

## Many Relieved as Form 5500 Compliance Questions Made Optional for 2015

The Department of Labor (DOL) and IRS have announced that a series of compliance-related questions proposed for retirement plan returns in the 5500 series will be optional for 2015 plan years. The news was delivered on December 4, 2015, in a [DOL news release](#) and in a set of [IRS frequently asked questions \(FAQs\)](#). The compliance questions were first proposed in drafts of 5500-related forms, and seek information on various dimensions of retirement plan design and administration—including plan features, specifics of coverage and nondiscrimination testing, amending history, custodian, trustee and preparer identity, operations, etc. The purpose of this information is to help the IRS assess the nature and degree of plan compliance, and potentially assist it in better targeting compliance and enforcement efforts. The IRS continues to encourage Form 5500 series filers to answer the new compliance questions on 2015 plan year submissions, even though the questions are optional.

### Adding Compliance Questions to Form 5500 Reporting: a Brief History

In March 2015, the IRS issued a draft of its new Form 5500-SUP, *Annual Return of Employee Benefit Plan Supplemental Information*. The compliance-type questions noted above were the chief purpose of this new form, intended to be used by retirement plans that are eligible to file Form 5500, *Annual Return/Report of Employee Benefit Plan* in paper form. The same compliance questions were to be added to the Form 5500 schedules H, *Financial Information*, I, *Financial Information – Small Plan*, and R, *Retirement Plan Information*, and to Form 5500-SF, *Annual Return/Report of Small Employee Benefit Plan* (for plans that file electronically).

In August 2015, the IRS issued a draft of the 2015 Form 5500-EZ, *Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan*. Compliance questions similar to those on the other forms and schedules appeared on the draft Form 5500-EZ. It was clearly understood that plan information submitted electronically to the DOL would be shared with the IRS, assisting that agency's efforts to monitor plan characteristics and compliance through both paper and electronic filings.

### Industry Reaction to IRS' Initiative

Confidentiality, liability, and timing were among the issues of serious concern. Beyond issues of privacy—Form 5500 submissions are, after all, part of the public record—there was substantial industry concern over the potential for plan misreporting and IRS misinterpretation, given the ambiguity of many of the questions on the aforementioned forms and schedules. Liability was certainly a concern, because preparer identities were to be provided, even though the source of much of the data to be reported might be from service providers having no relationship to the preparer. Timing was another concern because the draft forms were released with the plan year already in progress, and most defined contribution retirement plans were, or still are, in the process of being restated for the Pension Protection Act of 2006 (PPA).

Many of those within the retirement industry—including consultants, administrators, recordkeepers, and other providers—actively lobbied for a reversal, or at least a delay, in implementing these Form 5500 changes. In the end these efforts succeeded.

### Some of IRS' FAQ Clarifications Are Helpful

The IRS FAQs respond to industry comments that had pointed out ambiguities or potential conflicts that employers and preparers might encounter. For example, some of the IRS compliance questions could not be answered accurately by choosing a single response, even though that might be the only option given. Some of the more important clarifications in

the IRS FAQs include the following. (The IRS indicates that there will be further clarifications with issuance of the 2016 plan year forms.)

- Preparers for 401(k) plans that pass nondiscrimination testing using both design-based methods (i.e., safe-harbor contributions) and actual ADP/ACP testing for different contribution types should indicate that the plan passes nondiscrimination testing using actual ADP/ACP testing.
- Preparers for 401(k) plans that test both deferral and matching contributions for nondiscrimination where the current-year method is used for one and the prior-year method is used for the other should indicate the method used for ADP testing.
- Preparers for plans that do not have to meet plan coverage requirements using the standard testing methods (e.g., plans with no highly compensated employees (HCEs) or no nonHCEs, or plans that are temporarily exempt by reason of a merger or acquisition) need not answer the question on how coverage testing is passed.
- Preparers for plans on pre-approved documents that have not been restated for PPA by December 31, 2015, should report the date of the last interim amendment adopted, disregarding any discretionary amendments and any restatement occurring after December 31, 2015.
- Multiple employer plans (MEPs) filing a single Form 5500 should answer compliance questions on a plan level, not the participating employer level.

Several other less significant Form 5500 compliance questions are also addressed in the IRS FAQs.

### In Conclusion

While not all of the concerns raised by critics have been addressed, the IRS' willingness to make the compliance questions optional for 2015 plan year reporting, and clarifying some of the ambiguities are welcome. Other concerns, such as revealing a preparer's client relationships, potential liability for inaccuracies not of the preparer's making, etc., may be addressed in future guidance.