

Pension Plan Fix-It

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Avoiding Penalties for Late Form 5500s Becomes a Two-step Process

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So you thought you were all caught up on annual-report tasks when you filed your Delinquent Filer Voluntary Compliance Program form with the U.S. Department of Labor?

Well ... not exactly.

Some plan sponsors that filed under the DFVCP may still find themselves with tasks to complete before Dec. 1.

Bottom line: Avoiding Form 5500 penalties for late filing is now a two-step process — one to satisfy DOL and another for the IRS.

IRS has been busy with Form 5500 guidance, most notably Notice 2014-35, released May 9, about penalties for late filing of some forms with the agency. It said IRS would now require separate filing of a paper Form 8955-SSA in order for Title I ERISA-covered late filers to avoid financial penalties. The filers that are eligible for and meet the DFVC Program's requirements typically submit annual Forms 5500, 5500-SF with the DOL.

IRS will coordinate with DOL to determine which late filers are eligible for this relief; plans need not file a separate application for relief with IRS, the agency said. However, they must file an annual report separately with IRS.

The notice also said that non-Title I ERISA filers that use Forms 5500-EZ or 5500-SF, for plans without employees, are not eligible for the notice's penalty relief. These filers were covered in Revenue Procedure 2014-32, released at the same time, relevant to Form 5500-EZ for one-participant/100-percent business owner-spouse plans.

Plan sponsors will have to file these applicable forms with IRS on paper by the latter of Dec. 1, or within 30 days of the DFVCP filing.

Hopefully, you have already completed the Form 8955-SSA and filed it in a safe spot waiting for further guidance. If you haven't completed that form, you have more work to do!

Summary of Late-filing Penalties

It is that time again, when calendar-year plans will be submitting their 2013 Form 5500 by July 31, unless a 2½-month extension has been filed with Form 5558.

Failure to file Form 5500 can result in both DOL and IRS penalties. DOL can assess civil penalties of up to \$1,100 per day for failure or refusal to file a complete Form 5500 by its due date. In addition, IRS can impose late-filing penalties of \$25 per day, up to \$15,000 per plan. Furthermore, IRS can impose a penalty of \$1 a day for each participant for whom an annual registration statement was not filed up to \$5,000 for any plan year. IRS also can assess penalties for failure to report change of status (\$1 per day not to exceed \$1,000) and failure to file an actuarial report.

There are certain questions on the Form 5500 that are used jointly by DOL, IRS and the U.S. Pension Benefit Guaranty Corp. In 2009, DOL began the transition to requiring electronic filing of Form 5500. But IRS was not yet in a position to accept electronic filings, so certain items were removed from the Form 5500 filing, including the Schedule SSA.

Schedule SSA was used to report terminated vested participants so upon application for Social Security benefits, the Social Security Administration would remind the participant that a benefit was payable from an employer plan. At the same time, the plan administrator was required to inform the participant that he or she had been reported on the plan sponsor's Schedule SSA and to share what information had been reported.

See Andersen, p. 2

Andersen (continued from p. 1)

Eventually, Form 8955-SSA replaced the Schedule SSA. The Form 8955-SSA is filed with IRS only; it now can be filed electronically or on paper.

DOL has its own late-filing program: the DFVCP. It provides a channel through which plan sponsors can file Forms 5500 that are late or have never been filed. The DFVCP provides for reduced penalties.

In January 2013, DOL updated the DFVCP to require electronic filing. However, the Form 8955-SSA could not be filed with the DFVCP filing.

IRS Notice 2002-23 provided that IRS wouldn't impose certain penalties if a filing was made under the DFVCP program. But the recent Notice 2014-35 superseded it and changed the rules of the game for filing through the DFVCP.

Relief From IRS Penalties

Relief from the IRS penalties tied to late filing of Forms 5500 and 5500-SF for plans subject to Title I of ERISA is available only if any applicable Form 8955-SSA is also filed for the year at issue. This requirement applies to any DFVCP filing submitted through the EFAST2 electronic filing system at IRS (in other words, generally all DFVCP filings after Dec. 31, 2009), regardless of whether the filing was submitted before the issuance of Notice 2014-35.

The notice said IRS will not impose penalties under Section 6652(d) (a change in status reported on Form 5500) and 6652(e) (this section includes miscellaneous requirements related to deferred compensation, annuity and bond purchase plans) as those sections relate to the late filing of Forms 5500, 5500-SF and 8955-SSA or under Section 6692 (connected to the filing of actuarial reports required by Section 6059) if:

1. the requirements of the DFVCP for filing a delinquent Form 5500-series return for a year are satisfied; and

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2. a Form 8955-SSA, with any information required for the year covered by the DFVCP filing (if not previously been provided to IRS) is filed separately on paper with IRS by the latter of 30 calendar days after the completion of the DFVCP filing or Dec. 1, 2014.

Example. If a DFVC filing for a delinquent 2008 Form 5500 was submitted in 2012 and information required to be filed was never filed for 2008, a paper Form 8955-SSA must be filed with IRS for the 2008 plan year by no later than Dec. 1, 2014, to qualify for the relief provided by the recent IRS notice.

Filers of Form 5500- EZ that do not cover any common law employees are not eligible for penalty relief under Notice 2014-35, but IRS announced in Rev. Proc. 2014-32 a temporary pilot program for this group of filers.

Rev. Proc. 2014-32

IRS also launched a one-year pilot program for Form 5500-EZ filers. Specifically, the relief is only available to the plan administrator or plan sponsor of:

1. certain small business (owner-spouse) plans and plans of business partnerships (together "one-participant" plans); and
2. certain foreign plans.

No payment or penalty is required under this program. However, relief is not available if a penalty has been assessed (such as a CP 238 Notice, Penalty Charged on Your Form 5500 Return) by IRS in connection with a delinquent return.

The following must be submitted for plans to be eligible for penalty relief for delinquent filings:

- A complete Form 5500-series return, including all required schedules and attachments for each year for which the applicant is seeking penalty relief. For returns for 2008 plan years and earlier, the specific Form 5500 for the plan year must be submitted: for example, use a 2005 Form 5500 for a 2005 filing. For returns for the 2009 plan year and later, use a Form 5500-EZ; a delinquent Form 5500-SF cannot be filed for the plan year. The Rev. Proc. provides further details for filing Schedules B, SB and E.
- Each delinquent Form 5500 series filing must be marked in red letters in the top margin of first page above the title of the Form **"Delinquent return submitted under Rev. Proc. 2014-32, Eligible for Penalty Relief."**

See Andersen, p. 3

Andersen (continued from p. 2)

- A Transmittal Schedule found in the Appendix of the Rev. Proc. must be provided with the filing.

Multiple returns may be included in a single submission. There are two mailing addresses that must be used,

one for Form 5500-EZ submissions and a separate address for Form 5500 submissions.

The Rev. Proc. was effective June 2, and will remain in effect until June 2, 2015. IRS is requesting comments on whether a permanent version of this program should be established, and, if so, how fees should be determined. ♦



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