

Session 6: The Hot Topic in Employee Benefits for 2016

Tod Yeslow

I. Summary

- a. There was a time, before the affordable care act, when the biggest design and compliance concerns for plan administrators and tax and legal professionals practicing in employee benefits arose from the quagmire of tax and ERISA regulations applying to retirement plans. Then, health and welfare plans were the darlings of the benefits world as they would operate almost on a turn-key basis. No longer is this the case.
- b. The affordable care act has beefed-up the compliance requirements for welfare plans. Now both retirement plans and health and welfare plans are subject to strict requirements. With diminishing enforcement resources at the IRS and DOL they are expanded self-reporting obligations on employers and plan administrators.
- c. This outline discusses the agencies' efforts to modernize the Form 5500. The bulk of the proposed changes require new plan data to reveal a plan's degree of compliance. Eventually, these annual reports will be the primary tool used by the DOL to identify plans for compliance audits and how to target the audit for effective results.

II. Form 5500 Modernization Initiative.

- a. The Department of Labor is proposing a significant revision to the Form 5500 and the associated schedules. The three primary purposes stated by the DOL for the overhaul is to better obtain, and obtain better, data to: (i) Comply with the IRS and DOL requirements for ERISA plans to report data important to plan participants; (ii) be "an essential compliance and research tool for the DOL, IRS and PBGC"; and (iii) be a more useful resource for Congress, federal agencies, and the private sector to assess employee benefit, tax, and economic trends.

- b. Methodology for developing the proposed changes to the form:
 - i. The IRS, EBSA, and PBGC collaborated on the multi-year project to modernize the form.
 - ii. Input was obtained from the following:
 - A. The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. Often called the "congressional watchdog," GAO investigates how the federal government spends taxpayer dollars. The head of GAO, the Comptroller General of the United States, is appointed to a 15-year term by the President from a slate of candidates Congress proposes.
 - B. DOL-Office of Inspector General conducts audits to review the effectiveness, efficiency, economy, and integrity of all DOL programs and operations, including those performed by its contractors and grantees. This work is conducted in order to determine whether: the programs and operations are in compliance with the applicable laws and regulations; DOL resources are efficiently and economically being utilized; and DOL programs achieve their intended results.
- c. The OIG also conducts criminal, civil, and administrative investigations relating to violations of Federal laws, rules or regulations, including those performed by DOL contractors and grantees; as well as investigations of allegations of misconduct on the part of DOL employees. In addition, the OIG has an "external" program function to conduct criminal investigations to combat the influence of labor racketeering and organized crime in the nation's labor unions. The OIG conducts labor racketeering investigations in three areas: employee benefit plans, labor-management relations, and internal union affairs.
- d. Employee benefits racketeering investigations historically involved labor officials or employees with the Hotel and Restaurant Employees Union, the Teamsters Union, the United Food and Commercial Workers and others.

e. The DOL sees a new generation of racketeers which includes bankers, attorneys, accountants and administrators of employee benefit plans who, in many cases, deal with members of organized crime. For example, a labor conspiracy which sought to establish a nationwide criminal monopoly in the delivery of services to employee benefit plans--insurance, health care, vision care, legal services and various types of rehabilitative counseling.

i. The Treasury Inspector General for Tax Administration (TIGTA) established in January 1999 under the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) to provide independent oversight of Internal Revenue Service (IRS) activities. As mandated by RRA 98, TIGTA assumed most of the responsibilities of the IRS' former Inspection Service.

TIGTA is primarily staffed with auditors and investigators who focus on the Inspector General's handling of its duties and responsibilities pertaining specifically to the IRS. TIGTA is within the Department of the Treasury, but is independent of the Department and all other Treasury offices, including the Treasury Office of the Inspector General (OIG). TIGTA's focus is devoted entirely to tax administration, while Treasury OIG is responsible for overseeing the other Treasury bureaus.

ii. The Advisory Council on Employee Welfare and Pension Benefit Plans (e.g. the ERISA Advisory Council) was authorized by ERISA and established in 1974. The ERISA Advisory Council advises the Secretary of Labor on carrying out his responsibilities under ERISA. It consists of fifteen (15) members appointed by the Secretary including: 3 representatives of employee organizations, 3 representatives of employers, 3 representatives from the general public, and 1 representative each from the fields of: Insurance, Corporate trust, Actuarial counseling, Investment counseling, Investment management, and Accounting. Members are appointed for three-year terms with five terms expiring every December 31 and the Council is subject to the Federal Advisory Committee Act.

- iii. Stakeholders selected by those listed above.
- f. Process for revisions Form 5500.
 - i. The Form 5500 was first filed in 1975 for plan year 1974 and the first significant change to the form wasn't until plan year 1999. The second significant change to the forms was for effective beginning for plan years 2009. With changes under the Pension Protection Act, new EFAST-2 vendor selection and transition, changes to the reporting of service provider compensation, the Dodd-Frank Act, the ACA, investment advisor fees under the Fiduciary Duty rule, and the agencies' desire for greater transparency to participants and the agencies, the DOL is seeking its third significant change to the form effective for plan years beginning in 2019.
- g. Publishing the proposed changes.
 - i. In Federal Register Vol. 81. No. 140, Thursday, July 21, 2016, the DOL published the proposed rules for the revised Form 5500 and schedules. The public comment period closed October 4, 2016. The Federal Register includes an explanation of changes, a discussion of the advantages and the costs, a line-by-line list of all data elements for Forms 5500 and 5500-SF, schedules, and required attachments. For the proposed changes to the Form and schedules see:

https://www.regulations.gov/document?D=IRS_FRDOC_0001-1479 .
- h. New EFAST2 Contract
 - i. EFAST-2 is the electronic filing system all forms are submitted on. The system is shared among the DOL, IRS, and PBGC 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-worth plans.

