# IRS Creates Permanent Form 5500 Penalty Relief Program for Non-ERISA Plans


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# IRS Creates Permanent Form 5500 Penalty Relief Program for Non-ERISA Plans

Back in July of 2014, we alerted you to the establishment of a new but only temporary "pilot" program by the Internal Revenue Service ("IRS") which provided penalty relief to plan sponsors and plan administrators of certain retirement plans. The relief applied to the late-filing of Form 5500-EZ, Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan ("Form 5500-EZ"), or, in limited circumstances, Form 5500, Annual Return / Report of Employee Benefit Plan ("Form 5500"), with regard to plans which are not subject to Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). As a result of the rules of the program, the relief offered under the program was generally limited to plans sponsored by certain small businesses (owner-only or business partnerships) or certain foreign plans.

The temporary penalty relief program expired on June 2, 2015. However, the IRS recognized the utility and benefits of this program and, as a result, decided to make the program permanent. The following discusses the new and now permanent program in greater detail.

**Background**

Both the Internal Revenue Code of 1986, as amended ("Code"), and ERISA impose annual federal reporting requirements with regard to certain retirement plans. The various reporting requirements are consolidated within the Form 5500 Series Annual Return / Report. Although the IRS and Department of Labor ("DOL") have concurrent enforcement over the filing of Form 5500, the remainder of this article generally discusses only IRS / Code implications due to the fact that the penalty relief program, which is the focus of this article, relates exclusively to plans which are not subject to ERISA

Plan sponsors and plan administrators who fail to timely submit a Form 5500 may be subject to civil penalties under the Code. In general, the late-filing penalties set forth under the Code impose a penalty of $25 for each day the failure continues, up to $15,000 per late-filed return. Notwithstanding,



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no penalties are imposed under these provisions of the Code if the plan sponsor or plan administrator can demonstrate that such failure is due to "reasonable cause".

Attempting to argue reasonable cause can be an effective way of eliminating IRS assessed Form 5500 late-filing penalties. However, as any such abatement is the result of a somewhat subjective review of the individual facts and circumstances of the specific situation by the IRS, this method of attempting to eliminate late-filing penalties includes an undesirable element of uncertainty. Will the IRS accept the factual circumstances that are relayed as persuasive enough to establish reasonable cause? There is no way to be certain until the IRS reviews such arguments and decides to either accept or reject them.

In addition to the establishment of reasonable cause, the DOL established a program in 1995 known as the Delinquent Filer Voluntary Compliance Program ("DFVC") which is available to reliably and conclusively preclude penalty assessments associated with the late-filing of Form 5500. In exchange for the payment of a nominal fee, voluntary submissions to DFVC generally absolve its users of any late-filed Form 5500 penalties assessable by either the IRS or the DOL. The certainty associated with the elimination of late-filed Form 5500 penalties under DFVC generally makes it a preferable method of addressing these issues as compared to attempting to establish reasonable cause. However, DFVC only accepts submissions in relation to ERISA plans.

As a result of DFVC only being available to plans covered by ERISA, non-ERISA plans (such as the owner-only and foreign plans mentioned above) are not eligible to employ DFVC. As non-ERISA plans are not subject to ERISA penalty assessments, this limitation is irrelevant for purposes of such plans' need to avoid ERISA late-filed Form 5500 penalty assessments. However, the lack of availability of DFVC to non-ERISA plans also prevents plan sponsors of such plans from conclusively eliminating IRS Form 5500 late-filing penalties. Therefore, non-ERISA plans only path to attempt to abate late-fling penalties assessable by the IRS is through the establishment of reasonable cause.

As explained above, although reasonable cause arguments can be effective at eliminating IRS late-filed Form 5500 penalties, it is a less desirable method of addressing these concerns due to the subjectivity associated with the establishment of reasonable cause. Therefore, a reliable and



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conclusive method of eliminating such penalties with respect to non-ERISA plans remained unavailable before the establishment of the pilot program. However, with the June 2, 2015 expiration of the penalty relief program, it was thought that non-ERISA plans might be forced to return to the days where the establishment of reasonable cause was the only way to abate late-filing penalties. Fortunately, with the decision of the IRS to make the pilot program permanent, plan sponsors of non-ERISA plans now have an on-going, reliable and objective method for eliminating IRS late-filed Form 5500 penalties.

**New Guidance**

Under IRS Revenue Procedure 2015-32 ("Rev. Proc. 15-32"), effective June 3, 2015, the IRS made permanent the former pilot program and, in this manner, provided plan sponsors and plan administrators of certain non-ERISA plans with a permanent way to obtain relief from the IRS Form 5500 late-filing penalties discussed above. Many of the rules established under the initial pilot program remain the same under the permanent penalty relief program. However, several new rules also were implemented under the new program; most notably the assessment of a fee to employ the program.

As under the old pilot program, relief under the new program is granted on a "per plan" basis and is conditioned upon the preparation and submission of the outstanding Form(s) 5500-EZ (or in limited circumstances for plan years prior to 2009, Form 5500 in connection with non-ERISA plans that were required to file a Form 5500 as opposed to a Form 5500-EZ) including all required schedules before the assessment of any penalties by the IRS in connection with the delinquent return. In addition, similar to the pilot program, each delinquent form must be marked in red letters at the top of its first page with the words "Delinquent Return Submitted under Rev. Proc. 2015-32, Eligible for Penalty Relief." Failure to properly mark the submitted delinquent return may cause the IRS to treat the return as ineligible for the relief provided under the new guidance and could result in the assessment of all potentially applicable penalties.

New to the permanent program is the creation of an IRS form to replace the informal "transmittal schedule" that was previously required to accompany any submission made under the



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terms of the program. In this regard, IRS Form 14704, Transmittal Schedule – Form 5500-EZ Delinquent Filer Penalty Relief Program (Revenue Procedure 2015-32) ("Form 14704"), was created and must be included with each submission to the penalty relief program. The rather simple, one-page Form 14704 must be completed and, in the event of multiple late forms being included with a single submission, attached to the oldest delinquent return included with such submission.

As mentioned above, also new to the program is the assessment of a fee in order to obtain the relief available under Rev. Proc. 15-32. The amount of the fee is $500 per delinquent return up to a maximum of $1,500 per submission (that is, the payment is equal to $500 for a single return, $1,000 for two returns for the same plan, and $1,500 for three or more returns for the same plan). Any submission to the program is made on a "per plan" basis. Therefore, if a sponsor had more than one plan with delinquent filing issues, each plan would need to be submitted to the program separately and each plan could separately be subject to the maximum fee per submission.

As much as we hope this article helped you to better understand this topic, it is not to be construed as financial, tax or legal advice. Therefore, if you believe that it may apply to your (or your client's) company, be sure to further discuss it with a qualified accountant or tax professional. For more information about this topic, please contact our marketing department at 484-483-1044 or your administrator at Legacy.



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