds are tempted by lucrative and imaginative business deals to place those funds in dubious investments of all sorts.

One way to deter such schemes would be to require annual financial disclosure by union officials, especially those overseeing pension funds, of all outside income. Most such officials already receive six-figure salaries for their executive positions so outside income typically is limited. A disclosure requirement modeled after the one in the Ethics in Government Act for senior government employees would do much to deter the sophisticated bribery schemes common to pension corruption cases.

If the union officials on the Ullico board of directors had to disclose their inside trading profits in Ullico stock, it is doubtful they would have been as eager to pursue the secret arrangement by which they enriched themselves at the expense of their members.

Yet another disclosure reform to deter corruption affecting union pension funds would be to ensure that independent public accountants with knowledge of possible pension fraud have a legal duty to report such information to the Department of Labor. As the Department of Labor Inspector General recently pointed out, independent public accountants presently are not required by law to report ERISA violations to the Department of Labor. There is no rational justification for such a loophole if we are serious about protecting pension funds relied upon by American workers.

Earlier this year, this Subcommittee held hearings which featured extensive testimony calling for better disclosure of union financial information. The underlying belief that "Sunshine is the best disinfectant" cited in those hearings is even more compelling when union pension funds are under consideration because the financial stakes are so much higher.

Finally, while the Employee Retirement Income Security Act (ERISA) has done much to protect American pensions, it can be reformed to provide even better protection.

One gap that needs to be filled involves a weakness of audits performed under ERISA. this weakness was addressed by the Department of Labor Inspector General in his Fiscal year 2001 Annual report to Congress filed in January 2002:

ERISA contains a limited-scope provision that results in inadequate auditing of pension plan assets because it exempts from audit all pension plan funds that have been invested in institutions such as savings and loans, banks, or insurance companies regulated by federal or State governments. At the time ERISA was passed two decades ago, it was assumed that all of the funds being invested in those regulated institutions were being adequately reviewed. Currently, because of this provision, independent public accountants (IPAs) conducting audits of pension plans cannot render an opinion on the plans' financial statements in accordance with professional auditing standards. These "no opinion" audits provide no substantive assurance of asset integrity to benefit participants or the Department.

Millions of hardworking Americans are counting on the integrity of their union pension funds being protected. What could be more non-controversial than protecting pension funds from criminals?

APPENDIX F – SUBMITTED FOR THE RECORD, U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, MARCH 2002, PENSION AND WELFARE BENEFITS ADMINISTRATION, OPPORTUNITIES EXIST FOR IMPROVING MANAGEMENT OF THE ENFORCEMENT PROGRAM, GAO-02-232

United States General Accounting Office

GAO

Report to Congressional Committees

March 2002

PENSION AND WELFARE BENEFITS ADMINISTRATION

Opportunities Exist for Improving Management of the Enforcement Program

GAO
Accountability * Integrity * Reliability

GAO-02-232

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Abbreviations

EDS	ERISA Data System
EFAST	ERISA Filing Acceptance System
ERISA	Employee Retirement Income Security Act of 1974
IRS	Internal Revenue Service
OPPEM	Office of Program Planning, Evaluation, and Management
PBGC	Pension Benefit Guaranty Corporation
PWBA	Pension and Welfare Benefits Administration
VFC	Voluntary Fiduciary Correction

United States General Accounting Office
Washington, DC 20548

March 15, 2002

The Honorable Edward M. Kennedy
Chairman
The Honorable Judd Gregg
Ranking Minority Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable John A. Boehner
Chairman
The Honorable George Miller
Ranking Minority Member
Committee on Education and the Workforce
House of Representatives

The Department of Labor's Pension and Welfare Benefits Administration (PWBA) works to safeguard the economic interests of more than 150 million people in an estimated 6 million employee benefit plans—pension, health, and other plans with assets in excess of $5 trillion protected under the Employee Retirement Income Security Act of 1974 (ERISA). Safeguarding participants' interests in employee benefit plans is especially important to their health while working and their income in retirement. PWBA plays a primary role in ensuring that employee benefit plans operate in the interests of plan participants, and the effective management of its enforcement program is pivotal to ensuring the economic security of workers and retirees.

This report, prepared at our own initiative, discusses management issues associated with PWBA's enforcement of ERISA. We last reviewed PWBA's enforcement program in 1994[1] and concluded that PWBA needed to take steps to strengthen its enforcement program, including evaluating its resource allocation methods and main case selection processes. Our current review focused on assessing the progress PWBA has made in its efforts to improve its enforcement program so that it is effectively enforcing compliance with ERISA's employee benefit plan provisions. Specifically, our report discusses (1) PWBA's current strategy for

[1] U.S. General Accounting Office, *Pension Plans: Stronger Labor ERISA Enforcement Should Better Protect Plan Participants*, GAO/HEHS-94-157 (Washington, D.C.: Aug. 8, 1994).

enforcing ERISA's employee benefit plan provisions and (2) the areas in which PWBA could improve the management of its enforcement program.

To perform our work, we conducted over 100 in-depth interviews with staff and management in PWBA's headquarters and 5 of PWBA's 10 regional offices. We also conducted a nationwide e-mail survey of PWBA's investigative staff and their immediate supervisors. In addition, we reviewed internal PWBA guidance and documentation, agency performance plans and reports, and performance data relevant to PWBA's enforcement activities. Moreover, we interviewed key officials at other federal agencies with enforcement responsibilities regarding potential best practices and key individuals representing private organizations in the employee benefit plan, retired persons, and labor communities. We conducted our work between November 2000 and November 2001 in accordance with generally accepted government auditing standards. For further detail on our scope and methodology, see appendix I.

Results in Brief

PWBA's current strategy for enforcing ERISA's employee benefit plan provisions is a multifaceted approach of plan investigations supplemented by public education and a new voluntary correction program that are carried out mainly through its regional offices. Through its plan investigations, PWBA seeks not only to detect and correct violations, but also to have a deterrent presence that will prevent future violations. The Office of Enforcement prescribes the areas of focus for a portion of the regions' investigations to address issues of nationwide concern. Regional offices are then provided considerable flexibility in implementing PWBA's enforcement strategy by focusing the majority of their investigations on local issues. To complement its investigative activities, PWBA and its regional offices conduct outreach programs to inform plan sponsors, participants, and beneficiaries of their rights and responsibilities under ERISA and related employee benefit statutes. PWBA also publicly releases the results of its civil and criminal litigation against plans with violations to serve as a deterrent against future violations. To further enhance compliance, PWBA also recently established a Voluntary Fiduciary Correction (VFC) program, which allows plan sponsors to correct certain types of violations without penalty.

While PWBA has taken actions to strengthen its enforcement activities since our last review in 1994, in our current review we identified areas in which PWBA could further improve its enforcement program. In particular, we identified weaknesses in PWBA's management of its enforcement strategy and investigative process, in its overall human capital management, and in its measures for addressing program

performance. Specifically, weaknesses exist in the Office of Enforcement's program oversight and coordination in several key areas of its enforcement program. For example, PWBA has not gathered and analyzed information on the nature and extent of noncompliance. Lack of such data could undermine its enforcement strategy and operations. Although PWBA has taken steps to modernize its technology, most investigative staff still do not have sufficient and timely access to automated information for researching and selecting plans for investigation. Furthermore, PWBA lacks a centrally coordinated quality review process to ensure that investigations are conducted in accordance with accepted investigative quality standards. With regard to human capital management, PWBA has given limited attention to addressing key issues, including succession planning and workforce retention despite significant anticipated future workforce and workload changes. Considering that more than half of PWBA's senior management staff will be eligible to retire in the next 5 years, this situation could undermine the continuity and effectiveness of its enforcement program. Finally, we also found that PWBA's performance measures focus primarily on program outputs, such as the number of specific investigations conducted, rather than PWBA's impact on improving plans' overall compliance with ERISA.

The operational weaknesses and broader management issues that we identified in PWBA's enforcement program could affect its ability to effectively and efficiently carry out its responsibilities for enforcing ERISA's employee benefit plan provisions. Accordingly, we are making several recommendations intended to strengthen the Office of Enforcement's oversight and to enhance PWBA's ability to deploy its resources and better monitor the effectiveness of its operations. In its response to our draft report, PWBA acknowledged the need for more effective oversight and quality controls, and that there is a need to address the internal management issues we raised. PWBA also provided additional information on planned and current initiatives that they believe address a number of our recommendations. We made revisions to our draft report as appropriate.

Background

The Congress passed ERISA to address public concerns over the mismanagement and abuse of private sector employee benefit plans by some plan sponsors and administrators. ERISA is designed to protect the rights and interests of participants and beneficiaries of employee benefit plans and outlines the responsibilities of the employers and administrators who sponsor and manage these plans.

Three agencies share responsibility for enforcing the provisions of ERISA: the Department of Labor's PWBA, the Department of the Treasury's Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC). PWBA enforces ERISA's fiduciary standards for plan fiduciaries of privately sponsored employee benefit plans to ensure that plans are operated in the interests of plan participants, that reporting and disclosure requirements covering the type and extent of information given to the federal government and plan participants are met, and that specific transactions prohibited by ERISA are not used by plans. Under Title I of ERISA, PWBA conducts investigations of plans and seeks appropriate remedies to correct violations of the law, including litigation when necessary. The IRS enforces Title II of ERISA and provisions that must be met which give plans tax-qualified status,[2] including participation, vesting, and funding requirements.[3] The IRS also audits plans to ensure compliance and can levy tax penalties or revoke the tax-qualified status of a plan, as appropriate. The PBGC, under Title IV of ERISA in contrast, provides an insurance safety net for the participants and beneficiaries of defined benefit pension plans.[4] To do so, PBGC collects premiums from plan sponsors and then administers payment of pension benefits for terminated insufficient plans.

Over the last several years, the number of plans, participants, and assets within PWBA's enforcement jurisdiction have increased (see figs. 1, 2, and 3). PWBA's enforcement program includes a wide variety of pension and welfare plan sizes and types.[5] The majority of pension plans under PWBA's jurisdiction are small plans that serve fewer than 100 participants. However, the majority of pension plan participants under PWBA's jurisdiction are in a relatively small number of large plans that each serve thousands of participants. Moreover, since the passage of ERISA in 1974, the types of employee benefit plans and the financial transactions for

[2] To achieve tax-qualified status, plans must comply with a number of requirements in the Internal Revenue Code governing the provision of contributions and benefits.

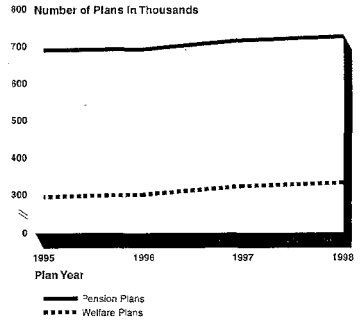
[3] ERISA includes minimum standards for how employees become eligible to participate in pension plans (participation standards), how employees earn a nonforfeitable right to their benefits (vesting standards), and how the plans are to be funded (funding provisions).

[4] Defined benefit plans pay specific retirement benefits, generally based on the number of years of service, earnings, or both. The sponsoring company is responsible for ensuring that plan assets are sufficient to pay benefits under the plan.

[5] Welfare plans are established and maintained to provide employee health benefits, disability benefits, death benefits, prepaid legal services, vacation benefits, child care, scholarship funds, apprenticeship and training benefits, or other similar benefits.

which PWBA must enforce ERISA provisions have become increasingly complex, giving the agency additional enforcement responsibilities.[6]

Figure 1: Employee Benefit Plan Universe under PWBA's Jurisdiction, 1995 to 1998

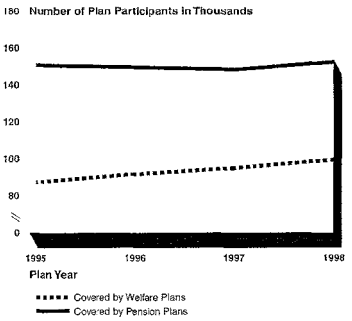


Note: Data for 1999-2001 are not yet available. Figure excludes insured and unfunded welfare plans with fewer than 100 participants, which are exempt from federal filing requirements, but for which PWBA has enforcement responsibility.

Source: PWBA.

[6] PWBA's enforcement responsibilities have increased particularly because of legislative changes in the health care area. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), which provides for the limited continuation of health care coverage for employees and their beneficiaries if certain events would otherwise result in a reduction of benefits, expanded PWBA's responsibilities under ERISA. Recently, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), aimed at making health care coverage more portable and secure for employees, and the Newborns' and Mothers' Health Protection Act of 1996, the Mental Health Parity Act of 1996, and the Women's Health and Cancer Rights Act of 1998 added new responsibilities to PWBA's education, compliance assistance, and enforcement functions.

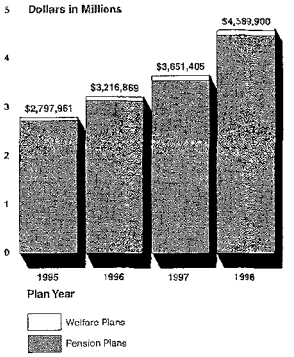
Figure 2: Number of Plan Participants under PWBA's Jurisdiction, 1995 to 1998



Note: Data for 1999-2001 are not yet available. Figure excludes insured and unfunded welfare plans with less than 100 participants, which are exempt from federal filing requirements, but for which PWBA has enforcement responsibility.

