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ERISA ENFORCEMENT: MANDATE FOR A SINGLE AGENCY

Beverly M. Klimkowsky* and Ian D. Lanoff**

Multiple jurisdiction for the administration of the Employee Retirement Income Security Act of 1974 (ERISA)1 does not work. Despite eleven years of effort, the Department of Labor (DOL), the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC)2 do not coordinate their activities effectively when joint action is needed. These deficiencies seriously hamper enforcement and policymaking activities. If ERISA is to be enforced and pension policy is to be made in a rational rather than a haphazard manner, ERISA administration must be consolidated into a single agency.

When citing the deficiencies of ERISA, members of the pension community most often express concern about the lack of a policymaking mechanism in pensions.3 When issues affecting all three agencies arise, such as asset reversion, solutions rarely can be reached in a timely manner. Although the case for a single agency based on the need for unified policymaking is meritorious, we will focus on enforcement instead; eleven years of evi-


2. The PBGC will not be a primary focus of this Article because of its relatively minor role in general ERISA administration. Title IV of ERISA creates the PBGC as an independent corporation within the Department of Labor that is charged with administering the termination insurance program for defined benefit plans. Nonetheless, the PBGC depends upon DOL and the IRS to supply it with information about endangered plans that would adversely affect its financial stability. Although the PBGC has little to do with fiduciary enforcement, a primary focus of this Article, it is interesting to note the PBGC’s recent involvement in this area in PBGC v. Greene, 570 F. Supp. 1483 (W.D. Pa. 1983), aff’d, 727 F.2d 1100 (3d Cir. 1984).

3. Interviews conducted by Beverly Klimkowsky with members of the pension community about issues of concern for ERISA’s tenth anniversary. Members of the pension community include past and present governmental officials of DOL, the IRS, the PBGC, Congress, and the White House as well as plan administrators, trade organization representatives, and tax and labor attorneys representing pension plans.
dence illustrates the failure of shared enforcement responsibilities. A review of fiduciary enforcement, in particular, indicates that the Department of Labor cannot enforce ERISA; the IRS does not enforce ERISA; and coordination in this area does not function well.

Recommending a single agency is not a new idea. Pension reform legislation that predated ERISA called for an independent commission to administer the law. Nearly every year since ERISA's enactment, a member of Congress has introduced legislation to consolidate its administrative structure.\(^4\) Unable to overcome historical rivalries between committees, however, Congress ignored the tenets of efficient and effective administration and worked out a multiple-jurisdictional compromise for ERISA administration. Congress has not moved beyond that compromise in subsequent legislation.

The administrative apparatus that Congress designed in ERISA called for DOL and the IRS to administer the law jointly. "Coordination" failed dismally.\(^5\) Congress deserves blame more than the agencies because Congress charged others with an impossible task.

ERISA could not be administered as legislated; a change had to be made. The agencies, loathe to have the program taken away from them, agreed to divide the responsibilities between them in a Memorandum of Understanding. That agreement became the basis of President Carter's Reorganization Plan No. 4\(^6\) that divided ERISA administration and forms the basis for the current administration. The agencies and Congress were, however, unable to reach a compromise about enforcement and followed Congress's prior example. In the absence of agreement, the agencies had no choice but to continue to "coordinate" enforcement efforts. Thus, although Reorganization Plan No. 4 severed most of the ties between the agencies, enforcement remained a common link requiring joint efforts.

Because pension plans involve large numbers of participants, represent a large body of capital, and relieve the social security system of some pressure, pension policy and administration are

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4. Senators Javits and Williams introduced S. 3017 in the 95th Congress and S. 209 in the 96th Congress. During the 97th Congress, Senators Nickles, Wallop, and Hatch, and Congressmen Erlenborn, Ashbrook, and Frenzel sponsored S. 1541 and H.R. 4330 respectively.

5. "Coordination" is a nonspecific word when used in an administrative sense. Lawmakers most often employ it to cover up disagreement, calling for accord to be reached during a later stage in the policy process.

important. The current system provides for inadequate enforcement of current law and no consolidated source of pension policy. These problems can be solved only by the establishment of a single agency responsible for administration of ERISA and development of pension policy. In Part I, this Article reviews the aspects of pensions that justify the attention of Congress during consideration of budgets and the federal deficit. Part II documents the initial administrative problems created by the congressional compromise that divided administrative responsibility between the Department of Labor and the Internal Revenue Service. Although Reorganization Plan No. 4 solved some of the initial problems, the remaining problems are not amenable to resolution within a system of responsibility divided between separate agencies. The specific problems associated with enforcement are discussed in Part III, which identifies the total failure of enforcement as a major threat to the future income security of participants in private pension systems. The establishment of a single agency, with the transfer of responsibility and funding from the Department of Labor and the Internal Revenue Service, is necessary to solve these problems and ensure adequate enforcement of the provisions of the Employee Retirement Income Security Act of 1974.

