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ERISA Newsletter

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Form 5500 Preparation – 10 Quick Considerations

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The Form 5500 filing due date is July 31 for most plans (without extension). Accordingly, at this time of year, we see increased activity relative to Form 5500 preparation and filing, as well as the preparation of the associated audit reports where that is required.

Close review of the Form 5500 is advised to ensure it is properly prepared and does not unnecessarily raise red flags to the Department of Labor (“DOL”) and/or Internal Revenue Service (“IRS”).

The following is a short list of considerations and questions aimed at helping avoid government inquiry otherwise prompted by a “wrong” answer on the Form 5500. The bottom line is that it is critical to follow the Form 5500 instructions and carefully review the entries in order to avoid triggering an investigation. Here are a few issues for your consideration:

1. Use the correct plan name and plan sponsor name (as well as the correct employer identification number “EIN”). This might seem a strange recommendation, but we see a lot of missteps in this regard. Often, it is just an error; other times, changes occur as the result of M&A activity that are not recognized and/or are not appropriately addressed.
2. Obtain appropriate proof of the Form 5500 filing (and the filing of the Form 5558 extension form). These steps are often overlooked by plan sponsors. It is easy to obtain such proofs in order to avoid an argument with the government over the imposition of potentially significant fines for not filing or for filing late.
3. If you failed to file a Form 5500 or will file late, quick participation in the DOL’s Delinquent Filer Voluntary Compliance Program (“DFVCP”) should be explored.
4. The DOL issued a report about a year ago entitled “Assessing the Quality of Employee Benefit Plan Audits.” The report was very critical of the plan audit process and is bound to result in closer examinations of plan audit reports. As such, a close review of the audit reports in addition to the Form 5500 itself is warranted.

5. Properly identify, report, and correct late deposits (including preparing and filing Form 5330s). This is still a hot button issue for the DOL. Incorrect reporting and correction activity relative to this issue is rampant. For example, the required separate statement is not included or the separate statement does not state that the matter has been corrected (when it has been corrected).
6. The IRS added some new questions to Form 5500 this year aimed at identifying compliance issues (or more likely, noncompliance). After issuing the new version of the form with the questions, the IRS indicated those questions should not be answered. Accordingly, do not answer those questions. Answering them might highlight a failure to follow the Form 5500 instructions, and may also communicate compliance problems.
7. Was a Form 8955-SSA appropriately prepared? This is a related filing generally due the same day as the Form 5500. Did it report small balances still sitting in the plan that should have been distributed (i.e., balances of \$5,000 or less)? Failure to automatically distribute (or rollover) small balances as provided by the plan, is a qualification failure. This issue reveals itself practically every time we look at a Form 8955-SSA. It is easily avoidable. In many cases, those amounts have been distributed, and thus need not be reported as still in the plan, or the reporting is on the wrong line of the form erroneously indicating that the amount has been there longer than it has been.
8. The DOL and IRS continuously state that where an answer on the Form 5500 is described as "other," it will have a tendency to garner their attention. Accordingly, effort should be made to avoid using that response. As an example, we have seen recently loan interest being reported as "other," when in fact the instructions specifically provide a place to report accrued, but unpaid interest on participant loans.
9. Are you filing for all plans that must file, such as flexible savings accounts and/or health reimbursement accounts? Have "top hat" statements been filed with the DOL to avoid filing Form 5500s for any nonqualified deferred compensation plans?
10. If you are filing a Form 5500-SF (i.e., the short form), are you fulfilling the conditions for being able to do so, or is a regular Form 5500 required?

In summary, close review of the Form 5500 will likely save time and money later. It is the plan sponsor who signs and submits the form under penalty of perjury; accordingly, the signer has a keen interest in ensuring the Form 5500 is properly and accurately completed. A close review also provides a good opportunity to identify weaknesses in fiduciary processes and/or qualification failures. It is better to discover and address those matters sooner rather than later.

For more information, please contact Jeff Mandell (jeff@erisalawgroup.com) or John C. Hughes (john@erisalawgroup.com), or call 208-342-5522 or 1-866-374-7252.

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