

GET TO KNOW BDO – EXECUTIVE AND HR SERVICES

EBP COMMENTATOR

THE NEWSLETTER OF THE BDO EMPLOYEE BENEFIT PLAN AUDIT PRACTICE

“THE BUCK STOPS HERE” – IRS REITERATES PLAN SPONSOR RESPONSIBILITY FOR DOCUMENTATION OF HARDSHIP DISTRIBUTIONS AND PARTICIPANT LOANS

Loans to participants and distributions due to participant hardship are transactions commonly delegated by employee benefit plan management to third-party service providers. As service providers continue to streamline their administrative processes in the increasingly paperless plan environment, the amount of documentation required by service providers supporting these transactions has been reduced, in some instances, to merely electronic certification (“e-certify”).

These streamlined administrative processes for loans and hardship distributions are coming under scrutiny by the Internal Revenue Service (IRS). The IRS has challenged the trend of service providers permitting participants to “self-certify” that they meet the applicable criteria for these loans and special early distributions and has specifically stated that the plan sponsor is responsible for the recordkeeping requirements regarding these transactions. Additionally, the sponsor may not rely on “e-certify” as sufficient evidence and should have documentation available for examination to support hardship

distributions and participant loans. The IRS also indicates that a lack of electronic or paper records is a plan “qualification failure” that requires correction under the Employee Plans Compliance Resolution System (EPCRS).

Under IRS guidance, it is the responsibility of the plan sponsor to:

- ▶ Maintain evidence of all relevant documentation for each participant loan (such as for the application and approval, the executed note receivable from participant, and repayments)
- ▶ Document the nature of the hardship distribution (e.g., that it was a permitted distribution) **even if** the service provider only required the participant to “self-certify” that the hardship criteria were met

For more details, refer to www.irs.gov/Retirement-Plans/Its-Up-to-Plan-Sponsors-to-Track-Loans-Hardship-Distributions.

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NOTEWORTHY CHANGES FOR 2014 ERISA ANNUAL REPORTS

As plan sponsors gear up to prepare the *Annual Return/Report of Employee Benefit Plan*, Form 5500, for retirement and welfare benefit plans with a December 31, 2014 year end¹, there are some significant changes to keep in mind.

FORM 8955-SSA MANDATORY ELECTRONIC FILING

Electronic filing has, to date, been optional. However, sponsors required to file a W-2 or 1099 electronically for a year that includes the first day of the plan year, are now required to file the 2014 filing of Form 8955-SSA, *Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits*, electronically as well.

It is important to note that, should the sponsor fail to comply with the mandatory electronic filing requirement, the form is considered **not** filed, even if a paper return is submitted. Plan sponsors who miss this step and thus fail to timely file an annual Form 8955-SSA could face IRS-assessed penalties of \$1 for each reportable participant for each day the failure to file the Form 8955-SSA continues, up to a maximum of \$5,000 per participant. All plan sponsors entering the Department of Labor's (DOL) Delinquent Filers Voluntary Compliance program for late Form 5500s can, within 30 days of entering DFVC, file a paper copy of the Form 8955-SSA with the IRS to avoid the IRS penalties. See IRS Notice 2014-35. The DOL does not have any penalties associated with Form 8955-SSA.

FORM 5500 - SIGNATURE AND DATE, ACTIVE PARTICIPANTS INFORMATION, AND MULTIPLE-EMPLOYER PLAN INFORMATION

There have been updates made to Form 5500 instructions for "Signature and Date," which now caution the filer to check the filing status in EFAST2. EFAST2 sends a notification (usually within 20 minutes of submission) that

¹ The due date for Form 5500 is the last day of the 7th month following the plan's year end. Therefore, for plans ending December 31, 2014, the Form 5500 and related forms are due July 31, 2015. An automatic extension of 2 ½ months may be requested by filing a Form 5558 prior to the Form 5500's original due date.



the return/report is ready to be processed. If the filer is not notified that the submission was successfully received and is ready to be processed, the problem will need to be corrected to avoid being deemed a "non-filer" subject to penalties from the DOL, IRS, and/or Pension Benefit Guaranty Corporation (PBGC).

If the filer receives notification that shows the status as "Processing Stopped" or "Unprocessable," it is possible that the submission was not sent with a valid electronic signature. It is therefore critical to look closely at the Filing Status and the specific error messages applicable to the transmitted filing to help determine the specific problem to be corrected.

