

Form 5500 as a Compliance Tool: Changes Today, Changes Tomorrow

ROBERT R. GOWER



Sponsors of calendar-year qualified plans working to complete the 2015 Form 5500 (Annual Return / Report of Employee Benefit Plan) by the extended filing deadline of October 15, 2016 may have noticed a handful of revisions to the Form 5500 for the 2015 plan year. These “compliance-focused” revisions indicate areas in which the Department of Labor (“DOL”) and Internal Revenue Service (“IRS”) are ramping up qualified plan compliance monitoring efforts and warrant special attention by plan sponsors.

The first, and most significant change for 2015 appears in an update to the instructions for a longstanding question on Line 4I to Schedule H (Financial Information for Large Plans) — *Has the plan failed to provide any benefit when due under the plan?*

The Form 5500 instructions in place prior to the 2015 reporting year were not clear on the intent or scope of the question, but practitioners generally understood Line 4I to focus on ascertaining whether a plan had sufficient assets available to timely pay benefits when due. The 2015 instructions were revised to provide that the failure to provide any benefit when due includes the failure to pay required minimum distributions under section 401(a)(9) of the Internal Revenue Code (the “Code”). Generally, this means a plan sponsor must report the failure to pay required minimum distributions to 5% company owners who have attained age 70 1/2, and to all other participants who have reached age 70 1/2 and retired or separated from service, including the total dollar amount of the minimum distributions. Arguably, these expanded instructions also require reporting the failure to timely commence mandatory benefit payments for plans that have mandatory commencement dates prior to age 70 1/2 (e.g., upon attainment of normal retirement age under the plan).

The revised instructions for Line 4I follow an uptick in investigations by the DOL of qualified plans with unpaid benefits. These investigations focus on a significant challenge for plan sponsors — locating missing participants in order to provide them with benefits when due. It is the view of the DOL that plan fiduciaries must maintain and follow procedures for ensuring payment of benefits to participants (including those participants who are “missing”). At a minimum, ERISA requires employers to maintain records with respect to employees sufficient to determine the

benefits that are due or may be due to such employees. This means employers must work to maintain up-to-date and accurate records of their active and inactive participants, including current address and contact information. Failure to extend efforts to maintain such accurate records may result in penalties from the DOL of up to \$10 per day, per impacted participant. When benefits come due, and a plan sponsor does not have current contact information, DOL guidance supports a plan sponsor exercising the following steps:

- Checking the records of related plans and employers
- Contacting the participant's designated beneficiary
- Using electronic/internet search tools
- Using a commercial locator
- Contacting credit reporting agencies

Responses to the revised Line 4l will require acknowledging any failure to timely distribute benefits when due, and potentially highlight weaknesses in maintaining up-to-date contact information for participants. As a result, Plan sponsors should examine their procedures for maintaining participant records, and consider whether additional efforts should be extended to locate current missing participants. If required minimum distributions (or other benefits) are not paid when due on account of an administrative error, then a plan sponsor will need to respond Yes to Line 4l. However, following guidance from the IRS published on July 29, 2016, it is appropriate to respond No if the delay solely is caused by the plan sponsor's inability to locate the participant or beneficiary after undertaking the steps described above.

Beyond the changes seen in Line 4l, the IRS added a significant series of new compliance questions to Schedule H, Schedule I (Financial Information for Small Plans), Schedule R (Retirement Plan Information), and Form 5500-SF (Short Form 5500 for Small Plans). The questions show the potential for new IRS compliance enforcement initiatives, and an attempt to gather much of the information previously obtained by the IRS through the now mostly closed determination letter application program. These compliance questions include the following:

- Whether the plan trust incurred any unrelated business taxable income ("UBTI") during the year.
- Whether there were any in-service distributions for the year.
- How a section 401(k) plan satisfies nondiscrimination requirements for employee deferrals and employer matching contributions, and whether the plan uses the "current year" or "prior year" testing methodology for the ADP and ACP tests.
- Whether the plan applies the ratio percentage test or average benefit test to satisfy coverage testing.
- Whether the plan is permissively aggregated with any other plans for purposes of satisfying coverage and nondiscrimination testing.
- Whether the plan has been timely amended for all required tax law changes, and the last date the plan received a favorable determination letter or opinion letter from the IRS.

These questions were originally *optional* for 2015. However, earlier this year, the IRS issued a statement providing that plan sponsors should ignore these new questions for 2015 reporting, largely the result of the IRS needing to review the questions with the Office of Management and Budget. Nevertheless, plan sponsors should anticipate these questions becoming mandatory in future reporting. Responses to these questions will require careful review between plan sponsors, administrators, and legal counsel in order to ensure accuracy, and where necessary, enhance plan compliance efforts.

Finally, on July 12, 2016, the DOL issued a Proposed Rule to overhaul the Form 5500 and its governing regulations. The proposal aims to modernize Form 5500 reporting by gathering greater information (including significant new information regarding group health plans), enhancing data mineability by making the 5500 more computer-friendly, improving and streamlining the reporting of service provider fees to align with ERISA section 408(b)(2), and enhancing compliance questions in order to better gather information on plan operations to protect participants' and beneficiaries' benefits, and educate and discipline plan fiduciaries. These changes, which the DOL hopes to implement beginning with the 2019 reporting year, promise to continue the expansion of enforcement efforts and reiterate the need for plan sponsors to carefully monitor and review their plans.

If you have questions or need assistance, please contact the author of this article or the Trucker Huss attorney with whom you normally work.

JULY 2016

[EMAIL ROBERT GOWER](#)