I. THE IMPORTANCE OF PRIVATE PENSIONS

An understanding of the politics of pensions provides a useful background to a closer examination of fiduciary enforcement. Politics is often described as the art of understanding who gets what, when, and how. Application of these standards to pensions reveals the stakes involved in pension policy. Decisions affect who participates in pension plans, under what conditions, when and whether they receive pension benefits, and how employer contributions are treated for tax purposes.

Private pensions play a critical role in the retirement income security of millions of Americans and in the nation's economy. Their importance as a political and economic issue grows over time. When pensions were first inaugurated, relatively few persons participated in plans and the total assets of the funds amounted to relatively small pools of capital. In 1983, approximately 15,000,000 Americans were recipients of benefits from

employer-sponsored pension plans, and approximately 51,500,000 workers were covered by such plans. Pension reserves are currently valued at nearly one trillion dollars and are growing rapidly. Retirees depend upon their pension benefits to sustain them, and workers regard their pensions as their security for the future.

Politicians concern themselves with pensions for several reasons. First, because pensions are important to their constituents, they are important to politicians. Second, private pensions relieve some of the pressure placed on social security, an expensive public program. Third, and more cynically, pension plan beneficiaries and participants belong to two groups that vote in high rates — the elderly and the affluent.

Pensions also play a critical role in the nation's economy. Much of the pension money is invested in stocks in large portfolios. Decisions about how those funds can be invested, as well as actual investment decisions, affect economic growth.

Large funds also constitute ripe grounds for illegal activities. As the investigation of the Teamsters Central States Pension Fund¹⁰ shows, plan officials can bilk pension funds of their assets. Pension regulators, therefore, must be vigilant about enforcing ERISA.

The involvement of several agencies in the administration of pension policy occurred incrementally. In response to specific problems, Congress regulated pensions and pension funds on a piece-meal basis. Because a series of Revenue Acts created pensions, the IRS has traditionally regulated them.¹¹ Congress, concerned but not alarmed about the operation of pension funds, passed the Welfare and Pension Plans Disclosure Act (WPPDA)

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8. Telephone interview with Dr. Emily S. Andrews of the Employee Benefit Research Institute (Nov. 12, 1985) (quoting E. ANDREWS, THE CHANGING PROFILE OF PENSIONS IN AMERICA (1985)).


11. The Revenue Act of 1921 allowed income tax deductions for trusts that accumulated earnings made by employers to profit sharing and stock bonus plans. The Revenue Act of 1926 enlarged this exemption to include pension plan trusts. The Revenue Act of 1928 allowed pension plan deductions. The Revenue Act of 1942 tightened the tax qualification requirements for pension plans, eliminating tax deductions for plans that benefit solely the highest paid workers or owners.
in 1958. It charged the Department of Labor with the administration of the Act, which required pension and welfare plans to file information with DOL, but did not set standards for plans or provide harsh sanctions for noncompliance. Because of the "toothlessness" of the WPPDA, no one challenged DOL's entry into the pension policy arena. DOL developed a reputation for "warehousing paper."

Congress drafted and enacted ERISA in the aftermath of the highly publicized termination of the Studebaker Pension Fund. Clearly, the Welfare and Pension Plans Disclosure Act had not effectively "reformed" the pension system. Politicians and the media scrambled to jump on the reform bandwagon. Presidential commissions and congressional committees delved into the study of private pension plans, unearthing a Sodom and Gomorrah of pension abuses. These abuses ranged from extremely stringent, albeit legal, requirements for participation and vesting to fraudulent investing of the money accumulating in pension funds.

Suddenly, pension regulation no longer suffered from a lackluster image. Competition for control of pension fund regulation arose on many levels: between House and Senate; between tax committees and labor committees; between the IRS and DOL; and between fiduciaries, accountants, lawyers, and myriad other professionals servicing pension plans.

Each of these actors claimed pensions as "their" issue. The tax factions, such as the House Committee on Ways and Means, the Senate Finance Committee, and the IRS, laid a historical claim to pensions and argued against the separability of the issue from the tax code, ensuring their constant influence. These committees exercise a great deal of power on Capitol Hill.

The labor factions, such as the House and Senate Labor Committees and the Department of Labor, led the initial charge for pension reform. They legitimizd their claim to pension reform

13. As a result of the termination, workers with vested pension rights, but who were not close to retirement, forfeited 85% of their benefits. ERISA Advisory Council, National Pension Forum 130-31 (Dep't of Labor transcript, Sept. 12, 1984) (testimony of Frank Cummings).
14. In January 1965, President Kennedy's Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs issued its report, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS, A REPORT TO THE PRESIDENT ON PRIVATE EMPLOYEE RETIREMENT PLANS. In 1971 and 1972, the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare held a series of hearings that resulted in PRIVATE WELFARE AND PENSION PLAN STUDY, 1971 and 1972, parts 1 and 2.
15. The Senate Labor Committee, under the leadership of Harrison Williams and Jacob Javits, held hearings and submitted the bills that predated ERISA. The public
by casting it as an employee compensation issue: workers were being denied their rights to compensation that had been earned but deferred for the future.