Source: PWBA.

Figure 3: Total Value of Assets Reported by Pension and Welfare Plans under PWBA's Jurisdiction, 1995 to 1998

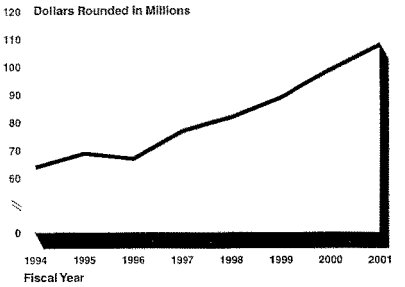


Note: Data for 1999-2001 are not yet available. Figure excludes insured and unfunded welfare plans with less than 100 participants, which are exempt from federal filing requirements, but for which PWBA has enforcement responsibility.

Source: PWBA.

PWBA's annual appropriations have risen in recent years, from $64 million in fiscal year 1994 to $108 million fiscal year 2001 (see fig. 4). PWBA earmarks its budget for three broad functions: (1) enforcement and compliance activities, which include conducting investigations of potential ERISA violations as well as reviews of plans' compliance with fiduciary, reporting, and disclosure standards; (2) policy, regulation, and public service activities, which include policy development and educational outreach programs; and (3) the agency's program oversight activities, which include providing internal administrative guidance. The enforcement and compliance activities are the main focus of PWBA's operations and account for $84 million or more than 75 percent of its budget in fiscal year 2001.

Figure 4: PWBA's Annual Appropriations, Fiscal Years 1994 to 2001

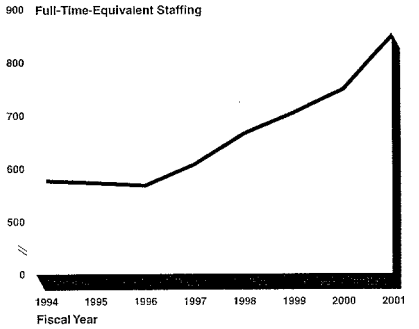


Source: Budget of the United States Government, fiscal years 1994 to 2001.

To accomplish its functions, PWBA relies on a relatively small but highly skilled and specialized staff.[7] Full-time equivalent (FTE) staff levels at PWBA have risen from 575 in fiscal year 1994 to 850 in fiscal year 2001 (see fig. 5).

[7] Many of PWBA's enforcement and compliance employees are attorneys or accountants.

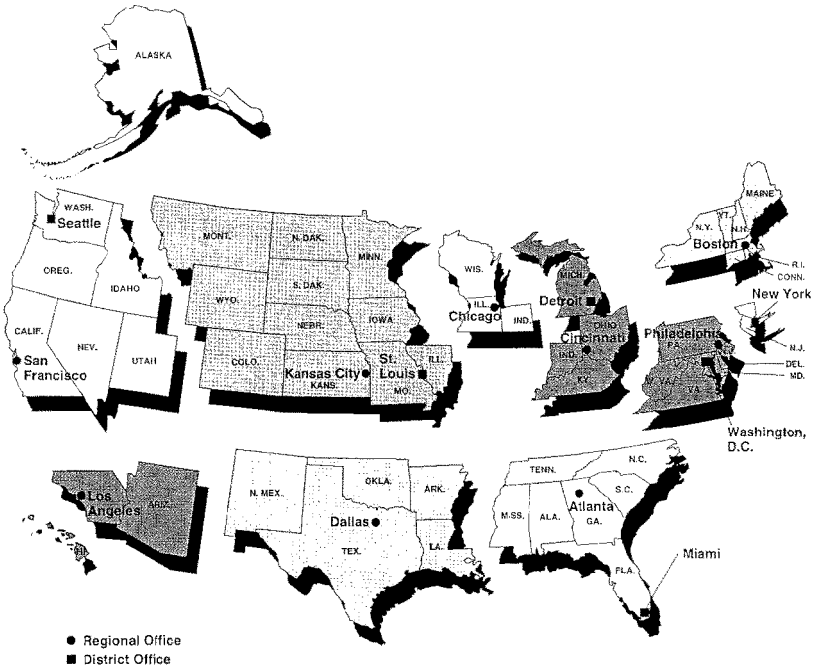
Figure 5: PWBA's Full-Time Equivalent Staffing, Fiscal Years 1994 to 2001



Source: Budget of the United States Government, fiscal years 1994 to 2001.

Over the years, PWBA has allocated the majority of its FTE increases to its enforcement and compliance function. Currently, the enforcement and compliance staff represent 80 percent of total PWBA staffing and most work in PWBA's 10 regional and 5 district offices (see fig. 6).

Figure 6: PWBA's 10 Regional and 5 District Offices



Source: PWBA.

PWBA Uses a Multifaceted Enforcement Strategy

PWBA's enforcement strategy is a multifaceted approach of targeted plan investigations supplemented by providing education to plan participants and plan sponsors and a new voluntary correction program for plan officials that are carried out mainly by its regional offices. PWBA allows its regions the flexibility to tailor their investigations to address the unique issues in their regions, within a framework established by PWBA's Office of Enforcement. The regional offices then have a significant degree of autonomy in developing and carrying out investigations using a mixture of approaches and techniques they deem most appropriate. Investigations range from responding to participant and others' concerns to developing large-scale projects targeted at a specific industry, plan type, or type of violation. To supplement their investigations, the regions conduct outreach activities to educate both plan participants and sponsors. The purpose of these efforts is to gain participants' help in identifying potential violations and sponsors' help in properly managing their plans and avoiding violations. The regions also process applications for the new Voluntary Fiduciary Correction program through which plan officials can voluntarily report and correct some violations without penalty.

PWBA Enforces ERISA Primarily Through Targeted Investigations

PWBA attempts to maximize the effectiveness of its enforcement efforts to detect and correct ERISA violations by targeting specific cases for review. In doing so, the Office of Enforcement provides assistance to the regional offices in the form of broad program policy guidance, program oversight, and technical support. The regional offices then focus their investigative workloads to address the needs specific to their region. Investigative staff also have some responsibility for selecting cases.

The Office of Enforcement identifies "national priorities"—areas critical to the well being of employee benefit plan participants and beneficiaries nationwide—in which all regions must target a portion of their investigative efforts. Currently, PWBA's national priorities involve investigating plan service providers,[8] health benefit issues, and defined contribution pension plans.[9] Officials in the Office of Enforcement said

[8] Plan service providers are third parties who assist plan sponsors in administering or providing other services to the plan.

[9] For a defined contribution pension plan, the employer establishes an individual account for each eligible employee and generally promises to make a specified contribution to that account each year. Employee contributions are also often allowed or required. The employee's retirement benefits depends on the total employer and employee contributions to the account as well as the investment gains and losses that have accumulated at the time of retirement or withdrawal. Therefore, the employee bears the risk of loss as to whether the funds available at retirement will provide a sufficient level of retirement income.

that national priorities are periodically re-evaluated and are changed to reflect trends in the area of pensions and other benefits. For example, health benefit issues have recently risen in importance due to significant changes in health care delivery methods, the aging of the population, and PWBA's expanded role in enforcing health plan standards under recent legislation aimed at making health care coverage more portable and secure for employees. Likewise, PWBA has placed an increasing emphasis on defined contribution pension plans, which have become a rapidly growing segment of the pension plan universe, because these plans are not guaranteed by PBGC and the risk of loss in these plans falls entirely on the individual plan participants. According to Office of Enforcement officials, the national priorities are also used to help leverage PWBA's investigative staff. For example, the emphasis on investigating plan service providers recognizes that an abusive practice of one service provider could affect a multitude of individual benefit plans and participants. On the basis of its national investigative priorities, the Office of Enforcement has established a number of national projects. For fiscal year 2001, there were six national projects pertaining to a variety of issues, including the timely crediting of employee contributions to defined contribution plans and the compliance of health plans with recent legislative changes.

The regional offices determine the focus of their investigative workloads based on their evaluation of the employee benefit plans in their jurisdiction and guidance from the Office of Enforcement. For example, each region is expected to conduct investigations that cover their entire geographic jurisdiction and attain a balance among the different types and sizes of plans investigated. In addition, each regional office is expected to dedicate some percentage of its staff resources to national and regional projects—those developed within their own region that focus on local concerns. In developing regional projects, each regional office uses its knowledge of the unique activities and types of plans in its jurisdiction. For example, a region that has a heavy banking industry concentration may develop a project aimed at a particular type of transaction commonly performed by banks. Currently, regional offices spend an average of about 40 percent of their investigative time conducting investigations in support of national projects and almost 25 percentage of their investigative time on regional projects.

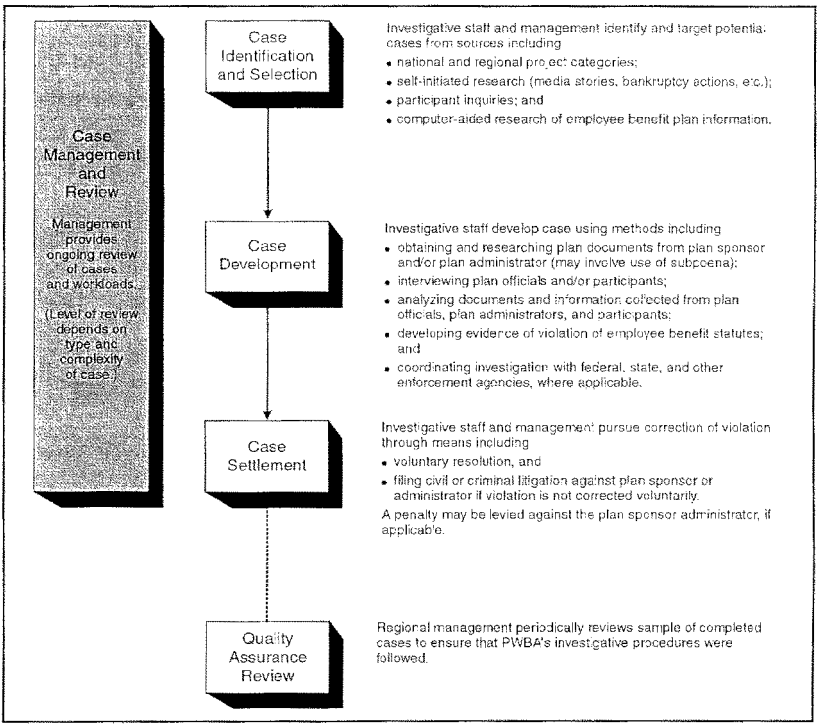
In addition to working cases from the national and regional projects, investigative staff are responsible for identifying a portion of their cases on their own to complete their workloads and address other potentially vulnerable areas. Investigative staff in regions we visited told us that these individualized cases often originate from news articles or other publications on a particular industry or company as well as tips from

colleagues in other enforcement agencies. Investigative staff and supervisors who responded to our survey indicated that leads from plan participants who call or write to the regions' benefit advisers for assistance are a major resource in targeting cases. The benefit advisers identify situations, including those where a participant's concerns may be indicative of broader violations, and refer these cases to the investigative staff.

PWBA's investigative process generally follows a pattern of selecting, developing, resolving, and reviewing cases (see fig. 7). In fiscal year 2001, PWBA expected to complete 6,954 investigations resulting from its enforcement activities.[10] Of these, 2,065 investigations—about 30 percent—were expected to be closed with results, such as plan assets being restored or protected. According to PWBA, its primary goal in resolving a case is to ensure that a plan's assets, and therefore its participants and beneficiaries, are protected. PWBA's decision to litigate a case is made jointly with the Department of Labor's Regional Solicitors' Offices. Although PWBA settles most cases without going to court, both the agency and the Solicitor's Office recognize the need to litigate some cases for their deterrent effect on other providers. According to PWBA, the decision to litigate is based on several factors, including the prospect of obtaining meaningful relief as a result of litigation, the nature of the violation, and consistency with PWBA's enforcement priorities.

[10] The number of investigations completed in a given year includes investigations opened in prior years and closed in the current year.

Figure 7: Overview of PWBA's Investigative Process



Source: GAO's analysis.

As part of its enforcement program, PWBA also detects and investigates criminal violations of ERISA. As a matter of policy, the Office of Enforcement requires the regional offices to limit the resources they use for criminal investigations to approximately 15 percent, to help maintain PWBA's focus on civil violations of ERISA. From fiscal years 1995 through 2000, criminal investigations resulted in an average of 47 cases closed with convictions or guilty pleas annually. Part of PWBA's enforcement strategy includes routinely publicizing the results of its litigation efforts in both the civil and criminal areas, as a deterrent factor.

PWBA Uses Education, Outreach, and a Voluntary Fiduciary Correction Program to Supplement Its Investigations

To further leverage its enforcement resources to prevent and detect violations and promote overall compliance with ERISA, PWBA provides education to plan participants and sponsors and now allows the voluntary self-correction of certain transactions without penalty. PWBA's education program for plan participants aims to increase their knowledge of their rights and benefits under ERISA. The agency also conducts outreach to plan sponsors and service providers about their ongoing fiduciary responsibilities and obligations under ERISA. Also, PWBA recently initiated the VFC program to facilitate corrections by plan officials who want to come into compliance with ERISA regarding their past practices and ensure better compliance in the future.