A new question that appears on Form 5500, Line 6a(1), asks what is the "total number of active participants at the beginning of the plan year?" While this question may seem very similar to Line 5 ("total number of participants at the beginning of the plan year"), these questions are actually asking for two different counts. Line 5 also **includes** participants that are retired or separated from service still receiving benefits under the plan whereas Line 6a(1) **excludes** those participants. For retirement plans, the difference between the count for Line 5 and Line 6a(1) is the former employees entitled to future benefits, while for health care plans the difference would be

retirees receiving benefits or other former employees who have elected COBRA.

Additionally, the check box for "Multiple-Employer Plans"² in Part I of the Form 5500 now indicates that multiple-employer pension plans and multiple-employer welfare plans filing the Form 5500 must include an attachment that:

- ▶ Lists each participating employer in the plan during the plan year, identified by name and employer identification number (EIN)
- ▶ Includes a good-faith estimate of each employer's percentage of the total contributions (including employer and participant contributions) made by all participating employers during the year

The sponsor will need to complete as many entries as needed to report all applicable employers. Multiple-employer welfare plans that are not required to file financial statements with their annual report are required to include only a list of participating employers with the corresponding EIN and Plan Numbers in the "Multiple-Employer Plan Participating Employer Information" attachment submitted with their filing.

² Do not check this box if the employers maintaining the plan are members of the same controlled group

FORM 5500 - SCHEDULE H, SCHEDULE MB AND SCHEDULE SB

According to the expanded instructions for Schedule H Line 1c(13), a qualifying registered investment company must be registered under the Investment Company Act of 1940, including mutual funds (legally known as open-end companies), closed-end funds (legally known as closed-end companies), and UITs (legally known as unit investment trusts).

Similarly, a new Line 4f has been added to Schedule MB, which requires the filer to provide information on plans in critical status regarding the year the plan is projected to emerge from critical status, or, if the rehabilitation plan is based on forestalling possible insolvency, the year in which plan insolvency is expected.

For each type of participant (active, retired, or terminated vested), Line 3 of Schedule SB now states that the funding targets (vested and total) need to be reported separately for each. Additionally, Line 11b has been split into two parts:

- ▶ The first providing the calculation based on the prior year's effective interest rate
- ▶ The second providing the calculation based on the prior year's actual return

Refer to the instructions if the valuation date for the prior plan year was not the first day of the plan year. Line 15 instructions have been expanded to address situations in which the Adjusted Funding Target Attainment Percentage (AFTAP) was not certified for the plan year, while Line 27 has been revised to reflect changes under the Cooperative and Small Employer Charity Pension Flexibility Act of 2014.

FORM 5500 - FORM M-1 COMPLIANCE INFORMATION

In general, Multiple Employer Welfare Arrangements (MEWAs) are arrangements that offer health and other benefits to the employees of two or more different employers (including self-employed individuals). If plans are determined by the Secretary of Labor to be collectively bargained, then they are exempt from filing Form M-1. Plans claiming this exception without a determination from the DOL are considered Entities Claiming Exception (ECEs) and have special filing requirements (covered in more detail below).

Additionally, all MEWAs that are employee welfare benefit plans under ERISA are now subject to the Form 5500 annual report, notwithstanding the general Form 5500 filing exceptions.

For 2013, the Form M-1 compliance information was required to be filed as a Form 5500 attachment. However, it now appears on the Form 5500 as three new questions: 11a, 11b and 11c. These new lines only apply to welfare benefit plans and ask if the plan is in compliance with M-1 filing requirements. The separately filed Form M-1 is now used to report the required information concerning a MEWA and any ECE.

FORM M-1 ELECTRONIC FILING BY MEWA AND ECE SEPARATE FROM THE FORM 5500

While most of the changes may seem minor, the Form M-1 is substantively different from previous years and now requires filers to include custodial and financial information relating to the MEWA or ECE.

The Form M-1 must be filed no later than March 1 following any calendar year for which a filing is required. There is a one-time extension that can be filed and *should* automatically be granted. The new rules do, however, impose stricter 30-day filing deadlines for MEWA registration and ECE origination and special filing events. In addition to the annual reports, for the first three years from origination, MEWAs and ECEs must now file 30 days prior to operating in any state or within 30 days of knowingly expanding operations in an additional state, experiencing a merger, a participant increase of 50 percent or greater, or a material change.