House and Senate rivalries erupted late in the policy formation process when the House Committee on Ways and Means tried to assert its constitutional right to legislate revenue matters. Amid this crossfire of claims and divergent perspectives, the ERISA Conference Committee met to iron out the differences in three pension reform bills.

The several factions within Congress diverged sharply over the substance of pension reform and the proposed administration of the new program.\textsuperscript{16} As ERISA was written, DOL and the IRS shared responsibilities jointly, as opposed to having divided responsibilities, necessitating intensive coordination between the two agencies if the law was to be implemented. Because political compromise rather than ease of administration dictated the administrative structure of ERISA, severe management problems surfaced as soon as managers attempted to implement the new law.

II. Initial Administrative Problems

ERISA's administrative problems stem from three major sources: the complexity of the law, the need to coordinate between agencies, and the lack of autonomy within the IRS and DOL. Implementing ERISA under any circumstances would have been a task worthy of the most capable administrator. The law is exceedingly complex and contained short transition periods during the initial years.\textsuperscript{17} The administrative structure, however, proved to be unworkable.\textsuperscript{18} It shackled one administrator to another administrator in a separate agency and required coor-

\textsuperscript{16} The tax committees wanted ERISA to be administered by the Internal Revenue Service; the Labor committees chose the Department of Labor as the preferred implementing agency. Creating a new independent commission or agency would have solved the stalemate, but neither faction would yield control.

\textsuperscript{17} Jacob Javits once noted that ERISA was one of the most complex pieces of legislation that had ever gone through Congress. \textit{Oversight of ERISA, 1977: Hearings Before the Subcomm. on Labor of the Sen. Comm. on Human Resources, 95th Cong., 1st Sess.} 51 (1977) (hereinafter cited as \textit{Oversight of ERISA, 1977}). ERISA's implementors had less than a year and a half before many of the provisions became effective.

\textsuperscript{18} ERISA § 406, 29 U.S.C. § 1106 (1982) lists a litany of transactions that ERISA prohibits. Many of the prohibited transactions were formerly common business practices. Plans can, however, apply for exemptions from these prohibitions. Processing these exemptions has been an administrative nightmare, fraught with delay.
ordinated efforts for the issuance of new regulations and the au-
chorization of exemptions. ERISA’s initial problems included ex-
cessive paperwork, delays in issuing rules and regulations, delays in issuing exemptions from the prohibited transactions provi-
sions, and burdensome reporting requirements.19

Time and Reorganization Plan No. 4 have alleviated the problems of complexity and coordination. Although ERISA re-
mains complex, members of the pension community are familiar with it now. The agencies simplified the initial paperwork re-
quirements in response to public pressure. The issuance of regu-
lations eliminated the uncertainty that prevailed during ERISA’s first days.

Reorganization Plan No. 4 aimed to eradicate the jurisdic-
tional overlap between the Departments of Labor and Treasury. But agreement could not be reached with Congress on separation of all functions. Specifically, Reorganization Plan No. 4 pro-
posed that: (1) authority over minimum standards in participa-
tion, vesting, and funding be held exclusively by Treasury; (2) authority for fiduciary obligations, including prohibited transac-
tions, be held exclusively by DOL; (3) coordination be continued on notices of intent to disqualify multiemployer plans; (4) each agency retain enforcement responsibility; and (5) the program be reevaluated and long-range recommendations for change be submitted on or before January 31, 1980.20 The current adminis-
trative structure of ERISA retains the divisions of responsibility agreed to by the agencies and reflected in Reorganization Plan No. 4.

In addition to allocating administrative tasks, Reorganization Plan No. 4 sought to reduce delays in issuing regulations and in processing applications for exemptions from the prohibited transactions provisions of ERISA.21 Administration of these two aspects of ERISA improved significantly in the first year under

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19. Pension Reform Act of 1974: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 94th Cong., 1st Sess. (1975); U.S. COMPTROLLER GEN-
eral, Efforts to Implement the Employee Retirement Income Security Act of 1974
by the Department of Labor, H.R. Doc. No. 99, 95th Cong., 1st Sess. (1977); OFFICE
of Management and Budget, Study of the Administration of the Employee Retirement
Commission on Federal Paperwork, The Employee Retirement Income Security Act
(1976).

