# Form 5500 Updates and Increased ERISA Penalties

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At the end of July 2016, the Department of Labor (DOL), Internal Revenue Service (IRS), and Pension Benefit Guarantee Corporation (collectively, Agencies) jointly issued proposed revisions to the Form 5500 annual report. The proposed revisions, if implemented, would affect 5500 filings for both retirement and welfare benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA). Plan sponsors and service providers won't be required to comply with the changes until preparing Form 5500s for the 2019 plan year.

The agencies said that the 5500 revisions are intended to:

- Modernize the financial statements and investment information reported.
- Update the reporting requirements for service provider fee and expense information.
- Require Form 5500 reporting by all group health plans covered by Title I of ERISA.
- Improve compliance and oversight under ERISA and the Internal Revenue Code through new compliance questions regarding plan operations, service provider relationships, and financial management.

In another recent guidance issued by the DOL, fees for certain employee benefit plan violations have been increased for inflation. The new penalty amounts apply to civil penalties assessed after August 1, 2016, if the violation occurred after November 2, 2015. Some of the most notable penalty increases are an increase from:

- $100 to $131 per day for failure to furnish a blackout notice or notice of the right to divest employer securities.
- $1,000 to $1,087 per failure to provide a summary of benefits and coverage.
- $1,100 to $2,063 per day for failure to file Form 5500.


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- $1,000 to $1,632 per day for failure to notify participants of certain benefit restrictions and limits applicable to a defined benefit plan under Code Section 436.
- $110 to $147 per day for failure to provide documents upon DOL request.

The proposed changes to Form 5500 are as follows:

## Changes to Schedule H

The Agencies intend to improve transparency for the current "other" categories of assets reported on the balance sheet portion of Schedule H. The Agencies are also proposing to change the way alternative investments, hard-to-value assets, and investments through collective investment vehicles are reported. The proposed changes would add new categories for derivatives and foreign investments, and new sub-categories under partnership/joint venture interests to distinguish between a plan's investments in limited partnerships, venture capital operating companies, private equity, hedge funds, and other partnership/joint venture interests. Also included are changes to more clearly identify assets held through self-directed brokerage accounts.

The proposed changes would also add more detailed reporting of amounts paid for salaries, audit fees, recordkeeping fees, trustee and custodial fees, actuarial fees, legal fees, valuation fees, and trustee expenses, including travel and meetings. Disclosures about how the plan administrator allocates expenses to the plan and whether and how expenses were charged directly to participant accounts (and if charged to participant accounts, how they were allocated among participants) will also be required.

## Changes to DFE Reporting

Changes include reporting of additional information about Direct Filing Entities (DFEs) and their underlying investments. The Agencies intend to get a better understanding of plan investments by implementing the following changes:


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- Rather than using Schedule D, plans will show the DFEs in which they invest through the line 4i attachment.
- For collective trust and pooled separate account investments, a plan's interest in the investment will be reflected on a single line of Schedule H regardless of whether the investment itself files as a DFE.
- Detailed information about the investments held by a plan for collective trusts and pooled separate accounts that do not file as DFEs will be reflected on the plan's line 4i attachment.
- The reporting rules for master trusts would be simplified, eliminating the current concept of master trust investment accounts.

## Better Information on Plan Terminations, Mergers, and Consolidations

The proposal would require additional information or plan terminations and mergers, including:

- The current question asking whether the plan has adopted a resolution to terminate a revision to by expanding it to include more detail about the termination.
- A new question asking the filer to indicate whether the plan received transferred assets or liabilities, and if so, the date of such transfer.
- A terminated defined contribution plan would be required to provide additional information to allow missing participants to locate assets transferred to a financial institution.

## New Group Health Plan Reporting Requirements and Information

Current rules allow health and welfare plans with fewer than 100 participants at the beginning of the plan year that are full-insured, unfunded, or a combination of both to be exempt from filing Form 5500. The proposed changes withdraw this exemption and would require all ERISA-covered plans that provide group health benefits to file Form 5500, regardless of size and even if the plan is fully


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insured or unfunded. Small plans will still be exempt from filing Schedules C, G, and H. Small, fully-insured plans would be required to answer only limited questions on the Form 5500 and Schedule J (i.e., basic participation, coverage, insurance company, and benefit information).

Health and welfare plan filings will be required to include a Schedule J—a new schedule, reporting additional information in order to determine compliance with the Affordable Care Act and other laws, including:

- The number of persons offered and receiving COBRA coverage.
- Whether the plan offers coverage for employees, retirees, and dependents.
- The type of group health benefits offered under the plan.
- Whether the health plan funding and benefit arrangement is through a health insurance issuer and whether benefits are paid through a trust or the employer's general assets.
- Grandfathered status of benefit options offered under the plan.
- Whether the plan is a high deductible health plan, a health FSA, or an HRA.
- Information on receipt of rebates, refunds, or reimbursements from a service provider (including medical loss ratio rebates).
- Information on service providers not identified on the Schedule A or C.
- Stop loss premium, attachment point, individual claim limit, and aggregate claim limit information.
- Information on employer and participant contributions (if not already reported on the Schedule H which continues to be required for funded welfare plans).
- Detailed claims payment data, including information on appeals, denials, and whether applicable timeframes were met.


