

## **Relief from Internal Revenue Code Late Filer Penalties for Certain Employee Benefit Plans**

NOTICE 2014-35

### **PURPOSE**

This notice provides administrative relief from the penalties under §§ 6652(d), 6652(e), and 6692 of the Internal Revenue Code (the “Code”) for a failure to timely comply with certain annual reporting requirements under §§ 6047(e), 6057, 6058, and 6059. This administrative relief applies to late filers that satisfy the requirements of this notice and the Delinquent Filer Voluntary Compliance (“DFVC”) Program administered by the Department of Labor (“DOL”) Employee Benefits Security Administration. The relief provided under this notice supersedes the relief previously provided in Notice 2002-23, 2002-1 C.B. 742.

### **BACKGROUND**

Plan administrators who fail to timely file Form 5500 series annual returns/reports can be subject to penalties under both Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Code. The Secretary of Labor has the authority under section 502(c)(2) of ERISA and 29 CFR 2575.502c-2 to assess civil penalties of up to \$1,100 per day against plan administrators that fail or refuse to file complete and timely annual reports. In addition, the Internal Revenue Service (the “Service”) may impose penalties under § 6652(e) against plan administrators and employers that fail to file complete and timely annual returns, as required under §§ 6058 and 6047(e) (with respect to employee stock ownership plans). Section 6652(e) generally provides that in the case of any failure to file a return or statement required under § 6058 or 6047(e), the late filer shall pay, upon notice and demand, a penalty of \$25 for each day the failure continues, up to \$15,000 per return or statement.

The Service may also impose penalties under §§ 6652(d) and 6692 for a failure to satisfy the reporting requirements of §§ 6057 and 6059. Section 6652(d)(1) generally provides that in the case of any failure to file an annual registration statement under § 6057(a), the late filer shall pay, upon notice and demand, a penalty of \$1 for each participant with respect to whom there is a failure to file for each day the failure continues, up to \$5,000 for any plan year. Section 6652(d)(2) generally provides that in the case of any failure to file a notification of change of status under § 6057(b), the late filer shall pay, upon notice and demand, a penalty of \$1 for each day the failure continues, up to \$1,000 for each failure. Section 6692 generally provides that in the case of any failure to file an actuarial report required by § 6059, the late filer shall pay a penalty of \$1,000 for each failure.

The DFVC Program was initially adopted by DOL in 1995 and was updated in a published Federal Register notice on March 28, 2002 (67 FR 15052) (2002 DOL Notice). In order to encourage voluntary compliance with the ERISA annual reporting requirements by late filers, the DFVC Program allows plan administrators who fail to file a timely annual report to pay reduced civil penalties. Following the issuance of the 2002 DOL Notice, the Service issued Notice 2002-23. Notice 2002-23 provides that the Service will not impose penalties under §§ 6652 and 6692 (as those sections relate to the filing of a Form 5500 series return) on a person who is eligible for and satisfies the requirements of the DFVC Program with respect to the filing of a Form 5500.

DOL updated the 2002 DOL Notice by a notice published in the Federal Register on January 29, 2013 (78 FR 6135) (2013 DOL Notice). The DFVC Program was updated to reflect DOL's final regulations mandating electronic filing of annual reports as part of the transition to a wholly electronic ERISA Filing Acceptance System (EFAST2). As revised, the DFVC Program now requires that delinquent annual reports be submitted using EFAST2.

Prior to the 2009 plan year, information required to be reported under § 6057 regarding deferred vested participants was reported on Schedule SSA (Form 5500). As part of the transition to mandatory electronic filing, however, the Schedule SSA was replaced by Form 8955-SSA, Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits. The Form 8955-SSA is now filed instead of the Schedule SSA. The Form 8955-SSA is a stand-alone form that must be filed with the Service, but not DOL. In the 2013 DOL Notice, DOL noted that filers cannot submit a Schedule SSA or Form 8955-SSA under the DFVC Program to DOL, even for 2008 and prior plan years.

#### ADMINISTRATIVE RELIEF FROM CERTAIN INTERNAL REVENUE CODE PENALTIES FOR DFVC PROGRAM PARTICIPANTS

The Service will not impose penalties under §§ 6652(d) and 6652(e) (as those sections relate to the filing of Form 5500, Form 5500-SF, and Form 8955-SSA) or under § 6692 (relating to the filing of actuarial reports required by § 6059) with respect to a year for which filing of such a form is required on a person who (1) is eligible for and satisfies the requirements of the DFVC Program with respect to a delinquent Form 5500 series return for such year and (2) files separately with the Service, in the form and within the time prescribed by this notice, a Form 8955-SSA with any information required to be filed under § 6057 for the year to which the DFVC filing relates (to the extent that the information has not previously been provided to the Service). Thus, for example, this notice provides relief from the penalties applicable under the Code to the late filing of Forms 5500 and 5500-SF only if any applicable Form 8955-SSA is also filed for the year at issue.

Although the Service generally encourages filers to file electronically whenever possible, relief is provided under this notice only if a Form 8955-SSA is filed on paper with the Service (including a fillable Form 8955-SSA completed online and then printed and filed on paper). The

systems needed to provide relief for a delinquent Form 8955-SSA filed electronically are not currently in place. In contrast, Form 5500 series returns must be filed electronically using EFAST2 in accordance with the requirements of the DFVC Program. If a Form 8955-SSA is filed pursuant to this notice, the filer must check the box on Line C, Part I (Special extension) of the Form 8955-SSA and enter "DFVC" in the space provided on Line C.

Any Form 8955-SSA required to be filed with the Service pursuant to this notice must be filed on paper by the later of 30 calendar days after the filer completes the DFVC filing or December 1, 2014. This requirement applies with respect to any DFVC filing submitted through EFAST2 (generally, all DFVC filings after December 31, 2009), regardless of whether the filing was submitted before the issuance of this notice. For example, if a DFVC filing for a delinquent 2008 Form 5500 was submitted in 2012 and information required to be filed under § 6057 was never filed for 2008, a paper Form 8955-SSA must be filed with the Service for the 2008 plan year by no later than December 1, 2014 to qualify for the relief provided under this notice.

The relief provided under this notice applies upon a late filer's satisfaction of the conditions of this notice. Accordingly, the late filer need not file a separate application for relief with the Service. The Service will coordinate with the DOL in determining which late filers are eligible for the relief provided under this notice.

Consistent with Section 5.04 of the 2013 DOL Notice, neither the acceptance of a filing and payment of a penalty under DFVC nor the granting of relief under this notice represents a determination by the Service as to the status of a plan or plan sponsor under the Code.

## INAPPLICABILITY OF THE ABOVE RELIEF FOR FILERS NOT COVERED BY TITLE I OF ERISA

The relief under this notice is available only to the extent that a Form 5500 series return is required to be filed under Title I of ERISA. Therefore, for example, Form 5500-EZ and Form 5500-SF filers for plans without employees (as described in 29 CFR 2510.3-3(b) and (c)) are not eligible for the relief in this notice. In Rev. Proc. 2014-32, which will appear in 2014-23 I.R.B., the Service has established a temporary pilot program to afford penalty relief under the Code for delinquent Form 5500 series filers that are not covered under Title I of ERISA (and has requested comments on whether the program should be permanent).

## EFFECT ON OTHER DOCUMENTS

Notice 2002-23 is superseded.

## DRAFTING INFORMATION

The principal drafter of this notice is Robert M. Walsh of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please e-mail Mr. Walsh at [RetirementPlanQuestions@irs.gov](mailto:RetirementPlanQuestions@irs.gov).