

A Simple Review of Your Plan's Form 5500 May Avoid Costly Deficiencies

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PRACTICES Health and Welfare Plans, Employee Benefits and Executive Compensation

One of the most unwelcome pieces of mail a plan sponsor can receive is a letter from the DOL notifying it of a deficiency in its plan's Form 5500 filing and possibly assessing very substantial penalties against them. As annual filing deadlines loom, we've described a few simple tips below that may help plan sponsors avoid receiving such undesirable correspondence.

Before filing any Form 5500, plan sponsors should carefully review the Form 5500 and any related schedules and read any accompanying audit report. According to the IRS, one of the most frequent errors on Forms 5500 is leaving fields blank that should be completed. Additionally, other common mistakes include using an incorrect employer identification number ("**EIN**") for the plan sponsor or an incorrect plan number. Since the DOL tracks Form 5500 filings based on the sponsor's EIN and plan number, it is imperative that this information is correct. Further, it is not uncommon for a Form 5500 to indicate that the plan sponsor is also the plan administrator. While in many cases this is accurate, some plans name a committee or even an individual as the plan's administrator, and the Form 5500 should be completed accordingly. It is important to note that if a committee or individual serves as plan administrator, they will need to have a separate EIN from the plan sponsor. Finally, plan sponsors should make sure that they have signed and dated their Forms 5500.

Retirement Plan Specific Form 5500 Issues

If a defined contribution plan has had late contributions during the plan year at issue, or if there are late contributions from prior plan years that have not been fully corrected, they must be reported on the appropriate financial schedule to the Form 5500 (*i.e.*, Schedule H or Schedule I) as well as the audited financial statements, if they are required. Audited financial statements are required to disclose the total amount of delinquent contributions that:

- Have not been corrected;
- Were corrected outside the DOL's Voluntary Fiduciary Compliance Program ("**VFCP**");
- Are pending correction in VFCP; and
- Have been fully corrected under VFCP and Prohibited Transaction Exemption 2002-51 (which is a class exemption that provides excise tax relief for certain eligible transactions corrected pursuant to VFCP).

Note that if the plan sponsor has not actually filed a VFCP application for the delinquent contributions before the Form 5500 is submitted, the audit report should not state that the delinquent contributions are either pending correction in VFCP or have been fully corrected under VFCP, even if the plan sponsor intends to file the VFCP at a later date. If it is reported that delinquent contributions have been fully corrected under VFCP or are pending correction in VFCP,

the DOL may review its records to determine whether a VFCP application has actually been filed with respect to the plan.

Welfare Plan Specific Form 5500 Issues

With respect to welfare plan Form 5500 filings, self-funded plans generally do not need to include a Schedule A, which is used to report on insurance information. This is true even when a self-funded plan has a stop-loss policy. Schedule A reporting of a stop-loss policy is only required when the stop-loss policy is an asset of the plan (e.g., funded via a trust or with participant contributions) or the plan is the policyholder or policy beneficiary. The DOL may look to the Schedule A to determine which brokers are providing services to the plan and should be providing compensation disclosures. Likewise, most self-funded plans are not required to file a Schedule C, which discloses fees of \$5,000 or more paid out of trust or plan assets to a plan vendor. Self-funded plans that are not funded through a trust and that take employee contributions pre-tax through a cafeteria plan rarely have a Schedule C requirement. The DOL has indicated that including a Schedule C can be a flag as the DOL will then look for other trust reporting elements such as a Schedule H and audited financial statements.

It is important that plan sponsors understand what is being disclosed in the plan's annual Form 5500 filings. Any questions that arise upon reviewing a plan's Form 5500, associated schedules, and audited financial statements, as applicable, should be raised to the plan's auditors, the entity which completed the Form 5500, and, if necessary, the plan's legal counsel. In order to avoid having to make corrections to the Forms 5500, deal with the DOL, and potentially having to pay penalties related to deficient Form 5500 filings, all questions and issues arising under the Form 5500 should be addressed before the Form 5500 is filed.