Regarding the filing of annual reports for ERISA plans, there is much truth in the old adage that claims "the devil is in the details." Even seemingly minor mistakes or failure to comply with requirements can be costly. Therefore, keeping up to date on reporting changes can help mitigate the risk of filing incorrectly and exposure to undue scrutiny by the enforcement agencies and/or costly penalties.

LEGISLATIVE ACTION TO DEFUND THE DOL "CONFLICT-OF-INTEREST" FIDUCIARY RULE

The Department of Labor's proposed fiduciary rule that was discussed in our [Winter 2015 edition](#) is still under review (with a public hearing expected in mid-August), but its ability to affect change should it be enacted has been threatened by recent riders attached to U.S. Senate and House of Representative appropriations bills. For instance, the House rider stipulates that no monies from the Act may be used to "finalize, implement, administer or enforce the proposed Definition of the term "Fiduciary" under the proposed regulation.

These attempts to essentially "defund" the fiduciary rule are the latest in continued opposition to the rule, based on two key concerns: First, changing what constitutes a "fiduciary" potentially exposes service providers (financial advisers and brokers) to litigation from which they were previously immune. Secondly (and probably most significantly), the rule affects how and how much financial advisers and brokers would be compensated.

Although the appropriation bills have the support of Republicans (who control both houses of Congress), both President Obama and the Secretary of Labor Thomas Perez have spoken out staunchly in support of the fiduciary rule and both bills may be vetoed by the President. Stay tuned for continuing developments.

IRS REVISIONS FOR PLAN CORRECTIONS UNDER EPCRS

In two separate pronouncements, the IRS recently issued revisions to the EPCRS, as set forth in Revenue Procedure 2013-12, in an effort to make the permitted methods for correcting errors in the administration of tax-qualified retirement plans more taxpayer-friendly.

The first revisions were outlined in Revenue Procedure 2015-27, which is generally effective July 1, 2015. However, plan sponsors may elect to apply these new provisions on or after March 27, 2015. Some of the more significant corrections affected by Revenue Procedure 2015-27 include the following:

- ▶ **Overpayment of benefits to participants** – The IRS has clarified that EPCRS does not require that a plan demand return of a participant overpayment due to the plan in every case.
- ▶ **Excess contributions to participant accounts** – The IRS will now allow self-correction of excess contributions, even if such failure occurs repeatedly, as long as the correction occurs within 9 ½ months after the end of the plan year.
- ▶ **User fees charged for plans under Revenue Procedure 2013-12** – The IRS has reduced the user fees originally

outlined in Revenue Procedure 2013-12 that apply to plan submissions for the following two corrections: (1) a failure to satisfy the minimum distribution requirements under IRC Section 401(a)(9), and (2) compliance with the requirements of IRC Section 72(p) in making loans to plan participants depending upon the number of affected participants.

A second set of revisions was announced shortly thereafter in Revenue Procedure 2015-28, effective April 2, 2015. This Revenue Procedure revises Revenue Procedure 2013-12 with regard to the following corrections:

- ▶ **Failure to timely implement salary withholding otherwise required under an automatic contribution feature of the plan** – The IRS no longer requires this failure to be corrected through a Qualified Non Elective Contribution (QNEC) equal to 50% of the participant's "missed deferral opportunity" under the automatic arrangement if the failure does not extend beyond the end of the 9 ½ month period after the end of the plan year of the failure and certain other requirements are met. Currently this correction method is only available for such errors occurring prior to December 31, 2020.

- ▶ **Failure to correctly implement a participant's salary deferral election** – The IRS has reduced the "correction payment" required of the plan sponsor seeking to correct this type of failure, depending on how quickly the failure is corrected by the plan sponsor. If certain conditions are met, no QNEC is required if corrections are made within three months of the failure. The QNEC is reduced to 25% of the participant's "missed deferral opportunity" if made generally by the end of the second plan year following the year of failure (and possibly a longer time period, under certain circumstances).

In making corrections easier for plans adopting automatic contribution provisions, the IRS is encouraging employers to adopt plans with these automatic contribution features despite implementation errors often occurring in such plans. By expanding the types of correction options available under EPCRS, the IRS is attempting to incentivize plan sponsors to detect and correct these types of plan operational failures as soon as possible.

WHERE WE'VE BEEN

AICPA Employee Benefit Plans Conference

In May, members of our National Employee Benefit Audit Group participated in the American Institute of Certified Public Accountants (AICPA) Employee Benefit Plans Conference held in National Harbor, Maryland. See page 6 for an article on some of our key "take-aways" from this conference.