20. Reorg. Plan No. 4, supra note 6, at 332-34.

21. According to the agencies, ERISA required that 215 regulations be issued. Four
years after ERISA’s passage, half the regulations had not been published. By 1978, 1,148
exemption applications had been received, but only half of the cases had been closed.
The average processing time for applications was 15 months, but some applications had
been pending for several years. See 1980 OMB Task Force Report, supra note 19, at 38.
Reorganization Plan No. 4.\textsuperscript{22} A third problem has not been solved by time or Reorganization Plan No. 4. The administrative units responsible for ERISA suffer from internal bureaucratic pressures and a lack of autonomy. The missions of the IRS and DOL are not always consistent with ERISA's goals. When conflicts arise between the goals of the Departments and the goals of ERISA, the Departments' goals often receive a higher priority. The Departments of Treasury and Labor buried the offices administering ERISA far down the hierarchical ladder.\textsuperscript{23} Couching within larger bureaucracies, the IRS's Office of Employee Plans/Exempt Organizations and DOL's Office of Pension Welfare Benefit Programs compete with other offices for scarce resources and the ear of the Secretary of the Department; their administrators are far removed from the President, and all communications to the higher echelons of government must filter through many layers of bureaucracy. Recently, the Office of Employee Plans/Exempt Organizations has been moved further from the sources of power within the Treasury by the imposition of an additional layer of bureaucracy between the Commissioner of the IRS and the Assistant Commissioner, Employee Plans/Exempt Organizations.

III. ERISA ENFORCEMENT

Enforcement is another area of ERISA that has not improved over time. Enforcement's appearance at a late stage in the policy process does not diminish its importance. An undeniable thrust and purpose of ERISA is to protect plans and their participants

\textsuperscript{22} Although the OMB Task Force noted significant progress in these aspects of ERISA in the first year, improvement did not continue at that rapid pace. Ten years after ERISA's enactment, some regulations have yet to be issued. In addition, delays once more plague the exemption process. Initially the issuance of many class exemptions expedited the process. Most of the class exemptions have now been issued and the majority of the remaining applications require individual determinations.

\textsuperscript{23} Although the Department of the Treasury retained policymaking responsibility within its Office of Tax Policy, it delegated its ERISA program responsibilities to the Internal Revenue Service. ERISA created a new office and a new assistant commissioner position in the IRS, the Office of Employee Plans/Exempt Organizations (EP/EO). 26 U.S.C. § 7802(b) (1982). The Assistant Commissioner EP/EO, who reports to the Commissioner of the IRS and the Deputy Commissioner, manages the provisions of the Internal Revenue Code governing employee benefit plans and other tax-exempt organizations. EP/EO, however, lacks status within the IRS; its mission is peripheral to the main revenue raising function of the Service. Recently, DOL established the Pension and Welfare Benefit Administration which will be directed by an Assistant Secretary. It must still report, however, to the Secretary and Undersecretary of Labor.
from fiduciary breaches. The Supreme Court most recently recognized this in *Massachusetts Mutual Life Insurance Co. v. Russell*: "The floor debate also reveals that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent this abuse in the future."24 The ERISA Enforcement Working Group noted that "[e]nforcement does not exist in a vacuum . . . . Any national enforcement policy must be an integral part of an overall unified approach which considers all aspects of governmental involvement in the regulation of employee benefit plans."25

A law is good only if it is obeyed; government does not know whether its citizens obey a law unless government checks to see that they do or violations are brought to the government’s attention. To prevent crises from occurring and to protect the integrity of laws, the government usually spends money on law enforcement.

An ideal enforcement program strives to attain the highest level of voluntary compliance. But given that some persons will not comply without the fear of negative sanctions, investigations and audits must be conducted. To be effective, investigators should focus most of their resources on the bad actors, but also employ a random audit process to keep everyone honest. The available resources should be divided between approaches to monitor the greatest number of plans and to protect the greatest number of plan participants. An adequate level of funding, however, is a prerequisite to the mounting of a credible enforcement effort.

No one really knows how well pension plans adhere to ERISA’s fiduciary provisions. Neither DOL nor the IRS examines plans on a routine basis. In addition, Congress has never allocated enough funds to enable plans to be audited at a rate similar to other financial enforcement programs such as those of the Securities and Exchange Commission and federal banking regulatory agencies.


A. Enforcement at Labor

The Labor Department's historical difficulties in administering ERISA have been well documented. These problems extend into the enforcement area and persist despite knowledge of their existence. Based on the Department's uneven performance during the past ten years, one can say that DOL cannot enforce its responsibilities under ERISA. In a recently conducted study of enforcement, the Department itself concludes:

Even if the program were organized in the best possible way and performing with 100 percent efficiency, the resources currently available are totally inadequate. Major personnel and material enhancements are necessary to allow even the most minimal level of credibility to be established within the employee benefit plan community. Only when such credibility is established can ERISA enforcement be said to be operating at a fully successful level.