PWBA anticipates that educating participants and beneficiaries about their benefits, rights, and PWBA's enforcement authority will establish an environment in which individuals can help protect their own benefits by recognizing potential problems and notifying PWBA when issues arise. At the national level, education and outreach efforts are directed by PWBA's Office of Participant Assistance and Communication (OPAC), which develops, implements, and evaluates agencywide participant assistance and outreach programs and provides policies and guidance to other PWBA national and regional offices involved in outreach activities. PWBA's nationwide education campaigns include a retirement savings program, launched in July 1995 and expanded after the passage of the Savings Are Vital to Everyone's Retirement Act of 1997,[11] which we reported on earlier this year.[12] PWBA started a similar nationwide effort in 1998 after the passage of health plan legislation to assist participants in understanding their medical benefits. Both educational campaigns encourage participants

[11] P.L. 105-92, Nov. 19, 1997.

[12] U.S. General Accounting Office, *Retirement Saving: Opportunities to Improve DOL's SAVER Act Campaign*, GAO-01-634 (Washington, D.C.: June 26, 2001).

to call PWBA with questions and concerns about their employee-provided benefits, such as complaints about late contributions to their pension plans. Thus, these national outreach efforts are aimed at protecting participants and beneficiaries by giving them the information and means to protect themselves.

PWBA's regional offices also assist in implementing national education initiatives and conduct their own outreach to address local concerns. The regional offices' approximately 90 benefit advisers provide written and telephone responses to participants. Benefit advisers and investigative staff also speak at conferences and seminars sponsored by trade and professional groups and participate in outreach and educational efforts in conjunction with other federal or state agencies.

PWBA's efforts to educate plan sponsors and plan service providers aim to increase these groups' awareness of their responsibilities and rights under ERISA and its supporting regulations and procedures. At the national level, several PWBA offices direct specialized outreach activities. As with PWBA's participant-directed outreach activities, its efforts to educate plan sponsors and service providers also rely upon Office of Enforcement staff and the regional offices for implementation. For example, these staff make presentations to employer groups and service provider organizations about their ERISA obligations, and any new requirements under the law, such as reporting and disclosure provisions. PWBA staff also attend and make presentations at employee benefits seminars and conferences on ERISA. Additional outreach activities include developing partnerships with professional organizations associated with employee benefits. For example, several regional offices plan to work with state accounting societies to increase the societies' knowledge of conducting employee benefit plan audits.

To supplement its investigative programs, PWBA is also taking steps to promote the self-disclosure and self-correction of possible ERISA violations by plan officials through its new VFC program, which went into effect on April 14, 2000. The purpose of the VFC program is to protect the financial security of workers by encouraging plan officials to identify and correct ERISA violations on their own. Specifically, the VFC program allows plan officials to identify and correct 13 transactions, such as delinquent participant contributions to pension plans and improper expenditures of plan funds. Under the VFC program, plan officials follow a process whereby they (1) correct the violation using PWBA's written guidance; (2) restore any losses or profits to the plan; (3) notify participants and beneficiaries of the correction; and (4) file a VFC application, which includes evidence of the corrected transaction, with the

PWBA regional office in whose jurisdiction it resides.[13] If the regional office determines that the plan has met the program's terms, it will issue a "no action" letter to the applicant and will not initiate a civil investigation of the violation, which could have resulted in a penalty being assessed against the plan.

Weaknesses Identified in Management of Key Areas of Enforcement Program

PWBA has taken actions to strengthen its enforcement activities since our last review; however, we identified areas in which PWBA could make further improvements. Agencies need a strategic management process to position themselves to meet future challenges. Such a process should provide agencies with a framework for planning, implementing, and evaluating initiatives needed to accomplish the organization's mission. Effective program oversight, human capital management, and program performance measures are three of the ingredients of such a framework. We identified weaknesses at PWBA in these functions. Specifically, weaknesses exist in PWBA's program oversight and coordination in several key areas of its enforcement program, including estimating the nature and extent of plans' noncompliance with ERISA for planning purposes and maintaining a centralized review process to help ensure that investigations are conducted in accordance with quality standards. With regard to human capital management, PWBA has given limited attention to key issues, such as succession planning and workforce retention, despite anticipated future workforce and workload changes. Additionally, the performance appraisal system for investigative staff may undermine effective case selection and the quality of investigations. Finally, we found that PWBA's performance measures focus primarily on program outputs rather than on PWBA's overall impact.

Weaknesses in Office of Enforcement's Oversight of the Enforcement Program

Weaknesses exist in PWBA's current program oversight and coordination of the enforcement program by the Office of Enforcement in six key areas. Specifically, we found that PWBA

- lacks data on the extent of plans' noncompliance with ERISA,
- lacks a systematic review to improve its selection of cases,
- provides limited sharing of "best practices" information,

[13] PWBA's guidance includes a VFC Fact Sheet on its Internet site and *Federal Register* Notice, Volume 65, Number 51, "Voluntary Fiduciary Correction Program," March 15, 2000. Also, to be eligible for the VFC program, plans and applicants must not be under investigation by PWBA, and the application must not contain evidence of potential criminal violations, as determined by PWBA.

- has limitations on its use of technology for selecting and developing investigations,
- provides a limited quality review process for closed cases, and
- has not achieved the level of expected participation in its Voluntary Fiduciary Correction program.

Because the enforcement strategy is implemented through decentralized regional offices, the need for central oversight and coordination is critical to ensure that the agency is conducting quality investigations that cover the range of potential violations and variety of plans within its jurisdiction. In short, the Office of Enforcement needs to ensure that it has the people, processes, and technology in place to effectively and efficiently carry out the enforcement activities.

Lack of Data on the Extent of Plans' Noncompliance with ERISA May Undermine Enforcement Planning Efforts

To date, PWBA has not systematically estimated the nature and extent of employee benefit plans' noncompliance with ERISA provisions. Therefore, PWBA cannot ensure that it is accurately identifying the areas in which it needs to focus to most efficiently and effectively allocate its limited resources. Furthermore, the lack of reliable data on overall plan noncompliance may reduce the effectiveness of PWBA's education and outreach programs. For example, if PWBA does not know the extent of a certain type of problem, it cannot gear its education and outreach to the plan sponsors to help correct and prevent further violations. In addition, the lack of such information may prevent PWBA from accurately measuring the overall performance of its enforcement program.

In January 2000, PWBA issued a memorandum exploring the feasibility of developing a baseline of noncompliance with ERISA for pension plans. However, PWBA concluded that such an effort would require PWBA's full investigative staff 90 years to fully and accurately complete. PWBA proposed estimating the level of noncompliance within the entire pension plan population under its enforcement jurisdiction through large samples that would allow it to draw conclusions about the plan population with a high level of confidence and precision. However, PWBA did not consider analyzing the level of noncompliance by using a smaller sample size and a lower, but still acceptable, level of precision than it originally considered. Nor did PWBA propose targeting specific segments of the plan population—i.e., certain plan types, such as defined contribution pension plans, or specific industry categories, such as manufacturing—to incrementally assess the level of noncompliance for these areas. Either of these alternatives would likely have required less time and resources.

Currently, PWBA carries out the strategic planning activities for its enforcement program based on previous experiences in dealing with

violations of ERISA provisions, as well as perceived and reported areas of risk. However, strategic planning based on such an approach may fall short in identifying and accounting for the level and range of violations within PWBA's enforcement jurisdiction. We believe that PWBA should consider alternative, potentially less resource intensive, methods for assessing the level of plans' noncompliance. Such an approach could entail systematic and periodic reviews based on representative samples of the entire plan population or by plan type or industry sector. For example, PWBA could perform studies similar in concept to one issued by the IRS in 1998 that examined a specific segment of the pension plan population to identify areas in which those plans failed to comply with the Internal Revenue Code. PWBA has already taken some actions in this regard. For example, in fiscal year 1999, PWBA undertook a limited survey of a sample of health plans to gauge the level of compliance among these plans, which we discussed in a prior report.[14] PWBA could build upon this approach to cover all of the employee benefit plans under its enforcement jurisdiction. Such analyses could be more helpful in identifying areas of simple confusion or error on the part of plan providers in interpreting ERISA provisions, as well as areas consistently vulnerable to fraud and abuse. PWBA could use the information from these analyses to enhance its overall enforcement strategy, by shifting its resources to areas of greatest need or to specific problem areas, as well as enhance its plan provider outreach and education efforts. This information would also enable PWBA to develop more effective performance measures to better assess its enforcement strategy's impact on improving compliance with ERISA.

Lack of Systematic Review to Improve Its Case Selection Processes

PWBA has not routinely analyzed the full range of cases investigated in order to determine which sources of cases are most effective in terms of detecting and correcting violations. The "sources of cases" are the original leads that brought the potential violation to PWBA's attention, such as a participant inquiry, a newspaper article, or a national or regional project. Such an analysis is critical to assist the regional offices in evaluating whether their investigative resources are focused in the most effective and efficient areas. Officials in the Office of Enforcement and several regional offices we visited told us that PWBA faces an overabundance of work and that they must manage multiple workload priorities. However, the effectiveness of prior sources of cases is a key piece of information that is

[14] See U.S. General Accounting Office, *Private Health Insurance: Federal Role in Enforcing New Standards Continues to Evolve*, GAO-01-652R (Washington, D.C.: May 7, 2001).

missing from PWBA's current workload priority and resource allocation decisions.

Previously, from fiscal year 1986 through fiscal year 1990, PWBA's Office of Policy and Research performed annual sources of cases evaluations that the agency says were aimed at ensuring that it was focusing its investigative resources on those cases that allowed it to maximize its effectiveness. However, the agency discontinued these analyses due to staff shortages. In November 2001, however, the Office of Enforcement completed another such analysis using data from its fiscal year 1999 investigations. The Office of Enforcement plans to perform such analyses on an annual basis, but is uncertain whether it will have sufficient resources to do so.

Limited Coordination and Sharing of "Best Practices" Information

Our review shows that the Office of Enforcement does not centrally coordinate the identification and sharing of best practices information among regions regarding case selection and investigative techniques. Limited coordination occurs in certain respects, such as the Office of Enforcement's provision of audit guides for specific national projects and within some regional offices regarding investigative techniques. However, the absence of a more formalized centrally managed process could lead to missed opportunities to increase the effectiveness of PWBA's enforcement efforts and leave the agency vulnerable to duplication of effort by its investigative staff.

Almost half of the investigative staff and their immediate supervisors who responded to our survey indicated that best practices information is shared within their region, but only on an informal basis. Management and some staff in one regional office we visited said that such information was not shared because it is considered "proprietary" in that it belongs to the individual investigator who developed it. These staff believed that the agency's performance appraisal system placed investigative staff in competition with each other for pay raises and promotions and that sharing an investigator's successful methods would negate their advantage over others. Numerous investigative staff told us that, at times, the lack of information sharing forced them to "reinvent the wheel" with each new investigation, which wasted valuable time and staff resources. Regarding the sharing of best practices information across regions, fewer than half of the respondents to our survey believed this takes place. During our regional office visits, some investigative staff told us that only limited and informal sharing takes place because of competition among the regions.

Representatives from the Office of Enforcement acknowledged that they could do a better job disseminating information among regions and

sharing best practices. However, they said that PWBA lacked the resources to conduct a major effort in this area. Currently, the Office of Enforcement disseminates information to the regions through annual training seminars conducted to explain policy and regulatory changes and quarterly regional managers' meetings.

Weaknesses in Technology Used for Selecting and Developing Investigations

We found that weaknesses remain in PWBA's use of technology for selecting plans to be investigated as well as its technological supports for developing information once a case has been opened. PWBA acknowledges that heavy reliance on technology is critical to its mission due to the small size of its workforce. In 1994, we reported that PWBA had done little to test the effectiveness of the computerized targeting runs it was using to select cases for investigation. Since then, PWBA has scaled down both the number of computerized runs available for staff to use and its reliance on these runs as a primary means of selecting cases. Accordingly, only 34 percent of all respondents to our recent survey indicated that case selection via preset computer searches of plan filings[15] was an effective method to identify cases involving ERISA violations. Several investigative staff we interviewed also explained that the computerized targeting runs were not very effective because source data were too old and the computer system did not allow them to customize targeting runs. PWBA recognizes these shortcomings and is attempting to improve computer-based targeting for investigative staff by developing both a quicker processing system for plan filings—the ERISA Filing Acceptance System (EFAST)—and a new targeting system—the ERISA Data System (EDS).

According to PWBA officials, EDS will provide investigative staff with enhanced targeting and research capabilities over previous PWBA systems. For example, staff will have the ability to perform ad hoc or customized inquiries to probe certain plan types, transactions, and employers in a specific sector directly from their computer. Previously, investigative staff were required to send requests for these types of inquiries to the Office of Enforcement for processing. In addition, EDS will have a selection of preset targeting runs to assist in case selection. Enforcement officials also plan to evaluate the preset targeting runs

[15] Pension, welfare, and fringe benefit plans are generally required to file an annual report on their financial condition, investments, and operations called the Form 5500 Annual Return/Report of Employee Benefit Plan. The Department of Labor, IRS, and PBGC jointly develop and maintain the Form 5500 series so employee benefit plans could satisfy annual reporting requirements under Title I and Title II of ERISA and under the Internal Revenue Code.

formerly available under its predecessor systems and, where appropriate, integrate them into EDS.