- ii. Federal contract procurement requirements. 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. Note to plan fiduciaries: The government set the example of prudent administration and requires that plan vendors be re-bid on a periodic basis and more frequently if the vendor demonstrates incompetence or raises fees. Failure to do so is prima facie imprudence.
 - iii. EFAST-2 processing under the new contract is scheduled for 2019 plan year filings beginning January 2020.
- i. Five major goals of the modernization initiative.
- i. Goal #1: Modernize the financial statements and investment information on employee benefit plans. These changes are intended to improve transparency and reliability of financial reporting, especially regarding alternative investments, hard-to-value assets, investments through collective investment vehicles and DFEs. This will result in changes to the information reported on Schedules H and I which have remained largely unchanged since 1975. There will be more data required on investments, investment behavior, and investment classes.
 - A. Proposed changes to Schedule H include more accurate and detailed reporting on general classes of investment. For instance, reporting of a REIT investment could currently be reported as “real estate” or “other.”
 - B. Schedule H line 4.i (Schedules of assets) will require more detailed information on individual investments. 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. Participant loan data will be reported on a new Schedule G.

- C. Master trust reporting changes. 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.
 - D. More complete information on plan terminations, mergers, and consolidations. Transfers from plans will be scheduled and information on frozen and orphaned plans will be reported.
 - E. 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”).
 - F. As proposed, the filer must report on Schedule the 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 including whether the IQPA had a peer review performed in accordance with state requirements.
 - G. Eliminate Schedule I. 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.
 - H. Additional questions designed to assess plan qualification (IRS) and fiduciary prudence (ERISA).
- ii. Goal #2: Enhance accessibility and usability of data provided by plans. As proposed, the new reporting requirements would 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.

- A. Defined contribution plans would be required to attach a chart comparing participant-level fees as required under ERISA section 404(a)(5) to the Form 5500-SF Schedule H.
- B. Clarify instructions to obtain more detailed information on individual trustee and plan employee expenses.

iii. Goal #3: Improve information on service providers and fees. Revise Schedule C to report data necessary to demonstrate compliance with the final service provider fee disclosure (See: 29 CFR 2550.408(b)-2. The enforcement agencies describe this data as a “powerful tool for improved evaluation of investment, recordkeeping, and administrative fees and services arrangements.”

- A. Require reporting of indirect compensation for service providers and types of compensation described in ERISA section 408(b)-2 regulations.
- B. 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.”
- C. 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,

- including those eligible but not contributing, the proposed changes would look at those with account balances only, seemingly requiring fewer plan audits.
- D. Large retirement plans must rely on ERISA section 408(b)-2 for Form 5500 definitions.
 - E. Defined contribution plans would be required to attach an ERISA 404(a) comparison chart to Schedule H and Form 5500-SF
- iv. Goal #4. Require reporting by all group health plans covered by Title I of ERISA. The proposed regulations eliminate the exemption from Form 5500 reporting for small plans. All health plans must file a Form 5500 and provide a schedule J – Group Health Plan Information.
- A. 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 Party 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).
 - B. The Form 5500 would be changed to include questions regarding:
 - Group Health Benefit Design. Information related to the grandfathered status and type of benefit offered (high deductible health plan, health flexible spending account (Health FSA), health reimbursement arrangement (HRA)).

- Rebates. Information related to the plan's receipt of rebates, refunds, reimbursements, or offsets (e.g. Medical Loss Ratio Rebates), including the amount received and distribution method to participants (check, premium holiday, payment of benefits, or other).
- Service Providers. Information related to service providers not already listed on Schedule A or C, including the name, address, contact information, 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.
- 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").

- C. The Schedule J would require the following information:
- COBRA. Information related to the COBRA coverage, 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.
- v. Goal #5: Improve compliance through new questions on plan operations and financial compliance. The proposed changes are intended to gather data to more easily assist in identifying compliance issues in plans of all sizes. In particular, 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. As EBSA has published, the proposed changes are designed 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.”
- A. Fiduciaries will be required to evaluate plan compliance under ERISA and the IRC as part of completing the Form 5500.
 - B. The proposed changes include tools for the agencies to focus oversight and enforcement resources (EBSA’s words).
 - C. As proposed, the Form will include questions regarding plan operations, service provider relationships, and financial management of plans.

- D. Addition of a schedule R (new Part VII) for reporting information on defined contribution plans specific to participation, enrollment, contribution, and matches.
 - E. More detailed information on investment alternatives and qualified default investment alternatives in participant-directed plans.
- j. Changes to Schedules
- i. Insurance (Schedule A):
 - A. New 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”).
 - B. Revise instructions to clarify rules on counting covered lives under an insurance contract.
 - C. New questions on variable annuities.
 - ii. ESOPs (Schedule E): Proposal to reinstate Schedule E and include questions from the pre-1999 schedule.
 - iii. Actuarial Information (Schedules MB and SB).
 - A. Expand data elements for multi-employer and single employer defined benefit plans.
 - B. Report data in computer-ready format.
 - C. Require “more refined” projections of the plan’s financial position.
 - D. Require “more refined” projections of future coverage and benefit adequacy for plan participants and beneficiaries.
 - E. Identify plans with compliance issues.

III. Conclusion

- a. It is clear from the proposed changes to the Form 5500 that the IRS and DOL are holding ERISA plans 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 changes to the Form 5500 are intended to move employers toward active participation in their plans' operation and governance. This means that employers have two years to develop and implement policies and procedures consistent with the requirements under ERISA or self-disclose its failure to do so.