

2016 - The Year in Employee Benefits
Presented by Tod Yeslow

MITCHELL | WILLIAMS

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

Form 5500 Modernization Initiative.

IRS, DOL, and PBGC are seeking regulations to better obtain, and obtain better, data to:

- (i) collect data important to plan participants;
- (ii) be "an essential compliance and research tool for the DOL," PBGC and IRS (includes IRS-only questions for 2016 and 2019);
- (iii) be a more useful resource for Congress, federal agencies, and the federal agencies, and the private sector to assess employee benefit, tax, and economic trends

2

Developing the proposed changes

- The IRS, EBSA, and PBGC collaborated on the multi-year project to modernize the form. Input was obtained from the following:
 - The U.S. Government Accountability Office (GAO)
 - DOL-Office of Inspector General
 - The Treasury Inspector General for Tax Administration (TIGTA)
 - The Advisory Council on Employee Welfare and Pension Benefit Plans
 - Stakeholders

3

Why revise the Form now?

- Historically, the Form 5500 is revised every 10 years.
- Compliance requirements since the last revision in 2009:
 - Pension Protection Act,
 - Dodd-Frank Act,
 - New EFAST-2 vendor selection and transition,
 - Changes to the reporting of service provider compensation,
 - The implementation of ACA, and
 - Investment advisor fees under the Fiduciary Duty rule.

4

New EFAST2 Contract

- EFAST-2 is the electronic filing system for filing all ERISA plan forms.
- Shared among the DOL, IRS, and PBGC
- Objective for EFAST is to simplify and expedite the submission, receipt, and processing of the Forms 5500 and 5500-SF.
- The consolidation of data processing among the three agencies may assist in more efficient pre-screening of audit-worthy plans.
- The proposed form revisions are being coordinated with the vendor selection for EFAST-2 as required under federal procurement rules requiring periodic re-bidding of long-term federal contracts.
- EFAST-2 processing under the new contract is scheduled for 2019 plan year filings beginning January 2020

5

5 goals of the modernization initiative

- Goal #1: Modernize the financial statements and investment information on employee benefit plans.
- Goal #2: Enhance accessibility and usability of data provided by plans.
- Goal #3: Improve information on service providers and fees.
- Goal #4: Require reporting by all group health plans covered by Title I of ERISA.
- Goal #5: Improve compliance through new questions on plan operations and financial compliance.

6

Goal #1: Modernize the financial statements and investment information on employee benefit plans.

Changes to Schedule H and Schedule I are requested to improve transparency and reliability of financial reporting, especially regarding alternative investments. Changes seek:

- Added detail on on-interest bearing accounts and alternative investments,
- Data on hard-to-value assets,
- investments through collective investment vehicles and DFEs.
- Data on investments, investment behavior, and investment classes.
- These schedules have remained largely unchanged since 1975.

7

Goal #1: Modernize the financial statements and investment information on employee benefit plans.

Changes seek :

- Beginning of year and end-of year valuations will be supplemented with value at of assets acquired and disposed of in the same plan year.
- Reporting will use uniform and consistent investment codes to better gauge investment performance, diversity.
- Additional questions designed to assess plan qualification (IRS) and fiduciary prudence (ERISA).
- Participant loan data will be reported on a revised Schedule G.

8

Goal #1: Modernize the financial statements and investment information on employee benefit plans.

Proposed changes to Schedule G – Financial Transactions Schedules:

- More detail pertaining to loan defaults, fixed income loses, and prohibited transactions.
- Checkboxes are used to standardize data for mining purposes.
- Detail on prohibited transactions includes certifying whether the PT is:
 - Discrete or ongoing,
 - Corrected, and the date and method of correction,
 - Reported on Form 5330 y the disqualified person.

9

Goal #1: Modernize the financial statements and investment information on employee benefit plans.

Sample of proposed changes to Schedule H – Financial Information: Large Plan:

- Part I – Asset and Liability Statement: No significant changes to this part. Changes seek additional breakdown of investments:
 - *Other* governmental securities,
 - *non*-publicly traded stock,
 - *Venture capital operating companies*,
 - *private equity*,
 - *hedge funds*,
 - *other partnerships, partnerships/joint ventures that do not hold plan assets under the DOL's plan asset regulation, Real Estate investments other than employer real property.*

10

Goal #1: Modernize the financial statements and investment information on employee benefit plans.

Sample of proposed changes to Schedule H – Financial Information: Large Plan:

- The MPIA concept introduced in 1999 is being eliminated. Individual plans will use the Schedule J to report its own assets held in a master trust.
- More complete information on plan terminations, mergers, and consolidations.
- Transfers from plans will be scheduled.
- Information on frozen and orphaned plans will be reported.
- DC plans would attach a chart comparing participant-level fees as required under ERISA section 404(a)(5) to the Form 5500-SF Schedule H.

11

Goal #1: Modernize the financial statements and investment information on employee benefit plans.

Sample of proposed changes to Schedule H – Financial Information: Large Plan:

- More detailed information on investment alternatives in participant-directed 401(k).
- Here the agencies are looking for performance, diversification, and data from which the agencies can determine whether there is a prohibited transaction as opposed to the self-reporting prohibited transactions. The rules propose questions on rollovers as business start-ups ("ROBS").
- *Practice Note:* Confirm that investment fiduciary followed fiduciary processes for selection and monitoring of investments.