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- Information on compliance with the Summary Plan Description, Summary of Material Modifications, and Summary of Benefits and Coverage content requirements.
- Information on compliance with applicable federal laws and DOL regulations (e.g., HIPAA portability and nondiscrimination, GINA, Mental Health Parity, the Newborns and Mothers' Health Protection Act, the Women's Health and Cancer Rights Act, Michelle's Law, and the ACA).

## Changes to Financial Reporting for Small Plans

The revisions no longer allow ERISA welfare benefit plans with fewer than 100 participants that provide group health plan benefits to use Form 5500-SF. The revisions also add certain content changes to the Form 5500-SF, including disclosures about the type of eligible assets the plan is investing in and the inclusion of questions with "Yes/No" answers about the plan's characteristics.

For any type of small plan filers that are not eligible to file a Form 5500-SF, proposed changes include (i) eliminating the Schedule I currently used by small plans to report financial information, (ii) requiring that the Schedule H be completed, including the schedules of assets (though small plans that are currently exempt from the audit requirement will continue to be exempt under the Proposed Revisions), (iii) revising the Form 5500 to add a new question asking defined contribution plans to report the number of participants with account balances at the beginning of the plan year, and (iv) revising the audit exemption to base it on the number of participants with account balances as of the beginning of the plan year, rather than on the total number of participants.

## Re-introduction of Schedule E to Improve Information on ESOPs

The Agencies have reintroduced a revised Schedule E (a prior requirement which was eliminated in 2009 when mandatory electronic filing was introduced) for employee stock ownership plans (ESOPs) to reporting information to the DOL and IRS. The new Schedule E reincorporates items previously moved to Schedule R,


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revises the pre-2009 Schedule E, and adds new questions, including whether (i) the ESOP is maintained by an S corporation (and if so, whether any prohibited allocations were made to disqualified persons), (ii) the employer maintaining the ESOP paid dividends deductible under Code Section 404(k), (iii) the ESOP held any preferred stock and, if so, the formula for converting that stock into common stock, (iv) any unallocated securities were used to pay an exempt loan (and if so, the method), and (v) the employer made payments in redemption of stock held by an ESOP to terminating participants and deducted them under Code Section 404(k).

## Improving Fee and Service Provider Transparency (Schedules C and H)

Schedule C is used to report information about service provider fees and other compensation if more than $5,000 in compensation is received from the Plan, and information about terminated plan accountants or enrolled actuaries. A revised Schedule C has been introduced to more closely align with the ERISA § 408(b)(2) fee disclosure requirements (requiring retirement plan service providers to provide written disclosure of services, fiduciary status, and total compensation to plan sponsors) and has reduced some of the complexity of required reporting on indirect compensation. Some of the more significant changes include:

- Required reporting of indirect compensation only for "covered service providers" within the meaning provided under ERISA § 408(b)(2).
- A continued requirement to report service providers that earn greater than $5,000 in direct compensation.
- Simplified reporting for certain forms of indirect compensation is eliminated.
- Small pension and welfare plans would no longer be exempt from filing Schedule C.
- The addition of a new line asking if an arrangement includes recordkeeping services without explicit compensation for such services or where compensation has been offset based


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on other compensation received by the provider.

- Required reporting of indirect compensation as a specific dollar amount – reporting using compensation formulas will no longer be allowed.

## Proposed Changes to Enhance Compliance and Oversight

Schedules H and R have been revised to include several new compliance questions, including whether (i) any person was permitted to serve the plan who was disqualified under ERISA Section 411 (i.e., persons convicted of certain crimes), (ii) the plan sponsor paid administrative expenses that were not reported as service provider compensation (Schedule C) or plan administrative expenses (Schedule H), and (iii) the plan sponsor (or any affiliates) acted as a service provider to the plan in exchange for compensation.

For participant-directed plans, questions about the following are also included in the new Schedules (i) the number of designated investment alternatives offered and how many are index funds, (ii) whether a plan provides participants with disclosures required by DOL's participant disclosure regulations, and if so, a copy of the comparative chart of investment alternative information must be attached, (iii) the number and value of uncashed checks at the end of the year along with procedures for verifying a participant's address and for monitoring uncashed checks, and (iv) the number of participants investing in default investments and the type of default investment used (Schedule R).

## IRS-Specific Changes

Under the proposal, Form 5500 will also add back many of the IRS-specific questions that were removed in 2009 when mandatory electronic filing began. Many of these questions were added back to the 2015 form, but the IRS later directed filers to not answer them. Beginning with the 2019 form, the following information will be required:


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- Trust information (trust EIN, name, trustee name).
- Whether the plan is a 401(k) plan and/or a pre-approved plan.
- Method of satisfying nondiscrimination and coverage testing.
- Method of complying with ADP testing.
- Whether the plan received a favorable determination letter and the letter's date.
- Whether any distributions were made to an employee who attained age 62 and who is still employed, for defined benefit and money purchase plans.
- The organization that prepared the form, identifying information, and signature of preparer.
- Whether a defined benefit plan complies with the minimum participation rules.

For more information, please contact Carl C. Lammers or any attorney in Frost Brown Todd's Employee Benefits Law practice.

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