Despite PWBA's efforts, the agency may not fully benefit from EDS in the near future because of delays in the implementation of EFAST, which supplies the underlying data. In August 2000, EFAST began preliminary operations, such as document scanning, to process plan year 1999 filings. However, due to system development delays, complete plan data from that year and subsequent filing years are still not available electronically for investigative staff use. According to PWBA officials, by the end of fiscal year 2002 the system should be operating so that complete filing data are online and accessible to investigative staff within 1 year of receipt by PWBA. Meanwhile, investigative staff told us they often compensate for the lack of internal computer-targeting tools by using public domain databases that contain basic information from more recent plan filings for their research. Delays in the implementation of the EFAST system may also affect IRS enforcement and PBGC regulatory activities, which are dependent on EFAST plan filing data. Until EFAST is fully implemented, PWBA's ability to provide timely and quality plan filing data remains a concern and a potential area for further evaluation.

Weaknesses also exist in PWBA's provision of external databases to investigative staff for collecting and researching information to develop cases. According to investigative staff, databases containing legal, economic, and corporate demographic information are a useful research tool. However, 63 percent of the investigative staff and 83 percent of the supervisors responding to our survey indicated that they do not have adequate or timely access to Internet databases that are needed to perform their work. Several investigative staff in the regions we visited told us that they used the Internet to gain access to a wide range of information sources to develop case leads and conduct investigations, such as news stories about economic events and activities of major employers in their region. However, according to officials in PWBA's Office of Information Management, access to several of these databases is limited to a set number of investigative staff in each region mainly due to cost. For example, in two regional offices we visited staff told us that only select individuals had access to key research databases, which meant that all investigative staff inquiries were passed through them. According to staff we spoke with, this process was both time-consuming and cumbersome.

Closed Case Review Process May Not Adequately Ensure Work Quality

Our review also found that PWBA lacks a centrally coordinated quality review process to ensure that its investigations are conducted in accordance with its investigative procedures. Government auditing standards and GAO internal control principles emphasize the importance

of having a quality control process to ensure that audits and other reviews of government operations are conducted in a manner to help improve the performance of those operations. In 1999, the Office of Enforcement formally assigned the responsibility for performing quality assurance reviews on closed cases to its regional offices. However, the Office of Enforcement does not provide procedures or guidance for the regions responsible for conducting such reviews.

We contacted all 10 regions and found that three regions did not have a quality review process for examining closed cases while others had only a limited process. Management officials at the seven regional offices with closed case review programs told us that the results of their reviews are used for quality improvement and staff development purposes. However, we believe that regional policies and procedures for conducting these reviews may limit their utility in assessing the quality of investigations. First, auditing and internal control standards require that officials performing quality control reviews should be organizationally independent of the unit being reviewed but this was not the case in the regional offices. A lack of independence creates potential biases in case selection and review that could limit the value of PWBA's quality assurance efforts. In regions with review programs, the associate or deputy regional directors, officials who are not fully independent of the work, conduct the quality reviews. In one region we found that group supervisors, who are even closer to the performance of investigations, select cases to be reviewed, a practice performed by associate or deputy regional directors in the six other locations. Second, management in regions with review programs noted that their closed case reviews were administrative in nature and generally focused on whether case procedures and forms had been documented. While this type of internal control activity has value, PWBA's reviews rarely address the technical merits of cases. We found that only one region's review process evaluated substantive technical case issues. Third, we found variation in how regions captured and reported the results of their reviews. Management officials in five of the seven regions with review programs provide written reports documenting their findings to the regional director, while officials in the sixth and seventh regional offices convey their results orally to staff in regional training and verbally to the regional director, respectively. The Office of Enforcement does not require the regions to report their findings and thus cannot ensure the quality of PWBA's investigations nationwide.

An effective quality control system is important considering that PWBA's enforcement resources are already highly leveraged and it will face increasing future workload challenges. Thus it is essential that PWBA's quality control system ensure the independence of individuals responsible

for closed case quality reviews. In addition to addressing administrative issues, these reviews should focus on substantive technical case issues to provide more assurance that established policies, procedures, and investigative standards are followed. Such a system should also include mechanisms to provide constructive feedback to staff and to make any necessary improvements in program policies and operations.

Low Participation in Voluntary Fiduciary Correction Program

PWBA has not realized the level of participation in the VFC program that it expected at the program's inception. When PWBA announced the program, it anticipated that up to 700 plans would apply for and use the program within its first year. As of July 2001—approximately 15 months after the program's inception—PWBA reported that only 37 plans had submitted 60 applications for this program. PWBA officials acknowledged that the VFC program is a "work in progress," and they are optimistic that it will expand and thus contribute to the effectiveness of the enforcement program. Specifically, PWBA believes that the voluntary correction of violations through the program will be less costly than direct intervention and will allow the agency to further leverage its limited investigative resources. PWBA officials also told us that the number of VFC program applications received alone does not fully capture the benefits of this program, because some plan sponsors may use the program's guidance to correct possible ERISA violations without filing an application with PWBA. While employee benefit industry officials cite benefits of the VFC program, such as the absence of user fees or penalties, they expressed concern that some of the program's current requirements hinder participation. For example, the program requires plan officials to notify all plan participants of the potential violation and the ensuing correction, a step they are not required to follow when they are subject to a traditional PWBA investigation. Benefit experts also cited PWBA's requirement to refer plans to the IRS for the levying of an excise tax on each prohibited transaction corrected as another potential barrier.[16] Given PWBA's expectations of the VFC program to promote overall compliance with ERISA and leverage its enforcement resources, we believe that PWBA needs to closely monitor and analyze the barriers to participation in the program and the program's effect on its enforcement strategy.

[16] PWBA's VFC Program Notice states that section 3003(c) of ERISA obligates Labor to report prohibited transactions to the IRS. Under section 4975 of the Internal Revenue Code, the IRS may levy a 15-percent excise tax on prohibited transactions.

Human Capital Management Has Received Limited Attention

Our review showed that PWBA has given limited attention to human capital management despite anticipated workforce and enforcement workload changes. Although PWBA has developed training and mentoring programs for its new staff, it has only begun to consider the larger issues of workforce planning, including succession planning and workforce retention. This situation could undermine the continuity and effectiveness of the enforcement program because more than half of the PWBA senior management staff present on September 30, 2000, will be eligible to retire in the next 5 years. Finally, our review found that PWBA's current performance appraisal system for investigative staff may be causing unintended, undesirable behaviors regarding the selection and prioritization of cases as well as the sharing of best practices.

Human capital management functions are carried out by the Office of Program Planning, Evaluation, and Management (OPPEM). OPPEM has recently begun to look into the issues that drive workforce planning, but it has not implemented plans to prepare for the retirement of many of PWBA's managers or to help ensure the retention of highly qualified employees. Similar to the rest of the federal government, PWBA faces the possible retirement of many of its employees in the near future, especially at the senior management level. This situation could compromise PWBA's ability to manage its enforcement program efficiently and effectively. By fiscal year 2006, 21 percent of PWBA's employees agency wide and 55 percent of PWBA's senior managers will be eligible to retire. In addition, PWBA faces recruitment and retention problems. The agency ended fiscal year 2000 unable to fill 8 percent of its authorized positions, including its national criminal coordinator position, which remained unfilled as of the end of November 2001. PWBA's attrition rate is also one of the highest within the Department of Labor. In fiscal year 2001, PWBA's rate of attrition was 9.7 percent compared with Labor's overall rate of 7.6 percent.

OPPEM officials have acknowledged the importance of addressing attrition and future retirement needs. To that end, OPPEM recently collected data from regional management on the skill mix needed to perform the future work of the agency. OPPEM has not yet implemented the steps necessary to facilitate employee retention and the smooth succession of senior staff, but anticipates using the collected data to develop specific strategies to ensure a skilled workforce in the future. In addition, OPPEM has begun to consider potential actions within its control to address the upward trend in attrition, including the adoption of retention bonuses and pay banding. OPPEM also recently developed an exit survey to better understand the reasons why employees are leaving the agency. Nevertheless, PWBA still lacks a comprehensive human capital plan or strategy that is linked to its current and future workforce needs.

Sound human capital management practices dictate that organizations should periodically engage in strategic planning and analyses to better position themselves to meet future challenges. Our prior work on human capital management planning also suggests that strategies should be linked to current and future human capital needs, including the size of the workforce; its deployment across the organization; and the knowledge, skills, and abilities needed by agencies. Staff deployment, both geographically and organizationally, should also enhance mission accomplishment and provide for efficient, effective, and economical operations.[17]

In addition, PWBA's performance appraisal system may serve as a disincentive to conducting quality casework and sharing best practices information and, therefore, has the potential to undermine the agency's enforcement program. In 1997, PWBA added a dimension to its rating system that evaluates investigative staff on the number of cases closed during the year. Investigative staff receive a set amount of points for closing a case based on the type of case and how it was resolved. The rating form used to calculate the points for cases closed does not include points for case complexity, number of violations found, or number of participants and beneficiaries affected. However, supervisors can grant additional discretionary points to investigators based on the above factors. Although the point minimum is only one dimension in the rating system, we believe that it may act as a disincentive in some cases in that staff are not motivated to complete a range of investigations that includes plans of different sizes and degrees of complexity. During field visits, investigative staff and their supervisors expressed concern about the point-rating system. In addition, 50 percent of all the investigative staff and their immediate supervisors who responded to our survey believed the rating system to be ineffective at motivating staff to initiate and complete a wide range of investigations. Among supervisors responding to our survey, more than one-third noted that the rating system is ineffective. Only 21 percent of all survey respondents believed the system to be effective. Respondents who believed the rating system to be ineffective were generally concerned that the current system (1) placed too much emphasis on quantity, rather than the quality of work performed; (2) caused investigative staff to focus more heavily on less complex plans and to perform more investigations of small plans; and (3) placed too much emphasis on monetary results. We believe that PWBA could strengthen its rating system by better incorporating case complexity into the point scale

[17] U.S. General Accounting Office, *Human Capital: A Self-Assessment Checklist for Agency Leaders*, GAO/OGC-00-14G (Washington, D.C.: Sept. 2000).

and considering additional measures to account for the overall impact of the case on plan participants and beneficiaries.

PWBA's current rating system for investigative staff also lacks a teamwork dimension. As previously noted, enforcement staff engage in only limited sharing of best practices both within and across PWBA's regions. Our prior work on human capital management has found that leading organizations foster cultures in which individual employees interact, support, and learn from each other as a means of contributing to the high performance of their peers and their organization as a whole.[18] Thus, PWBA may foster greater sharing of best practices among its investigative staff and enhance the effectiveness of its overall enforcement program by adding a teamwork dimension.

Finally, we identified a productivity requirement used by one region we visited which supplements PWBA's rating system for investigative staff and may have implications for case quality. This region requires its investigative staff annually to process 30 cases and to refer 2 cases to Labor's Regional Solicitor for litigation. Investigators we spoke with in that region and respondents to our survey indicated that this additional requirement sometimes causes them to focus on less complex cases rather than those that may take longer to resolve. Management in that regional office explained that the "30/2" standard was a goal for staff to strive toward and not a requirement. However, an internal regional memorandum we obtained indicated that this standard is tied to the "timeliness" performance standard in the rating system. Officials in the Office of Enforcement told us that they were unaware of any additional "unofficial" expectation being established in the region.

Performance Measurement System Provides Limited Assurance of Overall Program Effectiveness

While PWBA's performance goals and measures have evolved over time, several still do not help PWBA assess the impact of its enforcement program on improving overall compliance with ERISA. Performance measures that are included in agencies' annual performance plans should indicate progress towards their goals and should be objective, measurable, and quantifiable. PWBA's program performance measures fall short of this requirement in that they generally focus on how well it is managing and using its resources—such as the number of specific investigations conducted—rather than on PWBA's overall impact on improving the security of employee benefits.

[18] GAO/OCG-00-14G.

The performance measures that PWBA uses to track progress towards meeting its enforcement goals have improved since it published its first strategic plan in fiscal year 1999. For example, beginning in fiscal year 2001, PWBA began to use separate measures for pension and welfare plans related to deterring and correcting violations of relevant statutes. We had reported that the previously combined measures could have masked poor performance in one of these areas and hindered PWBA's efforts to monitor and measure two distinct workloads. Also since its first strategic plan, PWBA has increased the numeric performance target goals for several of its enforcement-related workloads, which shows that the agency is attempting to increase productivity. For example, from fiscal year 1999 to fiscal year 2002, PWBA increased its target for the percentage of civil investigations closed with corrected violations from about 16 percent to nearly 36 percent. In addition, several of PWBA's enforcement-related performance measures have a quality component and focus on actual results achieved, such as closed investigations where assets or participant benefits are restored. These quality-focused measures provide a useful framework for management to communicate its investigative priorities and may serve as an incentive for supervisors and investigative staff to pursue the most productive case leads.

