

Audit Ready: Protect Your Benefit Plan from Costly Compliance Mistakes

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Topics for Today

- What? Who? Why? How?
- Pre-Investigation Activities and Costs
- Letter and Document Requests
- Findings
- Tips During the Investigation / Audit
- Settlements and Closure



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What? Who? Why? How?

- How does a fiduciary prepare for an audit/investigation before they are aware of it?
- Two types of investigations: criminal and civil
- Overwhelming majority are civil and focus on three areas: procedural prudence (governance), prohibited transactions, payment of benefits
- Federal laws can be enforced by the Department of Labor ("DOL"/EBSA), Internal Revenue Service ("IRS") and/or Health and Human Services ("HHS"/CMS)
 - All can conduct audits also. DOL generally conducts the most
- State enforcement is possible, too, for non-ERISA plans



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What? Who? Why? How?

- What laws and risks do employers/plan sponsors face?
- Who is subject to these laws?
- Why should you be concerned about these laws?
- How can you reduce your risks?



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What Benefit Laws Should We Focus On?

- All of them, of course!
- But some are definitely more important than others, from a risk perspective
- ERISA
- Mental Health Parity and Addiction Equity Act ("MHPAEA") and its nonquantitative treatment limitation ("NQL") rules
- Consolidated Appropriations Act ("CAA")
 - Gag Clause Rules continue to be difficult
 - Some still have not taken effect, such as air ambulance reporting



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What Benefit Laws Should We Focus On?

- Affordable Care Act ("ACA")
- COBRA
- HIPAA
 - New, proposed HIPAA Security Rule regulations from few weeks ago
- Form 5500 obligations
 - Failures can trigger "red flags"
- "Grab bag" of others (e.g., Women's Health and Cancer Rights Act, GINA, Wellness)
- For retirement plans, mainly focus on Internal Revenue Code, with additional, retirement-plan-specific ERISA terms



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Who Should Focus on These Laws?

- ERISA requires various roles to be filled
- “Plan administrator” – generally in charge of compliance with these laws
- “Named fiduciary” – need to appoint someone (or a committee) with fiduciary responsibility
- Functional fiduciaries
E.g., if handle plan assets or decide final, internal appeal
- Co-fiduciary liability possible also



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Who Should Focus on These Laws?

- Who serves in these roles?
- Generally, liability starts at the highest level within your organization
E.g., board of directors or board of trustees
- Most individuals at that level do NOT want this liability
- So, very good strategy is to delegate responsibility “down”
- Perhaps to an individual. But a Benefits Committee is probably a better idea (but not technically required)
-Committees very common in retirement plan context. But also a very good idea in health and welfare plan context, especially given recent lawsuits on health plan fees



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Who Should Focus on These Laws?

- Coordination with internal resources (e.g., legal, finance, HR, risk management, etc.) is good idea
- Can have overlap with other laws/policies
E.g., FMLA applies to leaves. But FMLA also has special rules related to maintaining health plan eligibility while on leave
- But also be sensitive to other, competing interests
E.g., will Finance personnel focus too much on cost? Try to require employer to hire related service provider?
E.g., will head of HR see “too much” health information (for health plan or disability plan)? What if the head of HR later needs to fire or discipline an employee who has had health issues?
- Fiduciary liability insurance/indemnification of fiduciaries



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Why Focus on These Laws?

- Many possible adverse results if laws are ignored
- Monetary penalties
 - Fiduciaries can have personal liability – e.g., can lose their home, general savings, etc.
 - * Rarely happens, though, as plan sponsor/employer often pays for penalties made in good faith
 - Specific monetary penalties vary by law. But the common one in health plan area is \$100 per day per affected individual (i.e., \$36,500 per year per affected individual)
 - Federal government regularly collects billions of dollars per year in penalties (from all types of plans, not just health plans)
- Criminal actions
 - 196 criminal investigations in FY2023. 77 individuals found or pled guilty
- “Wall of shame”/public embarrassment
- Employee relations issues/union complaints



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Why Focus on These Laws?