Society for Human Resource Management (SHRM) Annual Conference and Exposition

If you attended the SHRM Annual Conference & Exposition, held in Las Vegas, Nevada, June 28-July 1, 2015, we hope you came by our booth to say hello. We enjoyed again being part of the world's largest HR event! We are continuing to grow our involvement with SHRM and appreciate having the opportunity to interact with HR professionals who are innovators in their field.

EVALUATING SPONSOR FIDUCIARY RESPONSIBILITIES



“Fiduciary Responsibility” has been getting a lot of attention in the press, which emphasizes the need for plan sponsors to periodically re-evaluate their responsibilities, as set forth by the Employee Retirement Income Security Act (ERISA). Some questions for consideration by the plan sponsor include the following:

- ▶ Has plan management adequately identified those who would be considered fiduciaries to the plan both inside the organization and outside (e.g., third parties)? Do these individuals within the organization know who they are and what their responsibilities entail? Do new fiduciaries to the plan receive adequate training? One resource is the *Meeting Your Fiduciary Responsibilities* guide, which is provided by the DOL. For an e-copy, go to www.dol.gov/ebsa/publications/fiduciaryresponsibility.html.
- ▶ How does plan management maintain proper oversight of the plan and its operations? For instance, is there a regular meeting by a plan oversight board? Does the board maintain minutes and ensure completion of key tasks determined and/or assigned by the board?
- ▶ How does plan management monitor the plan's investments and fees? Fees charged to the plan and participants as well as the investment options from which participants may select are two of the top fiduciary issues in the EBP industry.
- ▶ Does plan management utilize an investment adviser? Are the adviser's recommendations carefully considered by those charged with oversight of the plan and any decisions documented carefully? Is there a current investment policy statement adhered to by both the investment manager and plan management? Would plan management's processes and decisions in the areas of fees and investments stand up under scrutiny, such as from a DOL/IRS audit or a participant lawsuit?
- ▶ When there are issues with the plan's operations, has plan management used competent legal counsel specialized in ERISA matters, as needed? Are plan operational issues corrected timely and appropriately? Mistakes happen with even the best-run plans so having an appropriate process in place to address plan errors (and prevent reoccurrences) is essential.

REDUCTIONS IN IRS DETERMINATION LETTER PROGRAM

In late July, the IRS announced significant modifications to its determination letter program for employee benefit plans. Key changes include:

- ▶ As of July 21, 2015 (and effective through December 31, 2016), no off-cycle determination letter applications are accepted, except for certain new plans and terminating plans.
- ▶ As of January 1, 2017, 5-year, staggered amendment cycles for individually designed plans will be eliminated. Determination letters will only be issued at plan inception and termination.

There is a transition rule applicable to plans currently on the 5-year amendment cycle. The IRS has also announced a request for comments regarding these changes that may be submitted until October 1, 2015. For further details, see www.irs.gov/pub/irs-drop/a-15-19.pdf.

MAY 2015 AICPA EMPLOYEE BENEFIT PLANS CONFERENCE

Returning keynote speaker Phyllis Borzi (Assistant Secretary of Labor, U.S. Department of Labor Employee Benefit Security Administration [EBSA]) addressed the DOL's recently released report assessing the quality of employee benefit plan audits by CPA firms of all sizes. She expressed concern over the findings and indicated the DOL is considering various enforcement options available to reverse the unacceptably high deficiency rate of approximately 40 percent. More information and a copy of the report can be found on the [DOL website](#). Ms. Borzi also spoke regarding the DOL's fiduciary rules (see discussion in Winter 2015 edition at www.bdo.com/insights/assurance/ebp-commentator/ebp-commentator-winter-2015 as well as the update in this edition). In a continuation of her remarks at the 2014 conference, Ms. Borzi championed the concept of "lifetime income" (such as from an annuity) as a potential solution for making participant savings last through retirement.

Conference sessions addressed key accounting and auditing pronouncements/guidance applicable for the 2015 plan audit season:

- ▶ Statement on Auditing Standard No. 128, *Using the Work of Internal Auditors* (AU-C 610)
- ▶ Accounting Standards Update No. 2013-07, *Presentation of Financial Statements (Topic 205): Liquidation Basis of Accounting*
- ▶ PCAOB Auditing Standard No. 17, *Auditing Supplemental Information Accompanying Audited Financial Statements*
- ▶ New AICPA independence rules regarding non-attest services and new PCAOB guidance regarding prohibited financial statement preparation services

Several sessions focused on a better understanding of alternative and hard-to-value investments held by the plan. These types of investments are becoming more prevalent even in smaller plans due to the ongoing search for higher investment returns in a low interest-rate environment.