DOL's inability to enforce ERISA effectively stems from two major sources: lack of resources and internal management problems. Both of these categories encompass many smaller issues.

DOL's attempts to enforce ERISA have been plagued by insufficient staff, untrained personnel, and by a lack of information with which to target enforcement efforts. Enforcing ERISA vigorously would require a large staff. Currently, DOL oversees both pension plans—43,200 with more than 100 participants and 732,000 with fewer than 100 participants—and welfare plans—63,900 with more than 100 participants and an estimated four million with fewer than 100 participants. One hundred and seventy-five investigators and auditors currently police this plan universe. The budgeted ceiling is 223 enforcement staff.

27. ERISA ENFORCEMENT REPORT, supra note 25, at 69-70.
28. Id. at 5.
29. Id.
positions. If DOL were to review each of the larger plans and a two percent sample of the smaller plans every year, it would require 2,600 investigators.

Delays in processing ERISA paperwork and failure to enforce the program vigorously can be attributed in part to personnel cutbacks the Reagan administration mandated. Nearly all government agencies have experienced personnel cutbacks since 1980; the agencies administering ERISA are not exceptions. Given the current political climate, it is unlikely that even modest increases will be made in the size of the investigating staff. Certainly, increases of the magnitude necessary to enforce the program vigorously will not be forthcoming.

Enforcing the fiduciary provisions of ERISA requires knowledge of securities, investment banking, and real estate. As the size of pension funds grows, new types of investments must be sought. When ERISA was first enacted, many of the investigators had been transferred from the Labor-Management Services Administration and were not trained in pensions. Although the quality of the investigators has been upgraded over the years, the qualifications still fall short of the requirements of the job. Additionally, DOL's training efforts do not match its need: only four national office training programs have been held in ten years.

Lack of information about pension plans to be investigated poses myriad problems. Because of initial criticisms about the excessive paperwork ERISA caused, DOL and the IRS agreed to share the information gathered on the annual report that pension plans must file, which is Form 5500. The IRS receives that information, codes it for computer processing, and forwards it to the DOL. This process hampers fiduciary enforcement in several ways. First, DOL investigators receive information that is insufficient for enforcement purposes. The IRS codes only fifteen items on Form 5500, including identifying information. Discrepancies in plan operations cannot be detected with this small amount of information. Second, delays in receiving information mean that DOL investigators often do not have information from the most recent forms filed by pension plans. Assuming that the IRS receives complete information in a timely manner, the information is at least a year old when DOL gets it. Thus,

30. Id.
31. Id. at 6.
32. Many of those investigators came to the Labor-Management Services Administration after careers at the Federal Bureau of Investigation.
33. Plans need not file their annual reports until seven months after the end of the
investigators often must ask plans to supply the most recent copies of their annual reports, severely hampering DOL’s credibility as a capable enforcer.

The second major source of DOL’s enforcement difficulties is internal management problems. Internal bureaucratic infighting causes many administrative difficulties, including problems in fiduciary enforcement. Frequent changes in the top ERISA position and ongoing rivalries between different factions of DOL have resulted in an inconsistent philosophy of enforcement, in a lack of independence of the enforcement branch, and in a perception that no climate for enforcement exists within the Department.

No ERISA enforcement program in DOL has outlasted the Administrator who initiated it. Considering that five persons have occupied the key position in ten years, enforcement has been subject to frequent changes and reversals. During the first years of implementation, DOL’s philosophy of enforcement closely mirrored that of the IRS: attempting to secure voluntary compliance. At the beginning of a program, especially one as complex as ERISA, resources can best be spent informing the public about their obligations under the new law. At this stage, many plans probably were in violation of the law unknowingly. Focusing efforts on clarifying the new law and disseminating information to the public permits the program to move to a mature stage of operations more quickly.

Criticism of the enforcement program’s emphasis on technical assistance and public education led to the inauguration in 1978 of the “significant case” approach. Acknowledging the scarcity of enforcement resources, this approach sought to secure the widest enforcement and greatest compliance by focusing on fiduciary investigations of large plans. It took several years before the system worked well; field investigators had to be taught what constituted a significant case and the Solicitor’s office and the field offices had to develop a working relationship. The significant case approach purposely excluded many areas of ERISA enforcement, including delinquent and deficient annual report filings, criminal investigations, and all enforcement related to small plans. The Government Accounting Office, the Walsh report, and the Senate Labor Subcommittee criticized the Department’s enforcement program for its deficiencies.  

plan year. The IRS takes several months to keypunch data, and then a few months are needed to microfiche the data. ERISA ENFORCEMENT REPORT, supra note 25, at 42-43.