- Retroactive processing of claims
 - E.g., UMR sued in Wisconsin in 2023 by DOL. Seeking to have certain claims going back to 2015 re-processed
- MHPAEA: Cannot apply NQTL if insufficient comparative analysis
 - How much extra would it cost your health plan if it could not have a “medical necessity” exclusion? Or an “experimental / investigational” exclusion?
- Possible that certain plans could lose tax-qualified status if requirements not met
 - E.g., if a health reimbursement arrangement (“HRA”) provides benefits not allowed, it could lose its tax-qualified status
- May need nondiscrimination testing results to “prove” to regulators that the plan satisfies those rules



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How to Focus on These Laws?

- Understanding what laws apply is first step
 - If plan is not subject to ERISA, focus on state laws (which can be unclear)
- Reviewing plan documents/summary plan descriptions
- Reviewing forms/notices
- Establishing process to monitor and update all these
 - Who should do it? How often? How best to monitor?
 - Also monitor litigation and court decisions
 - Create template documents, if they will be used often (e.g., COBRA forms)
- Your vendors will, as a practical matter, handle a lot of this
 - Conduct regular RFPs
 - Ensure that contractual terms require vendors to follow these laws
 - * As they apply to you, not just them
 - And even after contract expires in some situations (e.g., in MHPAEA audit area, typical for DOL to ask prior vendor to assist with pulling of data and answering questions)



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How to Focus on These Laws?

- Understand basic ERISA fiduciary duty rules
 - In general, highest known obligations under the law
 - "Procedural due diligence" usually more-important than "substantive" decision
- Duty of loyalty (exclusive benefit rule)
- Duty of care (prudent person rule)
- Duty to diversify plan investments (usually for retirement plans; also for funded/trust-paid health plans)
- Duty to follow plan documents
- Duty to avoid prohibited transactions
- Duty related to co-fiduciaries



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How to Focus on These Laws?

- DOL has published some helpful guidance
- Compliance Assistance Guide: Health Benefits Coverage Under Federal Law
 - Covers ACA, HIPAA, GINA, MHPAEA, NMHPA, WHCRA
 - www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/compliance-assistance-guide.pdf
- Self-Compliance Tool for MHPAEA
 - Outdated now, but DOL is updating it, hopefully soon
 - <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/mental-health-parity-compliance-tool.pdf>



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How to Focus on These Laws?

- EBSA Enforcement Manual – with various forms and processes DOL uses in an audit
 - <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual>
- Form 5500 Instructions
 - <https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500/instructions-for-form-5500-annual-report.pdf>



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How to Focus on These Laws?

- If errors occur, relatively easy to correct retirement plan failures. Relatively difficult (sometimes essentially impossible) to correct health and welfare plan errors
- General rule is to put affected plan enrollee in same position he/she would have been if error had not occurred
 - Directly stated in COBRA rules and retirement plan correction procedures (EPCRS)
 - Generally followed for other errors as well



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How to Focus on These Laws?

- Voluntary Fiduciary Correction Program
 - Can sometimes self-correct errors and receive relief from excises taxes
 - <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs>
- Delinquent Filer Voluntary Compliance Program
 - For late Form 5500 filings
 - <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs/dfvcp>
- May be possible to enter into settlements with federal regulators outside these formal areas, but no formal process to do so



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How to Focus on These Laws?

- Complaints drive many audits from agencies
 - DOL's website: "Cases may stem from participant complaints" or other sources
- Discussing with plan enrollees their concerns – or having your vendors do so – good way to reduce the risk of complaints (and, thus, audits)
 - Perhaps put into vendor contracts that they will keep you informed of escalated complaints or errors that they could not fix
- DOL issues periodic reports on its enforcement activities and upcoming enforcement goals
 - See here: <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement>



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Current DOL Enforcement Goals

- What are the “hot topics” for DOL enforcement?
- Per prior website, DOL’s “Health Enforcement Initiatives” focuses on various ERISA provisions, including Women’s Health and Cancer Rights Act, Newborns’ and Mothers’ Health Protection Act, Genetic Information and Nondiscrimination Act
- Three “national initiatives”
- First, MHPAEA NQTL rules



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Current DOL Enforcement Goals

