



## Employee Benefits & Executive Compensation ADVISORY ■

**JULY 24, 2014**

### Notice to Late Filers of Form 5500 Regarding Relief from Penalties under the Internal Revenue Code and Reminder About Fee Disclosures

This advisory addresses an important update regarding additional steps that plan administrators must take, in order to avoid penalties under the Internal Revenue Code, if they failed to timely file the Form 5500 series of annual reports. This advisory also includes a critical reminder concerning the timing of fee disclosures regarding qualified retirement plans.

#### **Relief from Internal Revenue Code Penalties for Late Filing of Form 5500 – December 1, 2014, Deadline for Some Filings**

*A separate filing of Form 8955-SSA is required, even for plan years before 2009.*

Plan administrators who fail to timely file the Form 5500 series annual reports can be subject to penalties under both ERISA and the Internal Revenue Code. The penalties that can be assessed for a late filing are significant, and both the Secretary of Labor and the Internal Revenue Service (IRS) are authorized to impose penalties against plan administrators that fail to file complete and timely reports.

The Department of Labor (DOL) Employee Benefits Security Administration administers the Delinquent Filer Voluntary Compliance (DFVC) Program, which allows plan administrators who fail to file a timely annual report to pay reduced civil penalties if they voluntarily comply with ERISA annual reporting requirements. The IRS previously stated that it would not impose penalties on a person who was eligible for and who satisfied the requirements of the DOL's DFVC Program, with respect to the filing of a Form 5500.

The DOL updated the DFVC Program to reflect the DOL's final regulations requiring electronic filing of annual reports as part of the transition to the electronic ERISA Filing Acceptance System known as "EFAST2." The DFVC Program now requires that all delinquent annual reports be submitted using EFAST2.

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Prior to the 2009 plan year, certain required information regarding deferred vested participants was reported on Schedule SSA (Form 5500). However, as part of the transition to mandatory electronic filing via EFAST2, the Schedule SSA was replaced by Form 8955-SSA, Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits. The Form 8955-SSA is now filed instead of the Schedule SSA.

Importantly, the Form 8955-SSA is a standalone form that must be filed with the IRS, not the DOL. Some plan administrators may have been filing their delinquent annual reports with the DOL over the EFAST2 system, thinking that was all that was needed. The DOL has issued a notice informing filers that they cannot submit the Schedule SSA or Form 8955-SSA under the DFVC Program to the DOL, even for 2008 and prior plan years.

Recently, the IRS issued Notice 2014-35, stating that the IRS will not impose penalties relating to the filing of Form 5500, Form 5500-SF and Form 8955-SSA with respect to a year for which a person (1) is eligible for and satisfies the requirements of the DOL's DFVC Program with respect to a delinquent Form 5500 series report and (2) files separately with the IRS a Form 8955-SSA. Significantly, the IRS will only provide relief for the late filing of Forms 5500 and 5500-SF if any applicable Form 8955-SSA is also filed with the IRS for the plan years at issue. The filing of the Form 8955-SSA must be filed as a paper version with the IRS because the necessary systems that would allow electronic filing of the Form 8955-SSA with the IRS are not yet in place.

The Form 8955-SSA must be filed with the IRS in hard copy by the later of 30 calendar days after the filer completes the DFVC filing or by December 1, 2014. This requirement applies to any DFVC filing submitted through EFAST2 (which includes most DFVC filings from December 31, 2009, to present), regardless of whether the DFVC filing was submitted before the IRS issued this notice regarding the Form 8955-SSA.

For example, if in 2012 you submitted a delinquent 2008 Form 5500 via EFAST2, but did not also submit to the IRS the information required under Internal Revenue Code Section 6057, a paper copy of Form 8955-SSA must be filed with the IRS for the 2008 plan year by no later than December 1, 2014, to qualify for relief from the IRS's penalties for late filing related to the 2008 Form 5500.

Please note that this additional step does not apply to welfare plans and is a requirement for qualified retirement plans only.

If you have any questions about this additional step that may need to be taken regarding this new requirement to avoid the assessment of penalties by the IRS for the late filing of a Form 5500 (including those that you previously submitted within the past several years electronically through the DOL's DFVC), please contact Alston & Bird's [Employee Benefits & Executive Compensation Group](#) as soon as possible.

### **Important Reminder Regarding Participant Fee Disclosures**

To comply with 29 C.F.R. § 2550.404a-5, defined contribution plan sponsors of qualified retirement plans are required to disclose investment, administrative and other fees to plan participants, in a report that must include a detailed chart that outlines the fees and expenses for each investment option. Many of these disclosures must be provided once every 12 months. For example, if a plan sponsor initially provided the fee disclosures on July 31, 2012, then the disclosures for 2013 were due on July 31, 2013.

However, last summer, the DOL provided a one-time extension for the enforcement of the 12-month deadline for the second round of fee disclosures, to an 18-month deadline. For example, if a plan sponsor provided the initial fee disclosures on July 31, 2012, and then took the extended 18-month deadline to submit the second round of fee disclosures, the 2013 fee disclosures would have been due by January 31, 2014. The next round of fee disclosures would then be due 12 months from that date (January 31, 2015).

Depending on when your plan issued its disclosures last year, the 2014 disclosures may be due sometime in the coming month. For example, if you did not take the DOL one-time extension last summer and filed the 2013 disclosures on July 31, 2013, the fee disclosures must be made again on July 31, 2014. If you are a plan sponsor who met the 2013 deadline without taking the optional extension, you have one last opportunity to take the extension for the 2014 disclosures. For example, if a plan sponsor provided the original round of fee disclosures on July 31, 2012, and provided the second set of disclosures on July 31, 2013, the plan sponsor has one last opportunity to elect to take the one-time extension so that the fee disclosures for 2014 would be due 18 months from the date of the last disclosures (i.e., by January 31, 2015).<sup>1</sup> The next round of fee disclosures would be due 12 months later on January 31, 2016.<sup>2</sup>

The DOL may revisit the timing rules that apply to the 404a-5 fee disclosures in the future, but for now, plan sponsors have another opportunity to adjust their annual deadline for making the disclosures.

If you have any questions, please contact the [Employee Benefits & Executive Compensation Group](#) so we can discuss the impact of the timing of your fee disclosures.

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<sup>1</sup> Please note that a plan sponsor should elect to take the one-time extension only after the plan sponsor determines that a delay in providing the notice is in the best interest of participants. This determination should then be recorded in the minutes of the committee or fiduciary administering the plan.

<sup>2</sup> The latest date that a plan sponsor can timely submit the fee disclosures is February 25, 2015, if the plan sponsor waited until the initial deadline to submit the fee disclosures. See, Field Assistance Bulletin No. 2013-02. Importantly, the one-time extension runs from the date that the previous year's fee disclosures were submitted, so be sure to refer back to that date when determining the upcoming deadline.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

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