A key conference theme was the various activities ongoing within plans. Plan activities discussed included:

- ▶ Plan mergers and consolidations
- ▶ Increased number of plans requiring an audit for the first time
- ▶ Changes (including declines) in plan sponsor contributions
- ▶ Changes in investment option mix, which in some instances (as noted above) means using higher risk (but potentially higher return) investments
- ▶ Increased availability of annuities as an option for defined contribution plans (as Ms. Borzi noted, annuities may be an attractive option for participants nearing retirement)
- ▶ Pension plan de-risking activities for defined benefit plans

As 2015 is relatively quiet for new accounting pronouncements, it would be a good year for plan management to focus on preventive plan maintenance, such as reviewing plan practices and control processes, ensuring that there have been no issues with recently implemented pronouncements, etc. For additional plan maintenance suggestions, refer to the [checklists provided by the IRS](#).

It would also be a good time to consider the effect of implementation for upcoming accounting changes, such as for the change to eliminate disclosures for certain investments where net asset value (or NAV) is used as the "practical expedient" (Accounting Standards Update [ASU] No. 2015-07, *Disclosures for Investments in Certain Entities that Calculate Net Asset Value per Share [or Its Equivalent]*; www.fasb.org/cs/ContentServer?pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176165981889) and the amendments in ASU 2015-12 (www.fasb.org/cs/ContentServer?c=Document_C&pagename=FASB%2FDocument_C%2FDocumentPage&cid=1176166228978) related to the employee benefit plan simplification initiative released by the Financial Accounting Standards Board (FASB) on July 31, 2015.

BDO WEBINAR SERIES FOR PLAN SPONSORS

Fiduciary Gridiron – How to Succeed on the Field is a four-part webinar series focusing on a variety of fiduciary responsibilities and topics for plan management, regardless of plan size.

Part One – Selecting Your Retirement Plan Team was held on May 21, 2015. This webinar focused on who is a fiduciary and the different types of service providers available to fiduciaries. If you missed this webinar, we encourage you to listen to the recording available at university.learnlive.com/login.aspx?brandingid=1272&ref=/CourseDesc.aspx?course_id=507306.

Part Two – Kicking Off the Season is the next webinar in this series that will discuss Investment Policy Statements, latest trends in plan design, and monitoring of plans by the DOL and IRS. It will be held on **August 20, 2015 at 12:30 pm EST**. To register, use the following link: www.bdo.com/events/fiduciary-gridiron-how-to-succeed-on-the-field-aug.

HELPFUL WEBSITES

<http://www.dol.gov/ebsa/>
<http://www.efast.dol.gov>
<http://www.irs.gov/>
<http://ebpaqc.aicpa.org>
<http://asc.fasb.org>



BDO EBP PRACTICE

Nationally recognized in the field of employee benefit plan consulting and auditing, BDO audits over 1,600 plans ranging in size from 100 to close to 400,000 participants. Our engagements are staffed with accountants experienced with all types of audits including defined contribution (401(k), profit sharing, ESOP, and 403(b) plans), defined benefit (pension equity or cash balance) and health and welfare plans (defined benefit or defined contribution). We have extensive ERISA knowledge of audit and filing requirements, including full-scope, limited-scope, SEC Form 11-K filings and Master Trusts.

BDO's National Employee Benefit Plan Audit Group meets regularly to develop training and guidance and discuss updates in the industry and auditing practices. Our professionals are regular presenters at local, state and national seminars. We continue to be extensively involved with the American Institute of Certified Public Accountants (AICPA) National Conferences on Employee Benefit Plans. Many of our professionals serve in leadership roles in the accounting profession as senior advisors and are active members of several governing boards and CPA societies. For example, our professionals currently serve on various AICPA committees, such as the AICPA's Joint 403(b) Plan Audit Task Force (we are proud to have had representation at the chair level for this committee) and the AICPA Technical Standards Subcommittee of the Professional Ethics Executive Committee. BDO's EBP professionals have also served on the AICPA Employee Benefit Plan Audit Quality Center Executive Committee (immediate past chair) and the Employee Benefit Plan Expert Panel.

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