Despite these changes, room for improvement remains in PWBA's current enforcement-related performance measures (see table 1). PWBA continues to aggregate performance measures for separate program activities into a single overall measure, which makes it difficult to assess performance. For example, for closed fiduciary investigations of pension and health plans, PWBA aggregates and reports the number of cases with four types of results—(1) restored assets, (2) corrected prohibited transactions, (3) recovered participant benefits, and (4) plan assets protected from mismanagement and risk of future loss is reduced. As a result, assessing whether the goal is actually being met may be difficult, because success in one of the four elements may obscure failure in another.[19]

[19] We previously criticized this performance measure in our assessment of Labor's fiscal year 2002 annual performance plan. See U.S. General Accounting Office, *Department of Labor: Status of Achieving Key Outcomes and Addressing Major Management Challenges,* GAO-01-779 (Washington, D.C.: June 15, 2001).

Table 1: PWBA's Enforcement-Related Performance Measures for Fiscal Year 2002

Performance measure	Target
Increase by 5 percent per year the number of closed civil investigations of employee pension plans where assets are restored, prohibited transactions are corrected, participant benefits are recovered, or plan assets are protected from mismanagement and risk of future loss is reduced.	1,993
Increase by 5 percent per year the number of closed civil investigations of employee health and welfare plans where assets are restored, prohibited transactions are corrected, participant benefits are recovered, or plan assets are protected from mismanagement and risk of future loss is reduced.	620
Increase by 3 (to 10) the number of closed fiduciary investigations where plan assets are protected by filing a proof of claim or adversary complaint in a bankruptcy action.	10
Increase by 1 percent per year the ratio of closed civil cases with corrected violations to total civil cases closed.	51.83 percent
Increase by .25 percent per year the ratio of criminal cases referred for prosecution to United States Attorneys or to State prosecutors to total criminal cases closed.	43.41 percent
Increase by 2 percent benefit recoveries for individuals achieved through the assistance of Benefit Advisers.	$67 million

Source: PWBA's fiscal year 2002 Revised Final Annual Performance Plan.

In addition, some of PWBA's performance measures may not be sufficiently defined to help ensure that the agency properly tracks its achievements. For example, PWBA's fiscal year 2000 measure to track the assistance provided by benefit advisers aims to increase by 2 percent the amount of their *benefit recoveries*—the dollar value of benefits returned to participants. In its fiscal year 2000 performance report, PWBA stated that it met this goal. However, in this assessment PWBA also counted *benefits protected*—the dollar value of benefits prevented from being lost, which typically involve health plans. Thus, it was unclear whether PWBA met its goal as originally defined. This characterization of the goal persists in PWBA's fiscal year 2001 and 2002 annual performance plans.

Finally, our review identified the need for additional measures to more fully assess the effectiveness of the enforcement program. About one-third of all survey respondents indicated that PWBA needed additional measures than those currently being used to assess the enforcement functions. These survey respondents and investigative staff we spoke with in the regions generally noted that PWBA's existing measures placed too much emphasis on numbers of investigations conducted and monetary recoveries and too little emphasis on the number of plan participants and beneficiaries helped by PWBA's enforcement program. For example, a

relatively simple pension plan case could lead to millions of dollars in recoveries but help few participants whereas a complex welfare plan case may yield little in monetary recoveries but substantially help many participants. However, PWBA does not currently have any annual performance plan measures that track the number of employee benefit plan participants helped by PWBA's enforcement efforts.

Conclusions

PWBA is a relatively small agency facing the daunting challenge of safeguarding the economic interests of millions of Americans by overseeing the providers of employee benefit plans. Over the years, PWBA has taken steps to strengthen its enforcement program and leverage its resources. The agency has placed the majority of its resources into its enforcement program, decentralized its investigative authority to the regions, and made improvements in technology. All these actions contributed to what is, overall, a well-run program. However, we found that PWBA currently provides limited national oversight and coordination in key areas that have the potential to impede the operations and overall effectiveness of its enforcement program over the long term. Thus, it is important that PWBA take steps as soon as possible to improve weaknesses in its case selection analyses, best practices sharing, and quality assurance processes. In the longer term, PWBA needs to readdress whether and how it can better assess the level of noncompliance with ERISA and take steps to link this assessment with its human capital initiatives and resource allocation decisions. The ever-changing complexities of employee benefit plans and their financial transactions coupled with the imminent retirement of a large portion of PWBA's workforce heighten the need for PWBA to act more strategically to ensure that it designs the most efficient and effective enforcement program to address its workloads.

Recommendations for Executive Action

To improve the agency's management of the enforcement program, we recommend that the Secretary of Labor direct the Assistant Secretary of Labor, PWBA, to take the following actions:

Direct the Office of Enforcement to improve its oversight role in key areas.

- Develop a cost-effective strategy for assessing the level and type of ERISA noncompliance among employee benefit plans. Such a strategy should include an assessment of the feasibility of using sampling and/or segmenting the plan universe to allow PWBA to determine the level of noncompliance with an acceptable level of confidence.

- Institutionalize and conduct regular reviews of the sources of cases that lead to investigations.
- Coordinate the sharing of "best practices" information among regions relating to the optimum and most productive techniques for selecting and conducting investigations.
- Develop a closed case quality review process that ensures the independence of reviewers and sufficiently focuses on substantive technical case issues.
- Monitor and analyze the barriers to participation in the Voluntary Fiduciary Correction program and explore ways to reduce them.

Direct the Office of Program Planning, Evaluation, and Management to improve PWBA's human capital functions.

- Conduct a comprehensive review of PWBA's future human capital needs, including the size and shape of the workforce; the knowledge, skills, and abilities needed; succession planning challenges; and staff deployment issues.
- Reevaluate the performance rating system for enforcement staff to ensure that case complexity and teamwork issues receive sufficient emphasis.

PWBA's Comments and Our Evaluation

We provided a draft of this report to PWBA for review and comment. PWBA's comments are included in appendix III, followed by our brief response to some inaccuracies in PWBA's January 31, 2002, comment letter. PWBA also provided additional technical comments on our draft report, which we incorporated where appropriate. In its response to our draft report, PWBA acknowledged the need for more effective oversight and quality controls, and that there is a need to address the internal management issues we raised. PWBA also provided additional information on planned and current initiatives that they believe address a number of our recommendations. PWBA disagreed with one of our observations that its aggregation of performance measures for separate program activities into a single overall measure makes it difficult to assess performance. Our reply to PWBA follows below. We acknowledge PWBA's continuing efforts to improve its ERISA enforcement program but believe that implementing our recommendations will further strengthen the program.

In response to our recommendation that PWBA develop a cost-effective strategy for assessing the level and type of ERISA noncompliance among employee benefit plans, PWBA cited an ongoing project to gauge health plans' compliance with ERISA. PWBA noted that upon compiling the results of this project, it would gauge the use of such reviews. We revised our report to reflect this initiative. We acknowledge PWBA's efforts in this

area but believe that PWBA could build upon this existing work to better assess the level and type of ERISA noncompliance for the entire plan universe, including pension and welfare plans, under its enforcement jurisdiction.

Regarding our recommendation that PWBA institutionalize and conduct regular reviews of the sources of cases that lead to investigations, PWBA responded that it completed a Case Opening and Results Analysis 1999 Baseline Study in November 2001, and that it will produce similar reports in future years. We revised our report to reflect that PWBA had completed this analysis. As we noted in our report, PWBA's last sources of cases analysis was performed in 1990, and we believe that conducting such analyses on a regular, more frequent basis is important to evaluating whether PWBA's investigative resources are focused in the most effective and efficient areas. We believe that the results of these reviews will also help assist PWBA's future workload and resource allocation decisions.

In response to our recommendation that PWBA coordinate the sharing of "best practices" information among regions for selecting and conducting investigations, PWBA noted that sharing among senior field managers does occur and cited various activities in place to foster information sharing. However, PWBA agreed to find ways to address the problem to the extent that it exists. Our survey results indicate that PWBA may need to take actions to foster staff-to-staff information sharing. Considering that more than half of the investigative staff that responded to our nationwide survey felt that formal sharing across regions does not occur, PWBA should take additional steps to assess how best practices sharing among regions—including at the staff level—can be improved.

In response to our recommendation that PWBA improve its closed-case quality review process to ensure reviewer independence and that substantive technical issues are addressed, PWBA agreed that a quality review program is important. However, PWBA stated that given its organizational structure, none of its components are totally independent of the enforcement process. PWBA agreed to discuss our findings with its Regional Directors and explore possible modifications and improvements. PWBA also noted that it has a number of processes for reviewing staff work products and case summaries during ongoing assignments. We are aware of PWBA's product review process as depicted in Figure 7 of our draft report. However, we found that only one region's closed-case quality assurance review process addressed substantive technical case issues to ensure that established policies, procedures, and investigative standards are followed. Given the importance of independent and substantive quality

assurance reviews to ensuring the integrity of its enforcement program, we believe that PWBA needs to address the deficiencies noted.

Regarding our recommendation that PWBA monitor and analyze the barriers to participation in the Voluntary Fiduciary Correction (VFC) program, PWBA told us that it is assessing potential barriers, including the VFC's general notice and excise tax reporting requirements. These requirements were noted as potential barriers to participation in our draft report. Given PWBA's stated expectations for the VFC program—which include allowing PWBA to leverage its investigative resources and the correction of violations in a less costly manner than via its direct intervention—ongoing attention to this program is needed to increase participation over current levels.

PWBA cited various current and planned activities related to human capital management and succession planning in response to our recommendation that it conduct a comprehensive review of its future human capital needs. However, the activities PWBA cited are primarily stand-alone efforts and are not linked to an agency-wide assessment of potential changes in PWBA's future workload and workforce. Although PWBA's human capital initiatives have value, PWBA still lacks a comprehensive human capital plan or strategy that is linked to its current and future workforce needs. Human capital management planning strategies should be linked to current and future workforce needs, including the size of the workforce; its deployment across the organization; and the knowledge, skills, and abilities needed by staff. PWBA's attention to human capital management is critical, in part, because by fiscal year 2006, 21 percent of PWBA's employees' agency-wide and 55 percent of PWBA's senior managers will be eligible to retire. As we reported, this situation could compromise PWBA's ability to manage its enforcement program efficiently and effectively.

In response to our recommendation that PWBA reevaluate the performance rating system for enforcement staff to ensure that case complexity and teamwork issues receive sufficient emphasis, PWBA stated that it would provide a copy of our report to union officials representing its field staff and ask them to assist in determining whether the performance standards should be revised. PWBA also reported that for the one region we identified as having a productivity requirement that supplemented PWBA's rating system for investigative staff, it has retracted that requirement. This provision required investigative staff annually to process 30 cases and to refer 2 cases to Labor's Regional Solicitor for litigation.

Although we did not make any recommendations on PWBA's annual performance plan (APP) goals and measures, PWBA raised various concerns about our observations in this area.

- PWBA disagreed with our assessment that aggregating four separate and key measures of results for closed investigations makes it difficult to assess performance. PWBA stated that these activities are all linked to the desired outcome of secure benefits and that further separation of the data was not appropriate or necessary. However, PWBA acknowledged that it does internally monitor these component measures separately for management purposes. Despite PWBA's position, we continue to believe that the aggregation of measures for separate program activities into a single overall measure makes it difficult to assess performance because success in one of the four elements may obscure failure in another.

- Regarding PWBA's measure to track recoveries by benefit advisers, PWBA stated that it modified its fiscal year 2001 performance report by adopting the generic term "recovery" for this measure in place of "recovered or protected," as previously used. PWBA further stated that the term "recovery" in actuality is a function of "benefits restored" plus "benefits protected." We still do not believe that PWBA's revision sufficiently improves the clarity of this measure. Benefit recoveries—lost benefits actually returned to participants—are distinct from benefits protected, which include benefits that are threatened but not actually lost.

- Regarding our observation that PWBA does not measure the number of employee benefit plan participants helped by its enforcement efforts, PWBA replied that emphasizing participant numbers could skew the enforcement program strongly in favor of investigating large plans and leave many small-and medium-sized plans without sufficient oversight. Our draft report did not state that PWBA emphasize such measures, but rather that PWBA may need additional measures to fully assess the effectiveness of its enforcement program.

We are sending copies of this report to the secretary of labor, the assistant secretary of PWBA, and other interested parties. Copies will be made available to others upon request. This report is also available on GAO's homepage at http://www.gao.gov.

If you have questions concerning this report please contact me at (202) 512-7215, or Daniel Bertoni at (202) 512-5988. Other major contributors are listed in appendix IV.

Barbara D. Bovbjerg
Director, Education, Workforce,
and Income Security Issues

Appendix I: Scope and Methodology

This appendix describes our approach for collecting and analyzing data and for interviewing officials to document the management of the enforcement program at the Pension and Welfare Benefits Administration (PWBA). The objectives of our review were to determine (1) PWBA's current strategy for enforcing the Employee Retirement and Income Security Act's (ERISA) employee benefit plan provisions and (2) what areas PWBA could improve in the management of its enforcement program.

