

IRS spurs Form 5500 compliance with audits and penalty relief

The IRS issued Notice 2014-35 and Rev. Proc. 2014-32 providing relief from penalties for late filing of the Form 5500. For retirement plans subject to ERISA, the new guidance requires the Form 8955-SSA to be submitted to the IRS in addition to compliance with the DOL-sponsored Delinquent Filer Voluntary Compliance program. For plans not eligible to use the DOL correction program, a pilot program is established providing similar relief. Audit activity has been generated based on information found in the Form 5500; therefore, accurate reporting is critical.

Background

Under ERISA and the Internal Revenue Code, employee benefit plans are required to report certain plan information to IRS, DOL, and PBGC. Form 5500 and, more recently, Form 8955-SSA are used for this purpose, with steep penalties for noncompliance. For example, the DOL may assess late fees for failure to file a complete and timely Form 5500 for an ERISA Title I plan of up to \$1,100 per day.

The DOL established the Delinquent Filer Voluntary Compliance, or [DFVC program](#), to encourage late or delinquent filers to file the series Form 5500 by reducing civil penalties associated with a late filing. Under the DFVC program, penalties are limited to \$10 per day (calculated without regard to extensions) to a maximum of \$750 for each late filing, capped at \$1,500 per plan for small plans (fewer than 100 participant or when the plan sponsor is utilizing the “80-120” participant rule). Large plans (100 or more participants) are also limited to \$10 per day but the maximum fee per late form is \$2,000, not to exceed \$4,000 per plan. Relief under this program is limited to ERISA Title I plans.



In addition to the DOL penalties, the IRS may assess penalties on retirement plans of \$25 per day, up to \$15,000 per late Form 5500; \$1 per day, up to \$1,000 per failure, for not reporting certain status changes; and a flat \$1,000 penalty for failure to file an actuarial report. The IRS may also impose a penalty of \$1 per participant, up to \$5,000 each plan year, for failure to report separated participants with deferred benefits on Form 8955-SSA.

The IRS announced in 2002 that it would not assess late Form 5500 penalties on plans that utilize the DFVC program. In 2009, final DOL regulations made Form 5500 electronic filing mandatory using the EFAST2 program.

DFVC submissions were also made via EFAST2. Further changes to the DFVC program eliminated the ability to send the terminated participant information (SSA or 8955-SSA, depending on the form in effect for the delinquent year) as part of the correction program.

IRS extends penalty relief for ERISA Title I retirement plans

On May 9, 2014, the IRS issued [Notice 2014-35 updating the terms for obtaining](#) relief from IRS penalties for failure to timely comply with the annual reporting requirements of the Code for ERISA Title I retirement plans. Retirement plans that are not subject to Title I of ERISA are not eligible for this relief (see pilot program discussed later).

To obtain relief, the delinquent Form 5500/5500-SF filing must be submitted to the DOL **electronically** under the DOL's DFVC program and the delinquent Form 8955-SSA for that year must be filed on **paper** with the IRS. If these actions are taken, the IRS will not impose penalties for late filing of Forms 5500, 5500-SF, and 8955-SSA or late filing of actuarial reports for a year that a filing was required. For any Form 8955-SSA, the filer must check the box on Line C, Part I (Special extension) on Form 8955-SSA and enter "DFVC" in the space provided on Line C.

The delinquent Form 8955-SSA must be submitted to the IRS no later than 30 days after completing the DFVC filing for the late Form 5500/5500-SF, or December 1, 2014, whichever is later. This requirement applies to any DFVC filing submitted electronically through the DOL's EFAST2, even if the filing was submitted before the issuance of Notice 2014-35. For example, if a DFVC filing for a delinquent 2008 Form 5500 was submitted in 2012 and the Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits was never filed for 2008, a paper Form 8955-SSA must be filed with the Service for the 2008 plan year no later than December 1, 2014 to qualify for the relief provided under the notice.

Buck comment. The Form 8955-SSA is used for years prior to 2009 even though Schedule SSA (Form 5500) would have been filed for those years had the filing been timely submitted under the pre-EFAST system.