34. U.S. COMPTROLLER GENERAL, LAWS PROTECTING UNION MEMBERS AND THEIR PEN-
In response to these criticisms, DOL redirected its enforcement efforts in 1982 just as the significant case approach was beginning to prove highly successful. It dropped the significant case approach to emphasize criminal enforcement, greater review of small plans, and consideration of nonfiduciary violations. Criticisms of this newest enforcement effort focus on its vagueness, inconsistency, and absence of a defined strategy.\textsuperscript{35} Given the appointment of another individual to direct the program, enforcement policy has not yet been redirected in response to the latest comments.

The enforcement division of the Office of Pension Welfare Benefit Programs has suffered from the lack of independence that the Office itself has endured. In essence, DOL grafted ERISA enforcement onto the preexisting structure of the Labor Management-Services Administration. As a result, enforcement became decentralized. ERISA investigators have not been given a great deal of autonomy. Perhaps because of the continuing scrutiny of their actions by others involved in pension policy, DOL has kept a close eye on their progress. In response, investigators have been very conservative instead of engaging in prudent risk-taking that might enhance their enforcement efforts. The ERISA Enforcement Working Group noted that a climate for enforcement did not exist within DOL. Although they could not single out an overriding factor, they noted a lack of zeal within the Department of Labor for enforcement, the delegation of criminal investigations to the Department of Justice, and the lack of consideration for the impact administrative decisions would have on program enforcement.\textsuperscript{36} The lack of continuity in enforcement policies and the high degree of outside criticism create an unstable enforcement environment. Steps taken over the past several months do raise hope regarding improved management. The new chief of enforcement was recruited from the Securities and Exchange Commission. Also, a new Division of Investigations has been established in the national office to administer a program of nationwide investigations. However, this initiative will not be productive unless it is provided additional


\textsuperscript{36} See \textit{ERISA Enforcement Report}, supra note 25, at 66-69.
personnel and adequate resources.

The record shows that the Department of Labor has been unable to enforce ERISA. Its resources never have been sufficient to mount a credible enforcement effort. Shifts in management priorities have weakened enforcement still further. Despite recent reorganizations that should give the ERISA program more autonomy, there is little reason to hope that ERISA enforcement will improve dramatically in the immediate future.

B. Enforcement at the IRS

Under Reorganization Plan No. 4, the IRS has responsibility for enforcing the minimum vesting, participation, and funding standards of ERISA. Also, it is responsible for aiding DOL in enforcing ERISA's fiduciary standards.

Although the IRS has the means to enforce ERISA vigorously, it has not chosen to do so. The IRS considers its main function to be revenue raising. ERISA enforcement, peripheral to the agency's mission, receives a low priority. The most recent statement of the IRS's mission reads:

The purpose of the IRS is to collect the proper amount of tax revenues at the least cost to the public, and in a manner that warrants the highest degree of public confidence in our integrity, efficiency, and fairness. To achieve that purpose, we will: encourage and achieve the highest possible degree of voluntary compliance . . . .

Under the Internal Revenue Code, the IRS determines whether pension plans are qualified for tax exempt status. Typically, pension plans apply for a letter of determination, in which the IRS certifies that their plan is in compliance with the law. This process is voluntary, however, because pension plans need not obtain a determination letter in order to be tax exempt.

Congress has not scrutinized the IRS's enforcement of ERISA to the extent that it has examined DOL's enforcement. The last report on IRS enforcement was issued by the Government Accounting Office (GAO) in 1979. The report concluded, "During the 4 years since the enactment of ERISA, IRS has spent most of its field enforcement effort on determining whether plan pro-

visions comply with ERISA requirements. Little effort has been spent on determining whether plans operate in accordance with ERISA requirements.  

Although voluntary compliance by pension plans is preferable, plans must be examined to see if they are in compliance. At the time of the 1979 GAO report, the IRS recognized the need to improve its enforcement program and reported plans to increase the number of examinations, develop criteria both to measure the extent of compliance with ERISA and select plans for examination, and upgrade efforts to assure the quality of determination letters. The GAO has not reexamined the IRS's enforcement efforts to determine whether these goals have been met.

To date, the IRS has not developed a compliance monitoring system to select plans for audit. Although it conducted 27,732 examinations of employee plans in 1984 compared to 12,461 in 1978, this constitutes less than three percent of all plans, a meager sampling at best.

The IRS has been dilatory in other aspects of its ERISA enforcement program. It has responsibility for processing Form 5500, but no records exist of the IRS assessing any penalty for a pension plan's failure to file an annual report or a plan's filing of an annual report with deficient information. As another example of the IRS's lack of vigor in ERISA enforcement, the IRS abandoned a program that compared tax deductions taken for contributions to employee benefit plans with filings of Forms 5500. How can the IRS determine whether a Form 5500 has been filed unless it crosschecks with other records?