We conducted our review at PWBA headquarters in Washington, D.C., and 5 of 10 regional offices: Boston, Massachusetts; Philadelphia, Pennsylvania; Kansas City, Missouri; Dallas, Texas; and San Francisco, California. We selected the regional offices based on the following range of criteria: (1) geographic distribution—dispersed across the nation; (2) geographic coverage areas—mixture of small, medium, and large jurisdictions; (3) industry sectors covered; (4) workload levels; (5) performance indicators—mixture of low, medium, and high levels of performance results; (6) type of regional projects; (7) regional management—long-tenure managers versus managers recently reassigned from the national office; and (8) best practices used—locations known for innovative approaches. We also conducted a nationwide survey of PWBA's investigative staff and their immediate supervisors. In addition, we reviewed internal guidance and documentation, agency performance plans and reports, and performance data relevant to PWBA's enforcement activities. We also visited PWBA's contractor-run computer facility for the ERISA Filing and Acceptance System (EFAST) in Lawrence, Kansas. Furthermore, we interviewed key officials at other federal agencies with enforcement responsibilities regarding potential best practices as well as representatives from the nongovernmental employee benefits, retired persons, and labor communities. We conducted our work from November 2000 through November 2001 in accordance with generally accepted government auditing standards.

Identification of PWBA's Current Enforcement Strategy and Areas for Improvement

We interviewed and surveyed PWBA management and staff, as well as reviewed and analyzed relevant documentation from PWBA and the Department of Labor's Office of the Inspector General (OIG). To identify the current enforcement strategy and identify areas for improvement, we reviewed available PWBA policy guidance, internal studies, OIG reports, budget documents, performance and workload trend data, and other internal documents.

Interviews with PWBA Managers and Staff

To document the management of PWBA's enforcement program, including the agency's enforcement strategy and areas for managerial improvement, we conducted in-depth interviews with more than 100 PWBA employees. These included senior managers at PWBA's headquarter offices as well as senior managers, group supervisors, investigative staff and auditors, and benefit advisers at each of the five regional offices. We gathered the information using structured interview guides. In order to provide a degree of consistency across the agency, our interview guides included general questions applicable to all employees regarding agency procedures and policies, as well as specific questions tailored to each individual's particular position or area of expertise.

Survey of Investigative Staff and Supervisors

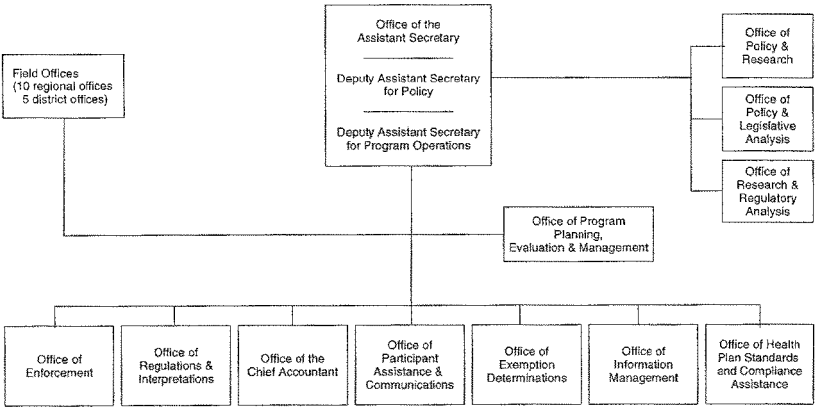
To collect additional data on PWBA's management of its enforcement program, we surveyed PWBA's entire investigative staff and their immediate supervisors—a total of 375 individuals. Of this number, 267 (approximately 71 percent) responded to the e-mail survey—representing all of PWBA's regional offices nationwide. To help gather accurate, unbiased data, survey respondents were assured anonymity. The survey questions reflected much of the content of the interview guides administered during field visits to headquarters and regional staff. Questions were designed to ascertain the effectiveness of various aspects of PWBA's management, including written guidance, quality assurance, enforcement priority areas, national office evaluations of the enforcement program, case targeting, benefit adviser leads, technological supports, sharing of "best practices" information, training supports, and the rating system.

Interviews with Representatives from Other Federal Agencies and Nongovernmental Organizations

In order to place PWBA's management of its enforcement program in larger context, we conducted interviews both with key officials from other federal agencies having enforcement responsibilities and individuals representing private organizations devoted to employee benefit and labor issues. We conducted interviews with officials from the Securities and Exchange Commission and from the Department of the Treasury's Internal Revenue Service to discuss their general enforcement strategies and any applicable best practices. We also solicited the opinions of experts from various external groups representing the pension industry, retired persons, and labor organizations—such as the American Benefits Council, the American Society of Pension Actuaries, the American Association for Retired Persons, and the American Federation of Labor and Congress of Industrial Organizations.

Appendix II: PWBA Organization Chart

Figure 8: U.S. Department of Labor, Pension and Welfare Benefits Administration



Source: PWBA.

Appendix III: Comments from the Pension and Welfare Benefits Administration

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

U.S. Department of Labor

Assistant Secretary for
Pension and Welfare Benefits
Washington, D.C. 20210

JAN 3' 02

Mr. Daniel Bertoni
Assistant Director
Education, Workforce,
and Income Security Issues
United States General Accounting Office
Washington, DC 20548

Dear Mr. Bertoni:

We have reviewed the General Accounting Office's (GAO) draft report entitled "Pension and Welfare Benefits Administration: Opportunities Exist for Improving Management of the Enforcement Program" (GAO-02-232). This letter provides our general comments concerning the draft report; we have already provided technical comments directly to you and your staff. We appreciate the recognition that actions have been taken since GAO's last review in 1994 to strengthen the enforcement program and leverage the use of our resources in what you conclude is "overall, a well-run program."

See comment 1 on page 52.

While we acknowledge the need for more effective oversight and quality controls, the agency has not been indifferent to these matters, and we will describe below some of those efforts. As GAO recommended in 1994, the agency has delegated a great deal of independence to the Regional Directors. The Regional Directors operate within a policy framework established through our Strategic Enforcement Plan and the annual program planning process. Since 1994, the Agency and the enforcement program have grown considerably, and we agree that there is a need to address these internal management issues. At the same time, it is important to recognize that much of our success is a result of the organizational culture that provides a significant amount of discretion to the Regional Directors to manage their staffs and to address the enforcement issues most relevant to their respective regions.

It is also worth noting that in addition to expanding in size since 1994, PWBA's mission has grown with the enactment of HIPAA and three other related health care statutes, the passage of the SAVER Act that expanded our outreach, education, and participant assistance programs, and the transfer of the responsibility from the IRS to PWBA for processing the ERISA annual reports (Form 5500s).

Provided below is information related to activities that have been undertaken in the enforcement area and the information technology, human capital management, and

Government Performance and Results Act (GPRA) areas which we believe was not covered in the draft report.

Recommendation No. 1: Develop a cost-effective strategy for assessing the level and type of ERISA noncompliance among employee benefit plans.

PWBA recently did embark on a statistical study to gauge health plans' compliance with the new provisions of Part 7 of ERISA (i.e., HIPAA, Mental Health Parity Act, Newborns' and Mothers' Health Protection Act, and Women's Health and Cancer Rights Act). After conducting a pilot project in FY 2000, covering approximately 200 investigations (not statistically selected), we decided to conduct a statistically valid review in this area. This project, entitled the Health Disclosure and Claims Issues—Project 2001 (HDCI), required extensive planning among PWBA's enforcement, research, and health plan compliance staffs. The project involved the referral of data on randomly selected group health plans to field offices for compliance reviews. PWBA compiled a statistically valid sample of approximately 400 multiemployer plans from Annual Report filings. A more labor-intensive task involved identifying by telephone contact over 900 covered plans from a random pool of over 2,100 single employers. These efforts, and ensuring the statistical integrity of the project, demanded meticulous record keeping at both the national and field office levels as these offices exchanged data on hundreds of entities. We have completed the investigative phase of the project and are just beginning the analysis of the results of the investigations. The Agency looks forward to being able to utilize the results of this project to guide our decisions regarding the allocation of the Agency's resources in the area of noncompliance by health plans.

In addition, once we have compiled the results of HDCI—Project 2001, we will be able to gauge better the use of such studies. As we begin planning later this year for FY 2003, we will give very serious consideration to conducting another baseline project within the framework of our existing resources and Agency priorities. We intend to continue to discuss this issue with the Agency's Regional Directors. With PWBA's resource limitations, it is important to ensure that any national enforcement initiative be manageable, while continuing to uncover misconduct and protect plan participants.

However, as GAO correctly points out, PWBA's current enforcement strategy recognizes its extremely limited investigative resources and relies on effective targeting methodologies and the identification of at-risk participant populations to leverage those resources most efficiently. The data reveal that this strategy is apparently working: both the percentage of PWBA cases converted to fiduciary investigations and the percentage of investigations resulting in the identification of violations have been steadily increasing over the past few years. By conducting enforcement projects, both nationally and regionally, PWBA identifies segments of the plan universe to ensure compliance with ERISA. The 401(k) Fee Project is an example where cases were targeted to ascertain the degree of compliance in a specific area. The enforcement project was one element of a multi-component PWBA initiative to address allegations regarding high and excessive fees charged to 401(k) plans. Fifty plans were selected for inclusion in the project with each region assigned five investigations. Forty of the plans identified for inclusion in the

project were selected because they were plan clients of institutions for which allegations of high or undisclosed fees had been made by the media or because of similar information obtained by PWBA in other investigations. The Form 5500 database was queried to identify the plan clients of these service providers through Schedule C of the Form 5500. This information was analyzed and plans were selected for investigation. Investigations of the plans were conducted and violations were cited where applicable. Other examples of similar initiatives include:

-- The proxy projects were initiated to ensure compliance with ERISA's requirements to manage the proxy voting of stock owned by plans prudently and in the interest of participants.

-- The employee contributions project ensured the timely payment of withheld employee contributions to health and pension plans, in particular 401(k)s.

-- PWBA also undertook a systematic review of 401(k) plans to ensure that fidelity bonds were in place as required to guard against loss through fraud or dishonesty.

-- Multiple Employer Welfare Arrangements (MEWAs) have been and continue to be a national emphasis because of the agency's experience that unscrupulous operators may leave participants with large, unpaid claims.

-- More recently, PWBA has identified orphan plans and plans whose sponsors are in bankruptcy as national emphases.

Recommendation No. 2: Institutionalize and conduct regular reviews of the sources of cases that lead to investigations.

In November 2001, PWBA completed the Case Opening and Results Analysis (CORA) 1999 Baseline Study to rank the most likely source that would best identify a potential violation of ERISA. The agency intends to build on the CORA 1999 Baseline Study and will produce CORA reports in future fiscal years so that longitudinal studies can be prepared. Work has already begun on the CORA 2000 study; currently data verification of FY 2000 data is underway, which is the preliminary step before data analysis can begin. In addition to analyzing the results based on the source of an investigation, PWBA intends to conduct corollary studies as part of CORA for management use.

It was important for PWBA to approach this analysis in a methodical manner and with long-term goals in mind. The first step was to complete the design, testing, and full implementation of the Enforcement Management System (EMS), so that the Agency would have reliable data upon which to base its studies. EMS is a significant milestone which has expanded the information being collected on investigations, empowered investigators and managers at all levels to access instantly information on any closed or

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open investigation, and provided flexibility to allow the addition of new data elements as the need arises. The system provides standard reports useful to both investigators and managers and permits the export of these reports to Excel for further analysis and calculations. These reports allow the regions to monitor and review specific information as to sources of cases, as appropriate.

Recommendation No. 3: Coordinate the sharing of "best practices" information between [sic] regions relating to the optimum and most productive techniques for selecting and conducting investigations.

"Best Practices"
With respect to the sharing of "best practices," we note that while Office of Enforcement (OE) managers did refer to being able to do a better job in the area, that response was given in the context of needing additional resources to be able to do so. We believe that we have taken a strong, proactive role in coordinating and delivering information on "best practices." GAO mentions on page 20 that ". . . fewer than half of the respondents [to the survey] believe [that sharing "best practices" across regions] takes place." However, it is possible that many field staff are unaware that considerable sharing among senior field managers does, in fact, occur on a regular basis; we will try to find ways to address the problem to the extent that it exists. For example:

-- We routinely review and share with field staff and managers (no less often than quarterly) the planned regional enforcement projects for the upcoming year and the results/successes achieved. This sharing of issues explored, targeting methodologies, and lessons learned is not reflected in GAO's report.

-- A specific audit guide to review plans' compliance with Part 7 of ERISA was developed and shared in connection with the HDCI—Project 2001.

-- Other specialized training in the areas of bankruptcy, proxy voting, MEWAs, and derivatives were developed by certain regions with OE assistance and made available to all other regions. Regions routinely share their investigative materials when their regional enforcement projects are adopted by another region; for example, the Kansas City region provided a senior investigator to conduct hands-on training to the Atlanta region when Atlanta adopted the settlor fee project. Similarly, Kansas City provided the written materials developed in conjunction with the settlor fee project to both the Dallas and New York regions.

-- During our annual field office training, we have made presentations in every region to field staff on techniques for selecting and investigating cases on such varied topics as orphan plans, health plans, Employee Stock Ownership Plans (ESOPs), MEWAs, and employee contribution cases.