- And “limitations that are imposed on benefits to treat opioid addiction and other substance use disorder benefits”
- Conducting NQTL comparative analysis important
- Effective for plan years starting 1/1/2025, also need to provide a “fiduciary certification” that a prudent process was followed
 - See November 2024 webinar from The Alliance for more details
- Note that the analysis will take time
 - Most TPAs and PBMs are updating their template documents; likely 1st or 2nd quarter 2025 before they finish those



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Current DOL Enforcement Goals

- For FY2022, EBSA (DOL) conducted 145 health plan investigations
 - 86 involved MHPAEA – *i.e.*, over half of all investigations
 - CMS received 5 MHPAEA inquiries in same time period
- Second, “coverage of emergency room services” under ACA
 - *E.g.*, denying claim “based solely on diagnosis without accounting for a participant’s presenting symptoms” or limiting coverage “within a particular timeframe after the onset of symptoms”
 - Talk to TPA about this/put into contract that they will comply on plan’s behalf



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Current DOL Enforcement Goals

- Third, "Service Provider Self-Dealing (undisclosed/hidden/excessive fees)"
- Fees from TPAs, PBMs, insurers, etc. sometimes "are not disclosed"
- DOL argues that service provider is "setting its own compensation and dealing with the plans' assets for its own gain, a fiduciary breach"



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Current DOL Enforcement Goals

- Plan sponsors/employers should press vendors on all sources of compensation
- Perhaps look back to prior, 2016 proposed regulations (later withdrawn) which would have required additional disclosures
- November 2024: DOL brings lawsuit against TPA seeking \$40 million in fees
- January 2024: DOL sues BCBS of MN over \$66 million in taxes allegedly improperly taken from employers



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DOL Overlap With Lawsuit Threats

- Johnson & Johnson, Wells Fargo and other plan sponsors faced new lawsuits in last 12-18 months over health plan fees
- But, determining what the fees are can be difficult. TPAs, PBMs, and others may refuse to provide the information
- Even if some of the information may be covered by Gag Clause (new CAA requirement)
- See, e.g., Bricklayers case in Connecticut
- Real conundrum for plan sponsors. Not likely to be an easy solution, but plan sponsors should press vendors (and document their efforts)



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Other Common Compliance Issues

- Not mentioned on that particular DOL website, but cybersecurity issues have been growing
 - September 2024 clarification that certain best practices apply to health and welfare plans. Because it was a "clarification", seems to apply immediately
 - Do you have anything like that for your plans?
 - If not, greater risk of private lawsuit/DOL inquiry (and we have had clients receive DOL questions about this area)
- Grandfathered health plans – can you provide every communication on this and every SPD/SMM since March 2010, to prove you maintain that status?
- Open enrollment issues – what to do if employee "forgets" to enroll?
 - What if the employee is the CEO?



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Other Common Compliance Issues

- HIPAA breaches or security violations
 - Many HIPAA Security Rule policies and procedures created in 2004/2005, when Security Rule first applied
 - May need to update yearly. Have you done so?
- Must our plan really do nondiscrimination testing?
 - Cafeteria plans have multiple nondiscrimination tests
 - Self-funded health plans have Code Section 105(h)
 - Self-funded health plans have quantitative treatment limitation ("QTL") test
- What if forms or notices are not distributed timely?
- Ways to improve plan document / SPD?
 - Forum selection
 - Time limit to bring lawsuits
 - Discretion to plan fiduciaries – including vendors who decide appeals (and perhaps claims)
 - Mandatory arbitration, perhaps?
- Wellness plan class-action lawsuits



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Take Steps to Prepare

- Operational Issues
 - Recordkeeping
 - Contracts with service providers
 - Ensure you have other plan documents / SPDs
- Current and signed versions of vendor contracts
- Confirm that plan is paying consistent with contract and receiving all contracted services
- Any "gag clauses" in them? CAA generally prohibits a group health plan from entering into a contract with a TPA, PBM or other vendor if it contains restrictions on data that plan sponsor can receive



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Take Steps to Prepare

- 1/14/2025 DOL Gag Clause FAQs: Includes "indirect" contractual restrictions
 - NOT just the contract between the plan sponsor and the vendor, but also "downstream" ones (e.g., contracts with providers or sub-vendors)
 - Contract CANNOT allow data to be sent to business associate only at "discretion" of TPA / PBM because it "could have the effect of restricting the plan ... from providing de-identified claims data"
 - Odd reference to "unreasonable" restrictions on de-identified information
- Most plans and contracts likely do not meet these rules
- New: "Should" report name of vendor, if vendor non-compliant and describe actions to remove Gag Clause
- Rules immediately effective
- Will nearly everyone who certifies (by 12/31/2025) need to say that they failed this rule in 2025?