Relief for non-ERISA plans

On May 9, 2014, the IRS also issued [Revenue Procedure 2014-32](#). This established a temporary one-year pilot amnesty program addressing the penalties applicable under the Code for late Forms 5500 (for certain pre-2009 filings) and 5500-EZ filings due from plan administrators and plan sponsors of:

- Plans covering only the owner of a business (or owner and spouse)
- Plans covering partners (or partners and their spouses)
- Certain foreign plans

The pilot program, effective June 2, 2014, will remain in effect until June 2, 2015, and only applies to retirement plans that are not subject to the reporting requirements of Title I of ERISA for the plan year that the annual return is delinquent. The relief granted under the pilot program is not

Foreign plans

A retirement plan maintained outside the US primarily for nonresident aliens is generally required to file with IRS if the employer that maintains the plan is a domestic employer or a foreign employer with income derived from sources within the US (including foreign subsidiaries of domestic employers) that deducts contributions to the plan on its US income tax return.

available if the IRS has issued a CP 283 Notice (*Penalty Charge on Your Form 5500 Return*) to a plan sponsor or plan administrator for the late Form 5500/5500-EZ.

Pilot program procedure for submitting delinquent Form 5500/5500-EZ filings

The submission requirements vary based on the year that the form was originally due to be submitted. For all plan years, the applicant must submit to the IRS a completed Form 5500/5500-EZ that includes all required schedules for each plan year that the applicant is seeking penalty relief. All returns submitted must be sent to the IRS **by paper** and cannot be submitted electronically through the DOL's EFAST2 filing system. The IRS cautions filers that if an applicant accidentally sends the filing to the DOL, the submission will not be treated as being submitted under this pilot program and the filing will continue to be subject to applicable penalties.

Delinquent returns submitted under this pilot program must be marked in red letters in the top margin of the first page above the title of the Form 5500/5500-EZ: "[Delinquent returns submitted under Rev. Proc. 2014-32, Eligible for Penalty Relief.](#)" In addition, for each delinquent return being submitted under this pilot program, the applicant must complete and attach a paper copy of the Transmittal Schedule provided in the Appendix of Revenue Procedure 2014-32.

Buck comment: Failure to properly mark the delinquent return or attach a Transmittal Schedule to each return may cause the IRS to treat the return as ineligible for the relief under this pilot program, and the IRS may assess all applicable penalties--unless the plan administrator or plan sponsor can establish that the failure to timely file was attributable to reasonable cause.

No penalty or payment is required to be paid under this pilot program. However, the IRS indicated that if this temporary pilot program is replaced with a permanent program, a fee or other payment will be required. The revenue procedure asks for comments as to whether a permanent relief program should be established and, if so, how the fees should be determined.

Incorrect Form 5500 may trigger an audit

The Form 5500 is often the source of information for the IRS to identify plans for audit. The IRS Employee Plans Compliance Unit (EPCU) has initiated several projects aimed at identifying errors on the Form 5500. An incorrect code on the Form 5500 is one of the criteria used to identify plans for an IRS audit.

Final return with assets project

One such audit was the [Final Return with Assets project](#) — aimed at identifying filings that marked the return as final but still had assets in the plan. Only when the assets are fully paid out and the trust balance is \$0 is the plan sponsor permitted to file a final report. Terminating plans must continue to file Form 5500s as long as assets remain in the plan. Once the assets are fully paid out, the plan sponsor has seven months from the date of payment — *not necessarily the last day of the plan year* — to file the final Form 5500 (unless an extension applies). The EPCU looked at the forms to verify that proper termination procedures were followed. Failure to properly terminate a plan can lead to plan disqualification.

Hacienda project

The objective of [the Hacienda project](#) was to determine if plans that cover employees who are residents of Puerto Rico were correctly classified. The IRS found that plan administrators were incorrectly using the 3J and 3C codes in

question 8a of the Form 5500 main schedule (pension codes). Code 3J on the Form 5500 is used to indicate that a US-based plan covers Puerto Rico residents and is intended to be dual qualified under US and Puerto Rico tax Codes. Some plans were incorrectly using code 3J because they were only intended to be qualified under the Puerto Rico tax Code. They should have used code 3C to indicate that they were not qualified under the US Code; rather, they were intended to be qualified by the Hacienda, the Puerto Rico equivalent of the IRS.

In closing

The new instructions from IRS make clear what is required to bring retirement plan Form 5500 and 8955-SSA filing obligations into compliance in a cost-effective way. Plan sponsors may wish to confirm that all filings have been done and catch up now on any outstanding delinquencies, preferably before IRS asserts a penalty assessment.

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