-- Individual OE staff members are assigned responsibility as subject matter experts for a wide range of topics, issues, and projects and are charged with

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monitoring field activities and sharing information through written guidance memoranda or national teleconferences.

-- We have a program of formal presentations on the topic of "What Works and What Doesn't Work" which is given by a Regional Director at most of the quarterly Regional Directors' meetings. The Regional Director making the presentation provides insight into what has and has not been helpful in doing the job.

-- Recently, field offices have been provided with Discoverer software that allows them to create their own ad hoc computer targeting reports. Field offices were also provided with a methodology for numbering these targeting reports. OE will monitor these reports for success and share these with the other field offices.

-- The recently issued CORA 1999 Baseline Study established a baseline of case-related data to assist enforcement personnel in selecting sources of cases with the greatest likelihood of producing results on behalf of participants and their families. CORA determined the sources of investigations that were the most common reason for opening an investigation. OE provided regions with copies of CORA to assist them in targeting plans for potential violations of ERISA.

-- The agency has developed and conducts a number of multi-week courses attended by all investigative staff in basic ERISA law and investigative techniques; auditing techniques for non-accountants; reviewing financial institutions servicing plans; and criminal law and investigative procedures.

PWBA National Targeting Committee

GAO omitted a description of the PWBA National Targeting Committee, which meets annually and is composed of at least one representative from each region as well as OE representatives. Committee meetings are open forums used to facilitate the exchange of ideas and experiences, and committee representatives are expected to carry back to their regions any helpful information gleaned from these discussions. Committee members share ideas and experiences relating to case targeting and develop strategies and methodologies designed to maximize the effective use of PWBA resources. The committee prepares a written report based upon the information shared in the annual targeting committee meeting. These reports are provided to the Regional Directors, the Director of Enforcement, and the Deputy Assistant Secretary for Program Operations, and are shared at the staff level. Included in these reports are descriptions of regional projects, targeting reports, and other methodologies used to locate plans with potential problems. GAO staff were provided copies of two of these reports.

Technology used to help select plans for investigation

GAO concluded that most of the PWBA investigative staff does not have sufficient and timely access to automated information for researching and selecting plans for investigation. However, each region, at a minimum, has the following services available to them: Westlaw; RIA; BNA; Lexis-Nexis; and People Finder. The last two services

are limited to only one person in each office due to licensing costs. The agency makes every effort to find the best available Internet sites and relies on input from the Solicitor's Office in its selection of web sites for conducting legal research. The National Training Coordinator also recommends publications that would assist in the conduct of investigations. Regions are given annual funding authority to procure books, services, and publications as needed. Instances where specific software is needed for help in an investigation can usually be accommodated within the budgetary resources of the region.

PWBA will again survey the regional staff to find the names of specific sites that investigators find useful during investigations and perform a cost-benefit analysis to ascertain the best way to make these services available to the staff. Although it may be ideal to provide each person within the agency a license to a particular software or Internet tool, the licenses are expensive and there is a significant time commitment to master the use of some of the software, such as Discoverer. It is the job of PWBA management to establish budget and time priorities. We may need to ensure that staff understand more of the management issues involved in these decisions.

Finally, it should be noted that PWBA has an internal "Intranet" site that is used to share a variety of information related to 1) cases underway in the Agency (a global search function covers all National Office components and the field), 2) technical information on conducting Part 7 compliance reviews, 3) the Enforcement Manual, 4) the EMS Users Manual, 5) web-based directories, and 6) the ERISA Data System (EDS). Plans are underway to place additional materials on the Intranet related to specific regional initiatives, enforcement issues, administrative guidance, and PWBA advisory opinion letters (combined with a search engine).

ERISA Data System (EDS)
It should be noted that the ERISA Data System (EDS) has now been successfully implemented in all field offices. EDS provides all investigators with the ability to probe directly the EFAST data by the most commonly used criteria, such as plan types, business sectors, certain investments (such as real estate), and other significant indicators. Feedback from the field offices regarding EDS has been very positive thus far. The 5500 data are made available when received from the EFAST contractor (currently on a monthly basis, but will be nightly once a software change request has been implemented). We are aware of the difficulties caused by the transition to the new EFAST system and expect that this technology will pay off once it is fully implemented.

We have also implemented the first phase of EDS targeting using the Oracle Discoverer query tool. This tool gives the regions the ability to search for plans as well as target plans that fit certain criteria designated by the investigator. These users have been provided a starting library of 21 targeting workbooks, which can be modified as the regions need to adjust them for local conditions. The results can be exported to Excel spreadsheets to be made available to all investigators. The OE has created a new targeting numbering scheme so that the outcomes of the resulting investigations can be better tracked. In addition to the preset targeting workbooks, these Discoverer users have the ability to create queries based on any data element on the Form 5500 plus

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accompanying schedules. The next EDS targeting phase is under development, and we expect implementation in the coming months. This phase will make a viewer version of Discoverer available to all investigators so that they can all run the preset queries and adjust benchmarks and thresholds as they see fit.

Recommendation No. 4: Develop a closed case quality review process that ensures the independence of reviewers and sufficiently focuses on substantive technical case issues.

PWBA agrees that a quality review program is important. As pointed out by GAO in its report, the majority of regions conduct an active program of quality review on closed cases, although the reviews were criticized because of the lack of independence on the part of the reviewers and the perceived lack of substantive technical review in some instances. While OE has not issued specific written procedures or guidance on how offices should conduct these reviews, we have discussed other offices' practices and policies at managers' conferences and provided written materials describing these programs.

In the past, we have struggled with this issue and have tried different models for conducting accountability reviews—none of which fully met the Agency's needs. For example, in 1992-93, we tried a pilot review project that covered enforcement and administrative operations. That model relied on National Office staff examining a pre-determined set of cases and selected aspects of the administrative part of the office operations. The latter part of the review was well received, but there were considerable differences of opinion on the accuracy and value of the enforcement review—in large part because several of the National Office staff reviewing casework had little or no experience in actually conducting investigations. This situation still exists today in that many of the OE staff have either worked only a short time in the field (on a detail) or have no field experience. Also, given the streamlined organizational structure in PWBA, there is no component that is totally independent of the enforcement process where staff would be knowledgeable enough to conduct such reviews. However, we will discuss GAO's findings with the Regional Directors and explore possible modifications and improvements to the current quality review program. We will provide a more detailed response on this matter when we respond to the recommendations in the final report.

We also would like to point out that OE has a number of routine processes in place that allow it to provide substantive technical oversight, ensuring consistent application of the law and agency procedures regarding the voluntary compliance process, litigation, penalty assessments, and claiming monetary results. OE receives and reviews every work product in each of these categories and, where appropriate, discusses discrepancies with specific offices. In fact, no monetary recovery submission is approved until it undergoes two levels of review in OE to ensure that violations are correctly cited with sufficient evidentiary basis and that monetary correction has actually occurred as a direct result of field office activities.

OE also receives and reviews quarterly written case summaries that the field offices identify as being the most significant and shares them with other components within the national office, such as PBSD, ORI, and OED. A group meeting is then held to discuss the issues identified for investigation and to offer suggestions to the field office to enhance the investigative results. On occasion, it is concluded that the issue identified is, in fact, not a problem (possibly because of the existence of a complex statutory or class exemption), and the field office is so advised.

V. Monitor and analyze the barriers to participation in Voluntary Fiduciary Correction Program and explore ways to reduce them.

GAO characterizes participation in the Voluntary Fiduciary Correction Program (VFCP) as "low" in light of the Agency's original projection of 700 that appeared in the context of the VFCP's economic impact analysis. It must be noted that this projection was merely a mathematical calculation based on very limited experience related to the Department's closest analog, the Pension Payback Program (PPP). However, the PPP had significant distinctions from the VFCP, including a narrower scope, a more limited duration, and excise tax relief resulting in approximately 170 plans participating in the six-month program. The fact that participation in the VFCP in practice is below that estimate, in our view, only goes to the issue of the legitimacy of the underlying assumptions made when it was calculated and does not necessarily reflect on the quality of the program.[1]

PWBA sought public comment on all aspects of the VFCP, and found that the VFCP as originally proposed included provisions that public commenters and potential applicants found to be potential disincentives to participate, such as a general notice requirement and mandatory reporting of prohibited transactions to the IRS for excise tax imposition. PWBA has submitted a final VFCP to the Office of Management and Budget, and will provide a description of the final program to GAO as soon as it is released.

[1] When PWBA announced the program, the Agency stated in the *Federal Register*, "The Department projects that Plan Officials of approximately 700 plans will apply for and use the VFC Program . . . . The Department views this estimate as an upper bound; actual participation may be somewhat smaller depending on the cost effectiveness of correcting the actual transactions involved, the complexity of the legal and factual issues involved in a given transaction, and the degree of similarity between an actual transaction and a transaction and correction described by the terms of the VFC Program. The Department recognizes that Plan Officials may not view the VFC Program as offering a cost effective means of correcting all potential violations." Nowhere is it indicated that the 700 participating plans would apply within the first year. It was always assumed that there would be a warm-up period before reaching full levels of participation.

VI. Conduct a comprehensive review of PWBA's future human capital needs, including the size and shape of the workforce; the knowledge, skills, and abilities needed; succession planning challenges; and staff deployment issues.

Human Capital Management

PWBA has identified the human resource management challenges it will face within the next five years and is taking proactive steps to ensure that the right people are in the right place at the right time and that the systems are in place to meet these challenges. Set forth below is a description of the kinds of activities being undertaken by the agency within existing resources:

-- In FY 2001, PWBA's attrition rate dropped to 9.4 percent. We also understand that the Departmental attrition rate in FY 2000 was 7.2 percent and was 6.7 percent in FY 2001. While our attrition rate was still higher than the Departmental average in FY 2001, we have made considerable improvement in this area.

-- PWBA is currently planning to implement a student loan repayment program as one vehicle to attract and retain valuable employees. Because the retention problem is more significant in certain field offices, the plan is to establish a pilot program. If this program proves successful, it may be implemented PWBA-wide.

-- In order to provide National Office Directors and Regional Directors additional tools to recruit well-qualified candidates for PWBA major occupations, the Deputy Assistant Secretary has re-delegated authority to them to approve certain human resource flexibilities. This includes the authority to approve advances in pay, superior qualification appointments, and payment of travel expenses for interviews.

-- To recruit more effectively well-qualified candidates, PWBA established national and field recruitment teams. Each national office component and region designated an individual to facilitate recruitment for major occupations. Recruitment team members attend a variety of job fairs, college campuses, and other events where applicants with the necessary skills to do the work of the organization are available. Recruitment team members can access a group e-mail address to alert other team members about their recruitment activities and share information about the best sources of candidates. In addition to recruitment teams, PWBA is beginning to advertise its vacancies on the Internet. We have begun to utilize BenefitsLink.com to advertise senior management and specialized positions. Based on our preliminary review of the visits to our advertisements, we believe this medium offers a very good recruitment source for future job advertisements.

Succession Planning

While PWBA has not instituted a formal succession plan, we have taken significant steps to build, sustain, and effectively deploy the skilled, knowledgeable, diverse, and high-performing workforce needed to meet current and emerging needs.

-- PWBA has made extensive use of the U.S. Office of Personnel Management (OPM) supervisory and executive development programs. Annually, PWBA sends non-supervisors, supervisors, and other managers to OPM's supervisory and executive development programs. Over the years, a number of employees who attended the OPM training have moved into supervisory and senior management positions with the agency. We know from reviewing past results that employees who have attended the training programs have progressed to supervisory and managerial positions in PWBA. These programs are highly rated by those who attend. In FY 2000 and FY 2001, we sent 29 employees and 35 employees, respectively, to OPM courses. In FY 2002, 47 employees are scheduled to attend at a cost of $148,000 for tuition and room and board.

-- In addition, we have established Deputy Regional Director positions in all 10 regions, providing more staff the opportunity to develop the expertise needed to manage a regional office. These positions also provide the missing "link" in the career ladder in our Field positions, since the first-line supervisors don't have the similar range of experience in running a multi-faceted program with a sizable staff (50-75 employees per office).

-- PWBA conducts an extensive in-house technical training program. In FY 2001, PWBA contracted with Job Performance System, Inc., to undertake a training needs assessment and make recommendations on how PWBA could improve its training program. The agency is currently evaluating that assessment and has begun implementing recommendations, as appropriate and as resources permit.

-- PWBA provides long-term career development assignments in two categories--executive potential and executive leadership. Each program lasts approximately one year. Over the past several years, PWBA has supported nine employees in these assignments. The executive potential program is available to supervisory employees who demonstrate executive management potential. Employees selected for this program must complete two 60-day rotational assignments outside PWBA. These rotational assignments are designed to give the employee exposure to the operations of other federal or state agencies. In some cases, the employee may work in a private sector organization during one of the rotational assignments. The executive leadership program is designed primarily for journey-level employees who demonstrate supervisory potential. Employees selected for this program conduct research on management and work-related issues, prepare group reports, shadow supervisory and management officials in their daily work, and complete two rotational assignments.

