

Employee Benefit Plans, Compliance and Penalties

By Robert W. Wood • Wood LLP • San Francisco

Most tax advisers rightly regard employee benefit plans as a specialty. Apart from HR and labor and employment law issues (of which there are many), there are many tax and compliance issues, too. Whether plans are health and welfare, pension, annuity, stock bonus, deferred compensation, options or profit-sharing, it can be a morass.

In virtually any acquisition or disposition, benefit plan issues are clearly something to address. These issues may not drive the

deal, but they can certainly derail one if they are not considered. And there is inevitably clean-up and compliance work to do after the deal closes. It may not be exciting, but someone has to do it.

Even without transactions, compliance can be a crushing burden. It is not infrequently neglected and reporting to the IRS is often tardy. In Notice 2014-35, 2014-23 IRB, the IRS provides a welcome list of administrative relief from penalties

associated with various annual reporting failures. This administrative relief applies to late filers that satisfy certain requirements as well as the Delinquent Filer Voluntary Compliance (DFVC) program administered by the Department of Labor Employee Benefits Security Administration.

Forms, Forms and More Forms

Employers must file annual Form 5500 returns reporting information about the qualification, financial condition and operations of the plan. Plan administrators who fail to timely file can be subject to penalties under the tax code and ERISA. The Secretary of Labor can add civil penalties of \$1,100 per day, and the IRS can accrue penalties of up to \$15,000 per return.

There are per-participant penalties as well that reach up to \$5,000 per participant. With these and other filing gotchas, there is almost a dizzying array of penalties possible with employee benefit plans. And in the inevitable switch to electronic filing, the IRS and DOL have issued drafts of new rules and notices, as well as some new forms.

As part of the transition to mandatory electronic filing, there is now a Form 8955-SSA, *Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits*. It is a stand-alone form that must be filed with the IRS, but not with the DOL. Many filers are using it in the DFVC program even for 2008 and prior plan years.

Notice 2014-35 announces that the IRS will not impose penalties 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 for a delinquent Form 5500 series return; and (2) files a Form 8955-SSA with the IRS with all of the requisite information.

It should be no surprise that the IRS generally encourages filers to file electronically. Nonetheless, Notice 2014-35 provides relief only if a Form 8955-SSA is filed on paper. In contrast, Form 5500 series returns must be filed electronically using EFAST2 under the DFVC program. The notice includes deadlines to qualify for this penalty get-out-of-jail free card. Filings are due 30 days after the DFVC filing or by Dec. 1, 2014.

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