

IRS and DOL Publish Rules on E-filing

Last month, IRS finalized regulations that require electronic filing of retirement plan Form 8955-SSA by filers of 250 or more forms generally for plan years beginning on or after January 1, 2014. Shortly thereafter, DOL proposed requiring top hat plan statements and notices for apprenticeship and training benefits to be filed electronically. DOL's proposed filing requirements would apply once the regulations are finalized, but the filing system is open for those who want to use it on a voluntary basis.

Background

Qualified Plan Returns. IRS may impose magnetic media (electronic filing) requirements on persons required to file at least 250 returns of any type. Since 2009, DOL has required e-filing of Forms 5500 and 5500-SF through its computerized ERISA Filing Acceptance System (EFAST2), but not all employers and plan administrators are subject to DOL requirements — nor is Form 8955-SSA covered by DOL's rule. Form 5500-EZ is not eligible for electronic filing.

IRS failure to file penalties can be imposed if a filer does not observe the magnetic media requirements. For example, a \$1 per day per person penalty applies for failing to file Form 8955-SSA information (capped at \$5,000 per year) and a \$25 per day penalty can be imposed by IRS for failure to file the Form 5500 (capped at \$15,000 per year).

In August 2013, IRS proposed regulations aimed at encouraging electronic filing. (See our [September 11, 2013 For Your Information](#).)

Nonqualified Plan Statements and Apprenticeship/Training Plan Notices. Unfunded or insured nonqualified plans for a select group of management or highly compensated employees ("top hat" plans) that are exempt from ERISA's participation, vesting, funding, and fiduciary rules are only exempt from ERISA's reporting and disclosure rules if a "top hat plan statement" is filed with the DOL. The plan is deemed to satisfy the reporting and disclosure rules if the statement — which includes the name, address, and EIN of the employer, and the number of plans as well as the number of employees covered — is mailed to the DOL within 120 days of the date the plan starts.



Failure to submit the top hat plan statement does not result in penalties, but does subject the plan to expanded reporting and disclosure requirements.

Similarly, welfare benefit plans that provide only apprenticeship or training benefits, or both, are exempt from reporting and disclosure if a notice is mailed to the DOL and the plan administrator discloses certain information to employees participating, or eligible to enroll, in the plan.

DOL converts each paper filing to electronic format.

A Sign of the Times

Recognizing that regular mail or personal delivery are no longer the most efficient or cost-effective ways to file and process these reports, notices, and statements, on September 16 the DOL [proposed regulations](#), and on September 29 the IRS [finalized regulations](#) on electronic filing requirements. The agencies expect that with ready access to the internet, such filings will be easier and more cost-effective than paper filings.

Form 8955-SSA and Form 5500-EZ

Under IRS' final regulation, any filer of 250 or more forms per year must file Form 8955-SSA, used to report deferred vested participants, under the [IRS Filing Information Returns Electronically \(FIRE\) system](#). A one-participant plan (or a foreign plan) required to file electronically must use the Form 5500-SF to file the information required on the Form 5500-EZ through EFAST2 instead of submitting a paper Form 5500-EZ. The 5500-EZ filers using the 5500-SF are not required to attach Schedule SB or Schedule MB. Filings submitted to EFAST2 under this requirement will not be posted on the DOL's electronic public disclosure website, as long as the one-participant or foreign plan boxes are properly checked on the Form 5500-SF.

The IRS does not currently have the capability to accept electronic filings of [delinquent](#) Form 8955-SSA or Form 5500-EZ. These must be filed on paper. See our [June 16, 2014 For Your Information](#) for a discussion of late filing penalty relief announced by IRS earlier this year.

Top Hat Plan Statements and Apprenticeship/Training Plan Notices

In addition to publishing proposed regulations that would make electronic filing mandatory, the DOL has launched a new tool for accepting submissions. [Top hat](#) and [Apprenticeship/Training](#) electronic forms available through DOL's web portal require certain information before the filing can be completed, thus ensuring that all of the required information is provided.

Comment: A new top hat statement is generally not required to report a change in the employer as long as the employer identified in the original registration statement continues to be an employer of employees covered by the plan and continues to be an authorized person from whom the DOL could request documents regarding the plan. Neither is a new form needed when a plan is amended to add a new class of participants. The Apprenticeship/Training instructions advise that a new notice is required when any of the information on file becomes inaccurate. For both forms there is an "amended filing" check box if a mistake needs to be corrected.

The plan administrator will receive electronic confirmation of the filing, and electronically filed documents will be promptly posted on DOL's website and be available to the public.

Comment: Public access and electronic confirmation will substantially eliminate any challenge to a claim that a statement or notice was filed. Conversely, it will be impossible for a plan administrator to claim that a statement or notice was filed unless it has, in fact, been filed.

Increasing the Odds

IRS encourages magnetic media filings by broadly defining the types of forms that are counted when assessing the 250 filings threshold to take into account all the returns of any type that a filer is obligated to file rather than applying the 250 count on a form-by-form basis.

Comment. Plan sponsors filing at least 250 forms using the form count in IRS' rule are likely already filing the Form 5500 and Schedule SB and MB electronically under the DOL's EFAST program. The effect of the final regulations will be to spur more electronic filings of Form 8955-SSA.

Electronic filing requirements for Form 8955-SSA may be waived in cases of undue economic hardship, if the amount by which the cost of filing electronically exceeds the cost of filing on paper.

Who's a Filer?

The filer is the plan administrator or the employer — or both — depending on the type of form and on whether the employer is the plan administrator. To determine the number of forms filed, count up all the forms filed like this:

Form	Who is Plan Administrator?	Count Forms Filed By
Form 8955 SSA or Schedule SB or MB	Not the employer	Plan administrator
	The employer	Plan administrator and the employer and all the controlled group companies of the employer
Form 5500	Either	

For Example

Consider ABC, Inc., which sponsors a defined benefit and a 401(k) plan. ABC, Inc. has designated the company as the plan administrator; ABC, Inc. is 100% owner of DEF, Inc. To determine the number of returns counted against the 250 threshold, ABC, Inc. would add up:

- W-2s and 1099s filed for ABC, Inc. or DEF, Inc.
- Eight quarterly Form 941 filings (four each for ABC, Inc. or DEF, Inc.)
- Corporate 1040 for the controlled group companies
- Form 5330
- Form 8955-SSAs due for both plans
- Form 5500 for each plan
- And so on ...

Comment. The plan administrator will not necessarily be responsible for filing the Form 1099-R to report plan distributions, rather the payor — typically the plan trustee — will handle this task. In that case, the forms filed by the trustee would not be included against the employer or administrator total, but would count for the trustee and serve to determine the trustee's electronic filing obligations.

Effective Date

The IRS final regulations apply to Form 8955-SSA for plan years that begin on or after January 1, 2014, but only for filings with a deadline (not including extensions) on or after July 31, 2015. Form 5500-EZ, reported on Form 5500-SF, must be filed electronically for plan years that begin on or after January 1, 2015, but only for filings with a deadline (not taking into account extensions) after December 31, 2015.

The DOL filing system is available immediately on a voluntary basis, and becomes mandatorily effective 120 days after publication of the final rule in the Federal Register.

In Closing

As part of the transition to a wholly electronic filing system, the IRS and the DOL continue to expand the situations that require electronic filing. We expect this trend to continue.

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