



EBP COMMENTATOR

Recent EBP Developments

Electronic Filing of Form 5500s Now Required

Beginning January 2010, all Form 5500s *Annual Return/Report of Employee Benefit Plan*, except 2008 plan year filings, are now required to be submitted by the plan sponsor via the Department of Labor's ("DOL") new electronic filing system called EFAS T2. Paper copies of the Form 5500, other than 2008 plan year filings, will not be accepted by the government.

Now that EFAS T2 is up and running, each individual who signs a Form 5500 on behalf of the plan sponsor and/or the plan administrator will need to go to the DOL website and register for electronic signing credentials, which will enable the appropriate individual to electronically sign the Form 5500 and submit it through EFAS T2. The DOL is planning to send post card notifications inviting Form 5500 signers to apply for their personal credentials but there is no need to wait. Form 5500 signers can log on today and get credentials at:

<http://www.efast.dol.gov/portal/app/welcome?execution=e1s1>.

Instructional tutorials for EFAS T2 are also available on the DOL website at:

[http://www.efast.dol.gov/training/EFAS T2%20Tutorial%20Menu.html](http://www.efast.dol.gov/training/EFAS%20Tutorial%20Menu.html). Once there, click on "Register" for a demonstration of how to obtain signing credentials.

Additional changes to 2009 form 5500

In addition to the electronic filing requirement, below is a summary of some other changes to be aware of regarding the 2009 Form 5500s:

Form 5500 – Includes new options related to the type of extension obtained, modifications to the participant count questions, elimination of preparer information, new feature codes for default investments and automatic enrollment, and a new question regarding multiemployer plans;

Schedule A – Insurance Information – New disclosure to report insurance companies that fail to provide required information;

Schedule C – Service Provider Information – Enhanced disclosures of plan fees and expenses with a new question to report service providers that fail or refuse to provide the required information (See "Fee Disclosure" article below for further details);

Schedules H and I – Financial Information – New questions regarding blackout periods and failure to provide benefits, as well as a standard supplemental schedule for reporting delinquent participant contributions;

Schedule R – Retirement Plan Information – Addition of ESOP and defined benefit plan questions; and

Other – The Internal Revenue Service ("IRS") Schedules E (*ESOP Annual Information*) and SSA (*Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits*) have been eliminated. However, the IRS intends to collect the Schedule SSA information going forward, but specific guidance on submitting that information to the IRS has not been issued at this time.

Finally, a simplified report, the new Form 5500-SF (Short Form) may be completed for plans that have fewer than 100 participants; are eligible for the audit waiver; hold no employer securities during the year; and have 100 percent of its assets invested in investments with a readily ascertainable market value.

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Fee Disclosures

As discussed above, there are enhanced fee disclosure requirements on the Schedule C. **The revised schedule will require fees charged by service providers to administer the plan to be classified as either direct or indirect compensation, as well as reporting persons in a conflict of interest sensitive position who received eligible indirect compensation.** Direct compensation is defined as compensation ***paid directly by the plan*** to the service provider, such as recordkeeping fees and custodial fees. These fees should be relatively easy to identify and disclose. Indirect compensation is compensation paid by sources other than directly from the plan, such as fees charged to investment funds and reflected in the value of the plan's investments or return on investment. These fees will be more challenging to identify and disclose.

The DOL's Employee Benefits Security Administration ("EBSA") has released frequently asked questions ("FA Q") to help plan administrators and service providers comply with the new Schedule C requirements. The FA Qs cover such issues as the alternative reporting option for eligible indirect compensation, electronic disclosure of fee information by service providers, fee reporting for brokerage window options in participant directed plans, and reporting on gifts, entertainment and other non-monetary compensation.

These FAQs can be found at http://www.dol.gov/ebsa/faqs/faq_schedulec.html and

403(b) Plans

Among other new 403(b) plan requirements effective for plan years beginning on or after January 1, 2009, **all ERI SA-covered 403(b) large plans – generally those with 100 or more total participants (active, retired, terminated with vested benefits, etc.)-must engage an**

independent qualified public accountant to audit the plan's financial information.

Please refer to the previously issued *EBP Commentator* newsletters and special editions, which can be located at: <http://www.gbq.com/newsletter/Employee%20Benefit%20Commentator> or ask a GBQ Employee Benefit Plan ("EBP") specialist for additional information on the new requirements related to 403(b) plans.

Deadline Extended for Certain Retirement Plan Amendments

The IRS issued Notice 2009-97, which extends the deadline to the last day of the first plan year that begins on or after January 1, 2010, for amending qualified retirement plans to meet certain requirements created by the Pension Protection Act of 2006 ("PPA ") and subsequently modified by the Worker, Retiree, and Employer Recovery Act of 2008.

EBSA 's 2010 Priorities

Recently the DOL's EBSA revealed its priorities for 2010 and at the top of the list is enforcement relating to the timely remittance of employee deferral contributions to defined contribution plans.

The DOL requires that employee deferral contributions and loan repayments be remitted to retirement plans on the earliest date on which they can be reasonably segregated from the company's general assets. Failure to remit such employee contributions and loan repayments to the plan in a timely manner results in a breach of fiduciary duty and is considered to be a prohibited loan to the company. The transactions must be separately reported to the DOL and may result in the payment of lost earnings, excise taxes and penalties by the company, not the plan.

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On January 14th, the EBSA issued final regulations setting forth a “safe harbor” for the remittance of employee deferral contributions and loan repayments by small plans (those with under 100 eligible participants). In order to comply with the safe harbor, these contributions and repayments must be received by the plan “not later than the 7th business day following the day on which such amount is received by the employer (in the case of amounts that a participant or beneficiary pays to an employer), or the 7th business day following the day on which such amount would otherwise have been payable to the participant in cash.”