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Take Steps to Prepare

Review of fiduciary insurance policy

- Coverage amounts, limits
- Waiver of recourse
- Special endorsements
- Coverage of expenses for DOL investigation
- Coverage for penalties
- Coverage for settlor functions



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DOL Audits: What to Expect

- Letter is sent to plan administrator (usually not a subpoena)
- Review letter for scope of investigation
- Broad request for documents or narrowly focused on one aspect of plan administration
- Period under examination
- Notice to fiduciary insurance carrier
- Don't be afraid to ask clarifying questions. Many times DOL/IRS/HHS letters are not clear on their scope



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DOL Audits: What to Expect

- Request for extension of time to produce documents – establishes contact with auditor
- Consider asking for ability to produce documents in stages depending on scope of request
- Ask DOL auditor about scope of investigation/issues under review or any background information they can share
- Consider asking for scope of document request to be narrowed if request is burdensome



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DOL Audits: What to Expect

- Document requests can encompass tens of thousands of pages
- Plan sponsor need to appoint a “point person” to gather documents and “point person” as contact person for DOL
- Counsel is typically “point person” with DOL
- Consider having all documents reviewed and sent by counsel to DOL
 - Try to identify anything which could harmful to disclose
 - Identify any attorney-client-privileged documents
- For fiduciary insurance policies that cover investigation costs start tracking costs



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DOL Audits: What to Expect

Types of Documents

- Plan and trust documents
- Plan policies/procedures
- Summary plan description
- Meeting minutes (decide whether to redact for privilege even though privilege may not be available)
- Actuarial valuations or consultant reports
- Financial statements
- Form 5500s
- Check registers or other payment documentation (may come from TPA or PBM)



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DOL Audits: What to Expect

- Contracts and associated fee schedules
- Data files of participants
- Notices to participants – annual benefit statements, etc.
- Expense reimbursements/employee payments
 - Any conflicts of interest?
- Investment manager reports
- Vendor audits
- Benefit payments



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DOL Audits: What to Expect

- Organize files in useable format and same order as DOL request
- Make copies
- Review documents that are confidential or proprietary and give vendors opportunity to object to production
- Once in hands of DOL, public may have access to documents (e.g., FOIA Requests). Ask that DOL keep the documents confidential as proprietary information and seek notice if a request is made



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DOL Audits: What to Expect

- Identify all documents that are produced in cover letter to DOL, advising of those documents that are not being produced (with explanation) or that are not located
- Attorney will often then meet with plan fiduciaries to discuss status of investigation, what to expect, length of time investigation may continue – try to avoid surprises
- Attorney will often discuss initial areas of concern with plan fiduciaries and future changes in practices and plan administration



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DOL Interview and Follow-Up

- Significant period of time could pass between initial production of documents and DOL's request for interview or additional documents
 - Do not interpret passage of time as "all clear" or "it's really bad"
- Follow-up document request will impose short deadline; follow same approach as initial production (e.g., request more time, assert privilege, contact vendors regarding confidentiality, etc.)
- Depending on auditor or focus of audit, interviews will be scheduled with plan fiduciaries, administrator or other plan service providers



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DOL Interview and Follow-Up

- DOL Enforcement Manual permits counsel to be present during plan fiduciary interview, but role is limited
- Interview preparation
 - Familiarize witness with basic structure of plan procedures and operations, and roles performed by fiduciaries/service providers
 - Identify areas that DOL may be focusing on based on enforcement announcements or issues raised in other audits by Regional Office
 - Interview: DOL agents will often ask "leading" or "tricky" questions. They are often trying to understand the "mindset" of the plan fiduciaries, to prove violations of ERISA