12

Goal #1: Modernize the financial statements and investment information on employee benefit plans.

Sample of proposed changes to Schedule H – Financial Information: Large Plan:

New disclosures regarding CPA include:

- State in which the accountant’s opinion was issued;
- Whether the report was discussed and reviewed with the Independent Qualified Public Accountant;
- Whether the IQPA report disclosed any errors or irregularities, plan qualification issues, internal control weaknesses, unusual or infrequent events which may impact the usefulness of the opinion in assessing the plan’s ability to pay benefits, and other disclosures; and
- Whether the IQPA had a peer review performed in accordance with state requirements.

13

Goal #1: Modernize the financial statements and investment information on employee benefit plans.

Eliminate Schedule I – Financial Information: Small Plan.

- Small plans with hard-to-value investments and alternative investments and consequently cannot report on Form 5500-SF will provide more detailed financial information on the Schedule H.
- Form 5500-SF will be updated to ensure that only small plans invested in eligible assets use the short form.
- Small plans (regardless of whether they file the Form 5500-SF or Form 5500 with Schedule H) would still be eligible for a waiver of an independent qualified plan audit as long as the number of participants with account balances as of the beginning of the plan year is below the audit threshold. This notes another change. Whereas previously the audit requirement was driven off of the beginning of year participant count number.

14

Goal #1: Modernize the financial statements and investment information on employee benefit plans.

Eliminate Schedule I – Financial Information: Small Plan.

- Small plans are determined by the number of participants with account balances as of the beginning of the plan year is below the audit threshold.
- Previously the audit requirement was driven off of the beginning of year participant count number, including those eligible but not contributing.
- The proposed changes are touted as the change assisting sponsors by seemingly requiring fewer plan audits.

15

Goal #1: Modernize the financial statements and investment information on employee benefit plans.

- The MPIA concept introduced in 1999 is being eliminated. Individual plans will use the Schedule J to report its own assets held in a master trust.
- More complete information on plan terminations, mergers, and consolidations.
- Transfers from plans will be scheduled.
- Information on frozen and orphaned plans will be reported.

16

Goal #2: Enhance accessibility and usability of data provided by plans

- Convert more elements of the form into computer-ready data that can be searched for data-mining and analytics.
- The proposed changes will make it possible to develop tools to gather more useful data for plans to evaluate performance and for participants to manage their retirement savings.

17

Goal #3: Improve information on service providers and fees

Revise Schedule C - Service Provider Information to:

- Report data necessary to demonstrate compliance with the final service provider fee disclosure (See: 29 CFR 2550.408(b)-2).
- Create a "powerful tool for improved evaluation of investment, recordkeeping, and administrative fees and services arrangements."

18

Goal #3: Improve information on service providers and fees

- Require reporting of indirect compensation for service providers and types of compensation described in ERISA section 408(b)-2 regulations.
- Reporting thresholds correspond to ERISA section 408(b)-2:
 - Service providers who get \$1000 or more in indirect compensation.
 - Service providers who get \$5000 or more in direct compensation.
 - Eliminate "eligible indirect compensation."

19

Goal #4. Require reporting by all group health plans covered by Title I of ERISA

- All health plans must file a Form 5500 and provide a schedule J – Group Health Plan Information.
- According to EBSA, existing Form 5500 requirements related to group health plans fail to consider laws enacted after the initial reporting regulations, including:
 - Health Insurance Portability and Accountability Act (HIPAA);
 - Title I of the Genetic Information and Nondiscrimination Act of 2008 (GINA);
 - Mental Health Parity Act and Mental Health Parity and Addiction Equity Act (MHPAEA);
 - The Newborns' and Mothers' Health Protection Act of 1996 (NMHPA);
 - The Women's Cancer Rights Act of 1998 (WHCRA);
 - Michelle's Law; and
 - The Affordable Care Act (ACA).

20

Goal #4. Require reporting by all group health plans covered by Title I of ERISA

The Form 5500 would be changed to include questions regarding:

- Group Health Benefit Design.
- Rebates.
- Service Providers. Information related to service providers not already listed on Schedule A or C, employer identification number, and National Insurance Producer Registry (if applicable).
- Stop Loss. Information related to the premium paid and individual and aggregate claim limits.
- Claims Payment Data. Information related to pre and post service benefit claims submitted, claims approved, claims denied, claims appealed, claims upheld at denials, claims payable after appeals, and claims not adjudicated within the required time frames.

21

Goal #4. Require reporting by all group health plans covered by Title I of ERISA

The Form 5500 would be changed to include questions regarding:

- Inability to Pay Claims. Information related to a plan's inability to pay claims at any time during the year; if fully insured, delinquent payments to an insurance carrier; and if a lapse of coverage occurred.
- Plan Assets. Information related to plan funding including trust, insurance company, or employer assets.
- Plan Documents. Information related to content requirements of plan documents, summary plan descriptions ("SPD"), summaries of material modifications ("SMM"), and summary of benefits and coverage ("SBC").

