DOL and IRS Grant Relief for Late Filers of Form 5500

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Plan administrators of employee benefit plans subject to the Employee Retirement Income Security Act ("ERISA") are required to file an annual report on Form 5500. This includes both pension and other retirement plans as well as certain welfare benefit plans and certain types of plans of deferred compensation. In 1995, the Department of Labor established a Delinquent Filer Voluntary Compliance ("DFVC") program for late filers of the annual report. This program established reduced penalty amounts for plan administrators who voluntarily filed delinquent returns.

The relief available under the DFVC program is significant because ERISA Section 502(c)(2) establishes a civil penalty (currently up to $1,100 per day) which may be assessed by the Department of Labor for a plan administrator who fails or refuses to file a timely Form 5500. Under administrative procedures subsequently established, this penalty is generally levied at $50 per day for late filers, or $300 per day for failure to file at all (up to a maximum of $30,000 per return). In addition, the IRS has a separate penalty structure of $25 per day up to a maximum of $15,000 per return. The DFVC program as it was originally established in 1995 provided substantially reduced penalties for plan administrators who voluntarily filed delinquent returns; that is, if they filed the returns prior to receiving a late filing notice from DOL. However, in 2002 the DOL announced that it was updating the 1995 DFVC program to reduce the penalty amounts and to provide both a lower limit for the maximum aggregate penalty, as well as a per-plan limit for multiple delinquent returns filed in the same DFVC submission.

Under the new DFVC program, the penalty for late filing is reduced to $10 per day and the penalty maximum is $750 for a small plan, with a per-plan maximum of $1,500. A small plan is a plan with fewer than 100 participants or a plan which has 120 or fewer participants if it had fewer than 100 in the previous year. In the case of a large plan (i.e., a plan with over 100 participants) the cap is $2,000 per return or $4,000 per plan. It is worth noting that if a plan is making a single submission for multiple years and for any of those years it was a large plan, then the large plan penalty limits will apply.

Observation: Obviously, it is necessary to "do the math" to determine whether to make a single submission for multiple years or separate submissions for each year. The penalty could be lower in some cases depending on the number of delinquent days and whether the plan may qualify for small plan status in some years and not in others.

It is important to bear in mind that this program is only available for plan administrators who have not received a notice from the DOL regarding a late filing. In addition, it does not apply to plans which are not subject to ERISA. Therefore, a plan which would normally file Form 5500EZ, under which only the owner or the owner and his spouse are participants, would not be eligible for this program since the obligation to file Form 5500EZ is solely an IRS obligation.

The IRS has announced that it will also not assess penalties for any plan which complies with the DFVC program. No separate notification to the IRS is required. However, this does not constitute a waiver of penalties for a Form 5500EZ, since, as noted above, that form is not subject to the DFVC program and therefore the pre-condition for the IRS waiver (that the plan administrator has complied with the DFVC program) cannot be satisfied.

Observation: It is also worth noting that in computing the penalties any extension period previously obtained is not taken into account. Therefore, if a plan with a December 31st plan year end obtains an extension of the July 31st deadline for filing the Form 5500 until October 15th, and then misses that extended deadline, it will be subject to the $10 per day penalty beginning from August 1st, even though the automatic extension was obtained. As a practical matter, the $750 penalty cap for a small plan essentially equals the penalty for 75 days, which would be the length of the automatic extension period.

In order to qualify for the DFVC program, there is a two-part procedure:

1. A Form 5500, complete with all schedules and attachments, must be filed for each year at the normal address for filing returns under the E-Fast program, in Lawrence, Kansas. Filings are permitted both by paper and electronically. For administrative convenience, the DOL has stipulated that one could either file the appropriate Form 5500 or 5500C/R (which has now been discontinued) which was in effect for each of the non-filing years; provided, however, that a Form 5500-R may not be filed even if it would have been permitted if the annual return had been filed when due. In the alternative, the plan administrator may elect to file the version of Form 5500 currently in effect and simply indicate on the form for which plan year it is being filed. This is intended to simplify the procedure for plan administrators who either have difficulty obtaining the forms (although the program announcement includes information as to how prior year forms can be obtained) or perhaps more likely, if the employer retains the services of a professional third-party administrator to prepare the forms, it may have a computerized return program which is only suitable for the current year and not for prior years.

2. A copy of the completed Form 5500 (without attachments) must be filed with the DOL office in Atlanta, together with payment of the applicable penalty amount. If a filing is being made for multiple years, it is preferable to submit these in the same package to qualify for the "per-plan penalty cap".

The DFVC program also applies to non-filed returns for so-called "top hat plans". This is a non-tax-qualified plan of deferred compensation maintained by an employer for a "select group of management or highly compensated employees". There is a DOL regulation which permits a one-time filing to be made for such a plan in order to relieve the employer of the obligation to file annual returns. For an employer who failed to do this upon adoption of a top-hat plan, the DFVC program offers relief. The employer can submit the one-time filing as required under the regulations and also file a Form 5500 for the current year with only a few items of information completed. Doing this and paying a $750 penalty will relieve the employer from the filing requirement for all future years.

Observation: Employers who have established plans of deferred compensation (whether or not funded) for certain management employees may well have violated the annual report filing requirement because these plans are still subject to ERISA. Unless at the time of adoption the alternate one-time filing was made, it would be advisable to seek relief under the DFVC program in this simplified manner to correct the situation.

Finally, since employers are only eligible for DFVC relief if they initiate action before receiving notice from the Department of Labor, each employer should consider whether it is appropriate to avail itself of this relief. In particular, late last year the Department of Labor and the IRS jointly announced that they were undertaking a new coordinated effort to examine various databases to identify plans which had not complied with the annual return filing requirements. This is clearly designed to encourage employers to voluntarily come forward under the DFVC program, file their delinquent returns and pay the reduced penalties. Certainly, the addition of the per-plan limit makes the DFVC program an attractive option for non-filers, particularly for those employers who maintain small plans.