The IRS places a low priority on enforcing the ERISA responsibilities that Reorganization Plan No. 4 delegated to it. It places an even lower priority on cooperating with other agencies to coordinate enforcement activities. Unfortunately, oversight committees, the GAO, and the pension community rarely scrutinize the IRS's lapses in ERISA enforcement.


39. Id.

40. Comparison of number of examined plans cited in 1984 IRS ANN. REP., supra note 37, at 20 with those cited in 1979 GAO REP., supra note 38, at 5.

41. ERISA ENFORCEMENT REPORT, supra note 25, at 45-46.

42. Id. at 46.
Coordinated enforcement fails even more dismally than intra-agency enforcement. Despite Reorganization Plan No. 4, the agencies charged with enforcing ERISA have failed to coordinate their activities internally and externally and to mount an effective enforcement program. Differing views about enforcement and scattered responsibilities account for failures in coordination of enforcement activities. Joint enforcement efforts have chronically fallen far short of goals.

The responsibility for enforcement of employee benefit programs is diffused within the Departments and within the federal government. The Department of Labor reports that "in every area, from policy decisions to the conduct of specific investigations, the enforcement effort is not as effective as it should be and has suffered from a lack of coordination among the various responsible agencies."  

In general, coordination does not work well because the agencies have different perspectives on what constitutes a violation and different priorities for the several aspects of enforcement. Agencies do not seem to follow up on leads received from other agencies, nor do they actively check on the status of matters referred to other agencies.

Coordination has not worked in the enforcement of the provisions for prohibiting certain transactions, the application of checksheets to monitor compliance, and the creation of an enforcement data base. In the area of prohibited transactions, DOL and the IRS agreed in 1983 that DOL would transmit information to the IRS about plans that DOL believed were violating the prohibited transactions provisions of ERISA and were thereby candidates for the imposition of an excise tax. Of the 390 cases that DOL referred between June 1983 and May 1984, 123 have been closed. Of those, the IRS closed 107 cases with no action and imposed an excise tax in 16 cases. The Department of Labor concludes, "Based on these results, DOL's agreement with the IRS does not appear to be working as planned."

Coordination also does not appear to be working in the circu-

43. Id. at ii.
44. In response to plans' complaints about multiple audits of their activities by different agencies, the IRS and DOL instituted the checksheet program. The agencies agreed to circulate checksheets among themselves to avoid duplicative audits, to better utilize resources, and to pass on information of interest to another agency.
45. ERISA ENFORCEMENT REPORT, supra note 25, at 31.
lation of checksheets. Representatives from DOL and the PBGC have expressed dissatisfaction with the lack of cooperation they feel they get from the IRS\textsuperscript{46} and claim that the IRS does not fill out the checksheets.

In a third area, the establishment of a data base for ERISA enforcement, coordination also has not worked.\textsuperscript{47} The IRS codes Form 5500 data to meet its own needs but fails to provide adequate enforcement information to DOL from Form 5500. Resolution of this problem appears improbable because funds for data entry and analysis come from the budgets of separate agencies.

Based on this evidence, one can conclude that the Labor Department cannot enforce ERISA, the IRS does not choose to enforce ERISA, and the coordinated enforcement mandated by Reorganization Plan No. 4 does not work.

\textbf{D. Single Agency Enforcement}

If ERISA is to be enforced, a single agency holds the most promise for success. History has proven that interagency coordination does not work. A single agency would eliminate the need for coordination between agencies. It would also reduce internal management problems; the goals of pension policy and enforcement would no longer have to compete with other goals of agencies or departments.

Reorganization Plan No. 4 palliated the initial sting of conflicting agency actions regarding ERISA. It untangled a web of administrative problems that had prevented the Department of Labor, the Internal Revenue Service, and the Pension Benefit Guarantee Corporation from administering ERISA as the law was written. The divisions of responsibilities between the IRS and DOL enabled administrators to focus their energies on specific aspects of ERISA without the burden of coordinating their actions with another agency. Reorganization Plan No. 4 succeeded in making ERISA administrable. It did not, however, eliminate the need to coordinate entirely, nor did it correct several administrative deficiencies that seriously limited Congress's ability to establish and evaluate pension policy.

\textsuperscript{46} Interview with Henry Rose, Former Legal Counsel for PBGC (Dec. 1984).