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-- PWBA also provides opportunities for short-term career development assignments. A few years ago, the Deputy Assistant Secretary for Program Operations established a Special Assistant position in his immediate office to provide journey-level employees with an opportunity to work on projects at the highest level in the agency. Since its inception, 14 employees have completed a rotational assignment. Of these, five have either been selected for supervisory or other management positions on a permanent or acting basis. For FY 2002, the Deputy Assistant Secretary has selected five Field staff for this program. PWBA has also established a similar rotational program involving regional offices. The PWBA San Francisco Regional Office is the first to participate in this program.

-- The Department of Labor has an SES candidate development program, in which PWBA has participated. This program lasts approximately 18 months and includes rotational assignments inside and outside the Department of Labor. A PWBA employee who was selected for the program has completed all requirements and is now eligible for a noncompetitive appointment to a position in the Senior Executive Service.

Recommendation No. 7: Reevaluate the performance rating system for enforcement staff to ensure that case complexity and teamwork issues receive sufficient emphasis.

See comment 2 on page 52.

The current performance rating system for field investigators and auditors was designed in partnership with the union that represents field bargaining unit employees—the National Council of Field Labor Locals (NCFLL). The performance standards reflect a desire to have a less subjective performance rating system. In FY 2000, at the request of the NCFLL, an analysis of the first performance element was undertaken, and as a result the element was modified for the rating period beginning April 1, 2001. We will provide a copy of GAO's report to NCFLL and ask them to assist us in determining whether the performance standards should undergo another joint revision, after the conclusion of the current rating cycle.[2] It should be noted that GAO states that about one-third of survey respondents indicated that PWBA needed additional measures than those currently being used to assess the enforcement functions. This could be restated to show that about two-thirds of survey respondents did not feel that PWBA needed additional measures.

Performance Measurement System Needs Improvements

Another conclusion reached by GAO, but not mentioned in terms of a specific recommendation for executive action, is that PWBA's performance measurement system provides limited assurance of overall program effectiveness. In a previous GAO report

[2] GAO notes that one region appears to have a productivity requirement in addition to those set forth in the formal performance standards. The Regional Director has agreed to retract formally the informal requirement of processing 30 cases and making two referrals to the Solicitor's Office via memo to the entire investigative staff.

(GAO-01-779, June 15, 2001), PWBA agreed with GAO that a single enforcement performance goal, as delineated in our FY 1999 and FY 2000 Annual Performance Plans, failed to be sensitive enough to measure adequately both pension and health related enforcement activities. In fact, prior to the issuance of that report, PWBA had already taken steps to bifurcate the goal into a pension and health enforcement goal to reflect more effectively the use of resources. In essence, GAO and PWBA had a mutual interest. We disagree, however, that further separation of the data within the respective goals is appropriate or necessary. GPRA envisioned overarching, outcome-oriented goals. While we continue to strive for outcome-oriented goals, it is acceptable to measure outputs that serve as surrogates to outcomes and can be reasonably linked to success. We believe restoring assets, correcting prohibited transactions, recovering participant benefits, and protecting plan assets are all linked to providing for the desired outcome of secure benefits.

While we appreciate that further separating the enforcement goals would provide us more specificity with respect to individual strategies, it would take us backwards in the performance measure evolution by measuring activities rather than a more outcome-oriented measure that incorporates numerous aspects of performance. PWBA considers the data to assess specific strategies. We aggregate it for the purpose of reporting broad goals while still monitoring the success or failure of individual strategies. We believe that the four outputs--restored assets, corrected prohibited transactions, recovered participants benefits, and plan assets protected are all favorable and indicate our success, none of which has greater weight over the other. Therefore, taken together and balancing the need for broad strategic objectives, the existing goals best serve PWBA's ability to manage towards results rather than by activity.

On pages 29-30, GAO raised questions regarding the performance measure used to track recoveries by the Benefit Advisors (whether the goal was defined as "benefits recovered" or "benefits restored") and whether the FY 2000 goal was met. In fact, PWBA exceeded its goal. In FY 2000, we recovered $62 million as a result of Benefit Advisor assistance. To address the confusion over the term "benefit recovery," PWBA modified its FY 2001 performance report and adopted the generic term "recovery" which in actuality is a function of "benefits restored" plus "benefits protected."

PWBA does have a concern about GAO's observation that the agency does not currently have any annual performance plan measures that track the number of employee benefit plan participants helped by PWBA's enforcement efforts. In the 1980s, PWBA's enforcement strategy concentrated large amounts of resources on "significant" cases (i.e., those that affected the largest number of participants). With the passage of time, however, we have learned that more problems exist in medium to small size plans--and that they tend to have fewer professional advisors or service providers. To emphasize participant numbers could inappropriately skew the enforcement program strongly in favor of investigating large plans, which would leave many of the most vulnerable participants without government assistance. Furthermore, if there were a numeric goal related to the number of participants affected by our investigations, that same goal would have to be placed in the performance plans of the field managers, which would bias the

selection of cases for investigation. As a matter of policy, PWBA has not used participant numbers but has instead used the number of investigations as a measure.

In conclusion, the Department of Labor appreciates having had the opportunity to comment on this draft report.

Sincerely,

Ann L. Combs

GAO Comments

1. In its response letter PWBA incorrectly depicted our prior work on its enforcement program. PWBA stated, "As GAO recommended in 1994, the agency has delegated a great deal of independence to the Regional Directors." While our 1994 report, *Pension Plans: Stronger Labor ERISA Enforcement Should Better Protect Plan Participants*, GAO/HEHS-94-157 (Washington, D.C.: Aug. 8, 1994), contained three recommendations to improve Labor's ERISA enforcement program, we did not recommend that PWBA delegate independence to its Regional Directors. In the context of our 1994 recommendation that PWBA increase the use of penalties authorized by ERISA by establishing procedures to routinely review referrals of potential violators from the Internal Revenue Service, we did state that PWBA use "...decentralized legal staff to help assess prohibited transaction penalties when warranted."

2. In commenting on our assessment of PWBA's performance rating system for enforcement staff, PWBA incorrectly linked one of our findings on its agency performance plan measures to a discussion of their rating system—e.g., that about one third of survey respondents believed PWBA needed additional agency performance measures to assess its enforcement functions. The example PWBA referred to is not related to its performance rating system but to our survey finding that PWBA may need additional measures to more fully assess the effectiveness of its enforcement program. We based this conclusion on our review and analysis of PWBA's measures and our nationwide survey of its investigative staff and supervisors. About one-third of those surveyed noted that additional measures were needed to assess the enforcement functions; about 40 percent felt that current measures were adequate; and about 26 percent submitted a "do not know" response. Although one-third of staff responding is not a majority, this seemed an important observation by a significant number of people knowledgeable about PWBA's operations. Respondents and investigative regional staff we spoke with generally noted that PWBA's measures placed too much emphasis on numbers of investigations conducted and monetary recoveries and too little emphasis on the number of plan participants and beneficiaries helped by PWBA's enforcement program.

Appendix IV: GAO Contacts and Staff Acknowledgments

GAO Contacts

Barbara Bovbjerg, (202) 512-7215
Daniel Bertoni, (202) 512-5988
R. Elizabeth O' Toole, (202) 512-3050

Staff Acknowledgments

In addition to those named above, Frank F. Putallaz, George A. Scott, Aonghas St-Hilaire, Roger J. Thomas, and Anthony J. Wysocki made key contributions to this report.

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APPENDIX G – SUBMITTED FOR THE RECORD, RESPONSE OF ASSISTANT SECRETARY COMBS TO QUESTION POSED BY CONGRESSMAN ANDREWS RE: FINANCIAL DISCLOSURE BY ERISA TRUSTEES

Question: Do you think people would be willing to serve on fiduciary boards under ERISA if they had to file a form like the ones Members of Congress file that disclose their sources of income?

Would the Department prefer amending ERISA so that all ERISA trustees would be covered by that disclosure?

Answer: It is likely that financial disclosure reporting requirements similar to those in place for some Federal public officials would be a significant factor in a private individual's decision to accept fiduciary obligations under ERISA; it is difficult to predict the impact of this change on the individual decisions of the thousands of persons who currently serve as ERISA trustees. In addition, the disclosure requirement would appear to contemplate an appropriate Federal entity to collect and process the forms and make the data publicly available; a significant administrative task.

Fiduciary status is determined by conduct. In addition to the named fiduciaries in a given plan, other persons may be fiduciaries based on the decisions they make and the actions they take with respect to the plan. As a result, it would be very difficult for the Federal entity charged with collecting the financial disclosure forms to determine whether all the appropriate persons had, in fact, complied with the requirement.

The disclosures included in the type of forms filed by public officials are not, by themselves, sufficient to identify the conflicts of interest prohibited under ERISA--these forms disclose assets and sources of income, but this data would have to be matched with the conduct of each of the thousands of fiduciaries to be useful to the appropriate Federal entity. Under current law, if the facts developed during an investigation suggest a violation, this type of self-dealing will be pursued by PWBA. Our policy goal is to advance the understanding of fiduciary obligations and prohibitions against self-dealing. To that end, PWBA is considering the development of a fiduciary education program to help educate fiduciaries about their responsibilities.

ERISA currently prohibits self-dealing and similar misconduct, providing strong civil and criminal penalties for such violations. Under ERISA, each fiduciary is personally liable, and PWBA's enforcement actions regularly result in recoveries from these individuals.

APPENDIX H - SUBMITTED FOR THE RECORD, LETTER TO CONGRESSMAN ROBERT ANDREWS, RANKING MEMBER, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, FROM GORDON S. HEDDELL, INSPECTOR GENERAL, U.S. DEPARTMENT OF LABOR, WASHINGTON, D.C., SEPTEMBER 20, 2002

U.S. Department of Labor

Office of Inspector General
Washington, D.C. 20210

SEP 20 2002

The Honorable Robert E. Andrews
Ranking Member
Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Andrews:

This is in response to your request during the September 10, 2002, hearing on pension enforcement and accountability that the Office of Inspector General provide a written response for the record that updates the latest action involving our cash balance audit entitled "PWBA Needs to Improve Oversight of Cash Balance Lump Sum Distributions."

In March we asked the Pension and Welfare Benefits Administration (PWBA) to provide a written response detailing either a corrective action plan for each of our recommendations, or an explanation of any point of disagreement. In July PWBA provided their final written response. PWBA stated they are still awaiting a determination from the IRS on whether there were any violations of the Internal Revenue Code and ERISA by the 13 plans we identified as having underpaid accrued benefits to participants. Until a determination is made, PWBA said they could not take any enforcement action against those plans. We should note that we have repeatedly asked the IRS about the status of their response to PWBA but have not been given any timeframe.

In addition, at our request, PWBA obtained from the Department's Office of the Solicitor an opinion on whether PWBA has the authority to take enforcement action absent a specific request from the Secretary of the Treasury or a participant. Based on a review of our work papers, the Solicitor's Office stated that there may be some theoretical cause of action for a fiduciary breach under part 4 of Title I of ERISA. However, because of the Secretary of Labor's limited authority in this area, it is their recommendation that PWBA wait for guidance from the IRS in order to avoid any challenge. Again, PWBA is still awaiting a response from the IRS.

Enclosed for your reference is the complete response from PWBA. If you have any questions or concerns on this or any other matter, please do not hesitate to contact me at (202) 693-5100.

Sincerely,

Gordon S. Heddell
Inspector General

Enclosure

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

July 30, 2002

MEMORANDUM FOR ELLIOT P. LEWIS
Deputy Inspector General
for Audit

FROM: ALAN D. LEBOWITZ
Deputy Assistant Secretary
for Program Operations

SUBJECT: PWBA Needs to Improve Oversight of Cash Balance Plan Lump Sum Distributions
Audit Report No. 09-02-001-12-121

This is in response to your request of March 29, 2002, that PWBA respond to each recommendation in the above-referenced OIG report with either a corrective action plan or an explanation of the basis of a disagreement with a recommendation.

Regarding Recommendation Nos. 2 and 3, PWBA has not yet heard from the IRS regarding the 13 cases referred for review. As we explained in our comments on the draft report, PWBA cannot take any enforcement action or begin working with the IRS on additional guidance until the IRS determines whether or not there were violations of the Internal Revenue Code (IRC) and ERISA. We inquired as recently as this morning, but have not received even an estimate of the completion date of their review of the case files.

However, even if the IRS concludes that some or all of the 13 plans violated the IRC and ERISA, we continue to have concerns regarding the OIG's methodology for extrapolating from the 13 cash balance plans to the universe of potential violations. Accordingly, we cannot commit at this time to redirecting our enforcement resources to cash balance plan calculations as suggested in Recommendation No. 1. We will, however, continue to coordinate with the IRS on these issues and will take appropriate enforcement action in this area whenever it arises in one of our investigations.

There also was a request in the final report that we obtain a formal opinion from the Solicitor of Labor as to whether PWBA has the authority to take enforcement action in the absence of a specific request from the Secretary of Treasury or a participant. We have received such an opinion and, based on review by the Solicitor's Office of the information in the OIG's work papers, there may be some theoretical part 4 cause of actions available. However, given the limitations on the Secretary's authority, the Solicitor's Office recommends that we await guidance from the IRS regarding possible

violations of sections 203 and 205. (A copy of the legal opinion is attached for your information.)

We will continue to provide a regular status report on these recommendations to the OIG through the new Monthly Tracking Reports on Unresolved Audit Recommendations.

Attachment

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