Historically, the DOL has penalized plan sponsors for untimely remittance of employee contributions and loan repayments. However, in a speech on September 14, 2009, at the 2009 American Society of Pension Professionals and Actuaries/DOL Speaks conference in Washington, D.C., the new head of EBSA, Assistant Secretary of Labor Phyllis Borzi, emphasized the DOL’s commitment to enforcement activities such as a “contributory plan criminal project” to prosecute violators who fail to forward employee contributions to employee benefit plans. **This program is designed “to target the most egregious and persistent violations and to protect the most vulnerable employee populations by pursuing criminal prosecution of individuals who commit crimes involving contributory health and retirement plans.”**

Examples of violations that would fall under this enforcement project include embezzlement of plan funds, including those who withhold money from worker paychecks without depositing them into the plan, and knowingly filing false Form 5500s.

Among the other priorities in 2010, the EBSA also plans to address 401(k) fee disclosure, investment advice regulations and issues regarding target-date funds used as qualified default investments.

DOL Withdraws Final Investment Advice Regulations

Effective January 19, 2010, the DOL has withdrawn the final rule on the provision of investment advice to participants and beneficiaries in individual account plans, such as 401(k) plans, and beneficiaries of individual retirement accounts (“IRA”) under the Employee Retirement Income Security Act of 1974 (“ERISA”) prohibited transaction provisions.

The final rule was originally published in January 2009 to make investment advice more accessible for participants in 401(k) plans and IRAs. The effective and applicability dates of the final rule had been deferred several times, most recently until May 17, 2010, while the DOL reviewed the policy and the legal issues raised. The PPA amended ERISA by adding a new prohibited transaction exemption that allows greater flexibility for investment advisers to give advice to participants of 401(k)s and IRAs.

The DOL decided to withdraw the final rule over conflict of interest concerns raised in public comments questioning “the adequacy of the final class exemption’s conditions to mitigate the potential for investment adviser self-dealing.”

The DOL has stated that it intends to publish separately a proposed rule that conforms to the PPA statutory exemption relating to investment advice.

PBGC Flat-Rate Increase

The Pension Benefit Guaranty Corporation (“PBGC”) per-participant flat-rate premium for single-employer plans with plan years beginning in 2010 will increase from \$34 to \$35. For multiemployer plans, the premium will remain the same at \$9 for the 2010 plan year. The PBGC is required by law to adjust the premium rates for inflation each year based on changes in the national average wage index.

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Audit, Accounting, and Reporting Updates

FASB Interpretation No. 48, Accounting for Uncertainty in Income Taxes—an interpretation of FASB Statement No. 109 [FASB ASC 740 and 805]

Financial Accounting Standards Board (“FASB”) Interpretation No. 48, *Accounting for Uncertainty in Income Taxes—an interpretation of FASB Statement No. 109* (“FIN 48”) [FASB ASC 740 and 805] generally was effective for fiscal years beginning after December 15, 2006. The effective date was extended for nonpublic enterprises (as defined in paragraph 289, as amended, of Statement 109), except for nonpublic consolidated entities of public enterprises that apply U.S. generally accepted accounting principles (“GAAP”). For these entities, FIN 48 is effective for annual financial statements for fiscal years beginning after December 15, 2008.

Since benefit plans are generally exempt from income taxes, a few matters, such as unrelated business income and operational issues that may jeopardize a plan’s tax exempt status, may trigger the application of FIN 48. **The adoption of FIN 48 by an employee benefit plan will require a fresh look at the risk of unrelated business income tax and other potential disqualifying impacts on its activities.**

FASB Statement No. 165, Subsequent Events [FASB ASC 855]

In May 2009, the FASB issued Statement of Financial Accounting Standards No. 165, Subsequent Events (“SFAS 165”) [FASB ASC 855] which is effective for interim or annual periods after June 15, 2009, and established a new GAAP requirement for management to evaluate subsequent events to the date the financial statements are issued or available to be issued and

to disclose that date in the notes to the financial statements. The date of the Management Representation letter will also correspond to this date.

FASB Accounting Standards Codification

On July 1, 2009, the FASB Accounting Standards Codification™ (“ASC”) became the single official source of authoritative, nongovernmental U.S. GAAP, including employee benefit plans (in addition to applicable guidance issued by the Securities and Exchange Commission (“SEC”) for employee benefit plans that file Form 11-K with the SEC) superseding existing FASB, AICPA, EITF, and related literature. Only one level of authoritative GAAP now exists, plus the guidance issued by the SEC. All other literature will be non-authoritative.

The FASB ASC became effective for financial statements issued for interim and annual periods ending after September 15, 2009. Employee benefit plans with fiscal years ending September 30, 2009, and later that refer to authoritative literature in their financial statements will need to refer to the FASB ASC. The general topics of FASB ASC pertaining to employee benefit plans are the following:

- 960, Plan Accounting – Defined Benefit Pension Plans
- 962, Plan Accounting – Defined Contribution Pension Plans
- 965, Plan Accounting – Health and Welfare Benefit Plans

SAS No. 115, Communicating Internal Control Related Matters Identified in an Audit Statement on Auditing Standards (“SAS”) No. 115, *Communicating Internal Control Related Matters Identified in an Audit* (“SAS 115”) is effective for audits of financial statements for periods ending on or after December 15, 2009.



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It supersedes SAS No. 112, *Communicating Internal Control Related Matters Identified in an Audit*, and aligns the definitions and related guidance for evaluating deficiencies in internal control.

EBP Commentator is provided by GBQ's Employee Benefit Plan Team for our clients and other interested persons upon request. Since technical information is presented in generalized fashion, no final conclusion on these topics should be made without further review.

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