\textsuperscript{47} In fairness to the agencies, one must note that they labor under difficult conditions due to the lack of funding they receive to mount such an effort. Starting up a data base information system is very costly.
The 1980 OMB Task Force Report, the last official review of the dual jurisdictional administrative structure, noted the following deficiencies: (1) lack of a policymaking mechanism in the executive branch; (2) lack of a coordinating mechanism to assess the overall impact of ERISA and its regulations; (3) lack of a mechanism to coordinate the interpretation and enforcement of ERISA; (4) lack of an oversight and evaluation mechanism of ERISA on a continuing basis; and (5) lack of a comprehensive data base information system.48

The lack of a mechanism to coordinate enforcement and the absence of a data base information system make ERISA enforcement virtually nonexistent. Given the scarcity of resources allocated to enforcement, those resources must be focused on plans most likely to be out of compliance. Without an effective data base information system, investigators must rely on less sure means to determine which plans might not be in compliance. Despite several attempts, the agencies have failed to develop a data base information system, rendering enforcement targeting impotent. The National Pension Forum confirms this evaluation when it states: "Electronic information management is the only way to create an ERISA data base which will support effective enforcement of ERISA's substantive requirements, responsible discharge of the Department's research and policy obligations, and for public information purposes. The present situation is unacceptable."49

The National Pension Forum recommended that the Secretary of Labor request approval for the computerization of an ERISA management information system and that an Office of Pension Statistics be established.50 The successful accomplishment of this goal would be an improvement of the status quo, but several obstacles stand in the way. The most formidable barrier is the IRS, which clings tenaciously to its claim to be the repository of pension data. The other obvious problem would be getting Congress to fund such an office, especially because some duplication would occur at the IRS.

A single agency could solve the problems of enforcement and establishment of a data base information system. Clearly, it would be easier to coordinate enforcement and sharing of a data base in one agency. Physically, information would not have to be transported between offices, reducing the delays in getting infor-

48. 1980 OMB Task Force Report, supra note 19, at 75-76.
49. National Pension Forum, supra note 26, at 3 (emphasis omitted).
50. Id. at 5, 11.
mation to appropriate offices that currently plague enforcement efforts. Further, one unit would be responsible for each activity.

The 1980 OMB Task Force concluded "Despite 1979 improvements, the existing institutional arrangements for ERISA administration are not adequate to most efficiently, and practically, administer the [A]ct for the longer-term future . . . (but) proposals to establish a new single-mission agency for ERISA administration are premature."51 Five years have passed since that assessment. Satisfaction with Reorganization Plan No. 4 no longer overwhelms the desire of many members of the pension community to leave ERISA administration alone because it works.

Time accentuates, rather than diminishes, the deficiencies in the administration of ERISA. The lack of a policymaking mechanism in pensions frustrates pension administrators each time they deal with issues such as asset reversions. Future policymakers and the public may wonder why more was not done to coordinate policies in private pensions, public pensions, and social security.

The lack of coordination in ERISA enforcement and the paucity of resources invested in this area of the program undermine the security of pensions. The potential for pension fraud grows as the number of funds and their total assets grow, as the types of investments made by funds diversify, and as the chances of a plan being audited remain low due to inadequate enforcement.

Establishing a single agency for ERISA administration would provide a policymaking mechanism in the executive branch and a unified enforcement effort. A single agency could also provide impact statements and internal evaluations. A single agency would provide a location for a comprehensive repository of pension data if policymakers were to fund such an effort.

CONCLUSION

Because policymakers in Washington currently focus on budget deficits, trade deficits, and changes in tax policy, politicians ignore the importance of pension policy. One trillion dollars of pension reserves constitute an enormous fund for economic recovery.52 An estimated $39 billion expenditure in 1985 for private pension funds comprises a large category of tax ex-

51. 1980 OMB TASK FORCE REPORT, supra note 19, at 75-76.
52. See supra text accompanying note 9.
penditure.\textsuperscript{53} Despite the obvious links between the budget deficit and tax policy and pension policy, most members of Congress decide that they cannot fathom the complexities of pensions. They choose to ignore the issue, blithely assuming that ERISA corrected what was wrong with pensions. A leadership vacuum has existed since the retirement of ERISA's framers.

Unfortunately, the lack of ERISA enforcement jeopardizes the retirement income security of millions of Americans. Unless measures are taken to ensure that the law is being obeyed, only time will reveal the depth of pension fraud and mismanagement.

The current administrative apparatus of ERISA needs to be changed. The framers of ERISA recognized its inadequacies when they sacrificed good management for passage of the law. Now that ERISA is widely accepted, its shortcomings can be corrected.

The division of ERISA administration into multiple jurisdictions has created many of ERISA's problems. Maintaining an awkward administrative system for the sake of administrative continuity has little to recommend it. Conversely, consolidating administration in a single agency has many advantages. Policymaking, enforcement, and establishment of a data base information system would be enhanced. Nothing holds out the promise of solving these deficiencies in ERISA like a single agency.

The failure of the Studebaker pension plan showed how inadequate the Welfare and Pension Plans Disclosure Act was. Unless Congress takes measures to ensure the enforcement of ERISA, a cruel lesson will be taught: a law is only good if it is enforced. Vigorous enforcement, not paper promises, brings pension security.

\textsuperscript{53} Telephone interview with member of Joint Committee on Taxation (Nov. 1, 1985).