22

Goal #4. Require reporting by all group health plans covered by Title I of ERISA

The Schedule J would require the following information:

- COBRA. Including number of persons covered, eligibility (employees, spouses, children, retirees, etc.), and type of benefits (medical/surgical, pharmacy, prescription drug, mental health/substance use disorder, wellness program, preventive care, vision, dental, etc.).
- Funding & Benefit Arrangements. Information related to plan funding and benefit arrangements (insured, self-insured, trust, or general assets of employer), policy number, and employer and or participant contributions.

23

Goal #5: Improve compliance with data on plan operations and financial compliance

The proposed changes are intended to gather data considered essential in identifying compliance issues in plans of all sizes. In particular,

- The DOL states that the data is now geared to identify ERISA compliance issues where the primary objective of the current and former forms was to gather data important to participants and to identify tax qualification issues.
- EBSA recognizes that the proposed changes are to "report on compliance to improve plan operations, protect participants and beneficiaries and their benefits, and to educate and provide annual discipline for plan fiduciaries."

24

Goal #5: Improve compliance with data on plan operations and financial compliance

- Fiduciaries will be required to evaluate plan compliance under ERISA and the IRC as part of completing the Form 5500.
- The proposed changes include tools for the agencies to focus oversight and enforcement resources (EBSA's words).
- The Form will include questions regarding plan operations, service provider relationships, and financial management of plans.
- Addition of a schedule R (new Part VII) for reporting information on defined contribution plans specific to participation, enrollment, contribution, and matches.

25

Goal #5: Improve compliance with data on plan operations and financial compliance

- Fiduciaries will be required to evaluate plan compliance under ERISA and the IRC as part of completing the Form 5500.
- The proposed changes include tools for the agencies to focus oversight and enforcement resources (EBSA's words).
- The Form will include questions regarding plan operations, service provider relationships, and financial management of plans.
- Addition of a schedule R (new Part VII) for reporting information on defined contribution plans specific to participation, enrollment, contribution, and matches.
- More detailed information on investment alternatives and qualified default investment alternatives in participant-directed plans.

26

Schedules overhauled to achieve goals

Schedule A - Insurance:

- Questions for additional information on fees and commissions, premium payment delinquencies, and insurer identifying information (National Association of Insurance Commissioners assigned company code, Health Plan identifier "HPID").
- Revise instructions to clarify rules on counting covered lives under an insurance contract.
- New questions on variable annuities.

27

Schedules overhauled to achieve goals

Schedule A - Insurance:

- Questions for additional information on fees and commissions, premium payment delinquencies, and insurer identifying information (National Association of Insurance Commissioners assigned company code, Health Plan identifier "HPID").
- Revise instructions to clarify rules on counting covered lives under an insurance contract.
- New questions on variable annuities.

28

Schedules overhauled to achieve goals

Schedule A - Insurance:

- Questions for additional information on fees and commissions, premium payment delinquencies, and insurer identifying information (National Association of Insurance Commissioners assigned company code, Health Plan identifier "HPID").
- Revise instructions to clarify rules on counting covered lives under an insurance contract.
- New questions on variable annuities.

Schedule E - ESOPs: Proposal to reinstate Schedule E and include questions from the pre-1999 schedule.

29

Schedules overhauled to achieve goals

Actuarial Information (Schedules MB and SB).

- Expand data elements for multi-employer and single employer defined benefit plans.
- Report data in computer-ready format.
- Require "more refined" projections of the plan's financial position.
- Require "more refined" projections of future coverage and benefit adequacy for plan participants and beneficiaries.
- Identify plans with compliance issues.

30

IRS-only questions for 2016

According to the IRS, there were specific areas where it has found substantial noncompliance. The 2015 Form 5500 included several new compliance questions that will be used solely by the IRS:

- Information about the plan's trust,
- Provide information about in-service distributions made during the plan year
- Report any unrelated business taxable income (UBTI) received by the plan.
- Additional information about if and how a plan satisfied certain non-discrimination testing requirements under the Internal Revenue Code,
- Whether the plan was timely amended for all required law changes and if the plan is covered by a favorable determination letter.
- The IRS made this information reportable beginning with their 2016 plan year filings.

The IRS also proposed adding more compliance and oversight questions to Form 5500 for plan years after 2016. The questions would address, among other things, whether:

- Defined benefit plans have complied with the minimum participation requirements under the Internal Revenue Code.
- Required minimum distributions were properly made to 5 percent owners.
- Hardship distributions were made during the plan year.

31

Conclusion

- The IRS and DOL are holding ERISA plan fiduciaries accountable for the compliant plan administration and prudent plan operation.
- The enforcement agencies are seeking data in useful formats to better identify weakness in plan operation and investment policy.
- The proposed changes to the Form 5500 are intended to move employers toward active participation in their plans' operation and governance.
- Plan sponsors and fiduciaries have two years to develop and implement policies and procedures consistent with the requirements under ERISA or self-disclose its failure to do so.

32

Conclusion

QUESTIONS?

Tod Yeslow
479-464-5667
tyeslow@mvlaw.com

33