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DOL Interview and Follow-Up

- Attorney should seek to be helpful during interview; aim for a conversation
- Basic witness rules: do not volunteer or speculate; ask for clarification, if question unclear
- DOL agent may request on-site inspection at employer's office (more common with IRS audits)
- Establish a designated room; do not allow auditor to roam
- Pursue production of documents at future date; organize and review documents before delivering
- Follow-up with points of clarification, areas of correction
- Prepare internal file memoranda of interviews



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DOL Findings

- DOL may issue a no violation letter (advise insurer that case is closed). But this is the exception; DOL statistics reflect that approximately 2/3 of audits result in a monetary correction
- Can also receive a “no-findings/no-action” letter, when DOL did not find anything of concern. Seems rather unusual
- Can also just never hear anything (“black hole” approach)
- Voluntary Compliance Notice Letter (VCNL): DOL identifies audit findings that it believes created fiduciary breaches; DOL generally does not specify required correction, which allows for negotiation
- Receipt of VCNL should be reported to the fiduciary liability insurance carrier as a claim
 - Plan assets generally cannot pay legal fees related to alleged fiduciary breaches; insurer or settlors must pay. Usually fine in single employer context, but can be more difficult in multiemployer plan context



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DOL Findings

- VCNL may request response within 10 days
 - Request extensions; tolling agreement if time sensitive
- Attorney should coordinate with plan fiduciaries and insurance carrier to form strategy for response and possible settlement parameters
- Because other parties could pursue civil litigation, a formal response contesting DOL assertions should always be considered
- In limited cases, DOL will refer case to Solicitor’s office to commence litigation or refer the case to another agency (DOL or IRS) without issuing a VCNL



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Tips for Interviews

During the Investigation

- Be cooperative. Don't be confrontational, argumentative, or angry when interacting with DOL auditor
- Never say more than required. Avoid the investigation spreading to other plans or other government agencies
- Fiduciaries and point person should be proactive in analyzing areas where improvements in plan operations can be made
- Consider making changes in ongoing policies and procedures before closure – better to say to DOL problem has been corrected than not to acknowledge the problem at all



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Tips for Interviews

During the Investigation

- Involve other professionals in process of analyzing issues under review
- Scope of follow-up may reveal direction of investigation
- Be prepared to take a stand on issues of importance
- Engage with the fiduciary insurance carrier while investigation is ongoing – will carrier pay potential claims and expenses during investigation?



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Tips for Interviews

During the Investigation

- Are participants and beneficiaries aware of investigation? Consider communications to participants and beneficiaries depending on circumstances
- Consider approach to take if DOL auditor wants to communicate directly with participants (by mail or phone)
- Request that DOL auditor discuss issues in advance of issuing a VCNL



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After the Investigation

After the Investigation

- Monitor operations to ensure policy changes required by settlement have been implemented
- Consider other changes not identified by DOL
- Review impact on fiduciary insurance renewal; check for added endorsements required by fiduciary insurance carrier



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Settlement and Closure

- Negotiate corrective action without admitting fault or entering into a formal settlement
 - ERISA 502(l) 20% penalties apply for settlements
- DOL can refer to Solicitor's office if consensual resolution is not possible; DOL lawsuit filings are limited
- Settlement can consist of restorative payments to plan or adoption of procedures, or both. In some cases, DOL could seek to bar an individual from serving as a fiduciary
- DOL generally will send a closing letter, but will not formally approve corrective action
- Consider whether prohibited transaction excise taxes are owed (separate filing with DOL for welfare plan and IRS for pension plan)



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Key Takeaways

- Keep up-to-date with best practices in Plan governance
- Start out with a strategic game plan with plan fiduciaries and plan professionals on handling audit
- Discuss points of concern identified in audit process and possible solutions
- Maintain ongoing communication with fiduciary insurance carrier
- Don't be confrontational during audit process
- Try to be focused on reaching mutually acceptable resolution – closure can be as important as results
- No two audits are the same, but the above slides summarize the typical flow of an audit and can serve as a roadmap for where you are in the process and what's next



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Questions?

Thank you!

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