



IRS Grants Form 5500 Penalty Relief for Non-ERISA Plans

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Effective June 2, 2014, the Internal Revenue Service (“IRS”) established a new temporary “pilot” program which provides penalty relief to plan sponsors and plan administrators of certain retirement plans. More specifically, the relief applies to the late-filing of Form 5500-EZ, Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan (“Form 5500-EZ”), or, in limited circumstances, Form 5500, Annual Return / Report of Employee Benefit Plan (“Form 5500”), with regard to plans which are not subject to Title I of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). Due to the new program’s availability only to non-ERISA plans, this relief is generally limited to plans sponsored by certain small businesses (owner-only or business partnerships) or certain foreign plans. The following discusses the new guidance in greater detail.

Background

Both the Internal Revenue Code of 1986, as amended (“Code”), and ERISA impose annual federal reporting requirements with regard to certain retirement plans. The various reporting requirements are consolidated within the Form 5500 Series Annual Return / Report. Although the IRS and Department of Labor (“DOL”) have concurrent enforcement over the filing of Form 5500, the remainder of this article generally discusses only IRS / Code implications due to the fact that the new guidance, which is the primary focus of this article, relates exclusively to plans which are not subject to ERISA

Plan sponsors and plan administrators who fail to timely submit a Form 5500 may be subject to civil penalties under the Code. In general, the late filing penalties set forth under the Code impose a penalty of \$25 for each day the failure continues, up to \$15,000 per late-filed return. Notwithstanding, no penalties are imposed under these provisions of the Code if the plan sponsor or plan administrator can demonstrate that such failure is due to “reasonable cause”.



Attempting to argue reasonable cause can be an effective way of eliminating IRS assessed Form 5500 late-filing penalties. However, as any such abatement is the result of a somewhat subjective review of the individual facts and circumstances of the specific situation by the IRS, this method of attempting to eliminate late-filing penalties includes an undesirable element of uncertainty. Will the IRS accept the factual circumstances that I relay as persuasive enough to establish reasonable cause? There is no way to be certain until the IRS reviews such arguments and decides to either accept or reject them.

In addition to the establishment of reasonable cause, the DOL established a program in 1995 known as the Delinquent Filer Voluntary Compliance Program (“DFVC”) which is available to reliably and conclusively preclude penalty assessments associated with the late-filing of Form 5500. In exchange for the payment of a nominal fee, voluntary submissions to DFVC generally absolve its users of any late-filed Form 5500 penalties assessable by either the IRS or the DOL. The certainty associated with the elimination of late-filed Form 5500 penalties under DFVC generally makes it a preferable method of addressing these issues as compared to attempting to establish reasonable cause. However, DFVC only accepts submissions in relation to ERISA plans.

As a result of DFVC only being available to plans covered by ERISA, non-ERISA plans (such as the owner-only and foreign plans mentioned above) are not eligible to employ DFVC. As non-ERISA plans are not subject to ERISA penalty assessments, this limitation is irrelevant for purposes of such plans’ need to avoid ERISA late-filed Form 5500 penalty assessments. However, the lack of availability of DFVC to non-ERISA plans also prevents plan sponsors of such plans from conclusively eliminating IRS Form 5500 late-filing penalties. Therefore, non-ERISA plans only path to attempt to abate late-filing penalties assessable by the IRS is through the establishment of reasonable cause.

As explained above, although reasonable cause arguments can be effective at eliminating IRS late-filed Form 5500 penalties, it is a less desirable method of addressing these concerns due to the subjectivity associated with the establishment of reasonable cause. Therefore, a reliable and conclusive method of eliminating such penalties with respect to non-ERISA plans remained unavailable...until now.



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New Guidance

Under IRS Revenue Procedure 2014-32 ("Rev. Proc. 14-32"), the IRS established a temporary one-year pilot program which provides plan sponsors and plan administrators of certain non-ERISA plans with relief from the IRS Form 5500 late-filing penalties discussed above. Such relief is generally conditioned upon the preparation and submission of the outstanding Form(s) 5500-EZ (or in limited circumstances for plan years prior to 2009, Form 5500 in connection with non-ERISA plans that were required to file a Form 5500 as opposed to a Form 5500-EZ) including all required schedules before the assessment of any penalties by the IRS in connection with the delinquent return. In addition, each delinquent form must be marked in red letters at the top of its first page with the words "Delinquent return submitted under Rev. Proc. 2014-32, Eligible for Penalty Relief." Failure to properly mark the submitted delinquent return may cause the IRS to treat the return as ineligible for the relief provided under the new guidance and could result in the assessment of all potentially applicable penalties. Finally, a brief one-page transmittal schedule must be included with each return associated with any such submission.

Unlike DFVC, no payment is required in order to take advantage of the new pilot program established under Rev. Proc. 14-32. However, it behooves any potential applicant to this program to act quickly. This is because the IRS announced that, subsequent to the expiration of the current authorization for the program on June 2, 2015, the program may or may not be extended. Not only might the program disappear entirely on June 2, 2015, if the program is extended beyond June 2, 2015, the IRS has already indicated that a payment will be required to make a submission to any comparable program that exists after that date.

As much as we hope this article helped you to better understand this topic, it is not to be construed as financial, tax or legal advice. Therefore, if you believe that it may apply to your (or your client's) company, be sure to further discuss it with a qualified accountant or tax professional. For more information about this topic, please contact our marketing department at 484-483-1044 or your administrator at Legacy.



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