

February 23, 2015

Attention: Christie Preston
Internal Revenue Service
Room 6129
1111 Constitution Avenue, NW
Washington DC 20224

**Re: Comment Request for the Annual Return/Report
Of Employee Benefit Plan (Including Form 5500-SUP)**

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates the opportunity to comment regarding the notice of proposed expanded data collection and revisions to the Form 5500 series, which includes the introduction of the Form 5500-SUP.

ASPPA's comments will take into account the following three documents:

- Federal Register Notice and Request for Comments dated December 23, 2014 ("Notice")
- Draft Form 5500-SUP ("SUP")
- Draft Instructions for Form 5500-SUP ("Instructions")

ASPPA is a national organization of retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines including consultants, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA is now part of the American Retirement Association whose total membership of more than 17,000 retirement plan professionals is diverse but united by a common dedication to the employer-based retirement plan system.

Summary

The following is a summary of ASPPA's recommendations, which are described in greater detail in the **Discussion** section which follows.

- I. **ASPPA recommends** that the IRS delay by at least one year the implementation of the proposed changes and additional data collection for all plans to allow the time needed by service providers to accommodate the extensive data collection, programming, and other systems changes that will be required. This is absolutely necessary to minimize the burdens of collection and will enhance the quality, utility and clarity of the information that will be collected.
- II. **ASPPA recommends** that the IRS modify the collection of preparer information to limit the public disclosure of the preparer's name by the use of functions already

present in the EFAST2 system and to follow the model of other returns (e.g. Form 1120, Form 945, etc.) which require authorization for the IRS to directly contact the preparer to discuss the return and information contained therein.

III. **ASPPA recommends** that the IRS expand the Plan Characteristic Code section of the existing Form 5500 series to collect SUP items which are a function of the plan document (i.e., Part III, line 4 of the SUP and its Instructions) or that are similar to items already collected in that section ((i.e., Part III, line 8 of the SUP / line 7 of the Instructions).

IV. **ASPPA recommends** that the IRS modify the financial sections of the existing Form 5500 series to collect the distribution information described at Part III, line 11 of the SUP / line 9 of the Instructions).

V. **ASPPA recommends** that the IRS use check boxes at Part III, line 5 of the SUP to collect more specific data regarding the plan's coverage testing.

VI. **ASPPA recommends** that the IRS simplify the line 6 inquiries relating to plan documents to ensure that filers prepare fact specific information in a uniform manner.

VII. **ASPPA recommends** that the IRS provide more specific information regarding which filers are required to provide the SUP information electronically and the application of certain penalties and late filing remedies.

Discussion

I. Effective Date

The data necessary to support the responses to the items on the SUP include information that service providers are not immediately poised to provide. The quality and accuracy of the data collected will be greatly enhanced if preparers / plan administrators are given sufficient time to create procedures, communication protocols, and systems capable of coordinating the responses required by the SUP. As a practical matter, service providers generally do not gear up for systems changes based on draft or proposed changes; instead, these businesses must wait until final forms are issued. It then generally takes 6-12 months for the necessary capital investments to be approved and technology, communication, and procedure changes to be developed and implemented.

Recordkeeping systems are the primary source for most data required for preparation of the current Form 5500 series. The information that must be collected to respond to the new SUP questions, however, is not currently resident in most recordkeeping databases. This information is presently captured in separately maintained systems that may be maintained by a different service provider or may not be tracked at all. Coordination or integration of these systems, information from other providers, and development of a mechanism to gather data that is not being tracked, will be required in order to accurately provide the information requested by the new questions on the SUP. Some of the larger service providers have responsibility for more than 10,000 plans and the costs to reprogram systems will run into millions of dollars.

Consider the data required for lines 4, 5, and 6 of the SUP. Many plans are currently in the process of document restatements that will impact the reporting on line 6. The date a plan executes an amendment or restatement is not typically captured in a recordkeeping

system but is resident with plan's attorney or other document provider. It will therefore require special effort to review documents and amendments that have been adopted in the last year and to ensure this information is properly maintained for easy retrieval on a prospective basis. Similarly, lines 4 and 5 require disclosure of nondiscrimination testing methodologies, which may involve multiple service providers or which may be resolved beyond the due date of the Form 5500 series filing.

Given the enormity of the data collection required for the SUP, and the systems changes that are inevitably linked to the capture of such data for reporting purposes, service providers need adequate time to put in place sufficient mechanisms to respond to this initiative. In addition, a later effective date also will provide additional time for the IRS to evaluate public comments on the proposal and to make refinements and enhancements to both the form and its instructions.

ASPPA recommends that the financial burdens of the proposal be reduced by delaying by at least one year the implementation of the proposed changes to allow time needed by plan sponsors, plan administrators and their service providers to accommodate the extensive data collection, programming, and other system modifications that will be necessary.

II. Preparer Line

The Notice indicates, in part, that "*EP Exam needs at least basic information of preparers, so that Exam can contact preparers for issues relating to Form 5500s and plan qualifications.*" Further, the SUP and its Instructions include a requirement to disclose the "*Preparer's name (including firm name, if applicable) and address, including room or suite number along with the Preparer's phone number.*" The Instructions also reiterate that "*Form 5500 and its attachments are open to public inspection and the contents are public information and are subject to publication on the Internet.*"

Taken together, the proposal creates business and liability concerns that the IRS may not have considered in its development of the SUP and related guidance. For example, other IRS forms that require disclosure of the [paid] preparer (a) do not cause that information to be published on the Internet, and (b) generally include a separate *Third-Party Designee* line or a check-box item in which the filer authorizes the IRS to discuss the return with the preparer.

The guidance implicitly assumes the preparer has been authorized by the filer to respond to inquiries about "plan qualifications." As a practical matter, many preparers rely on the work of others engaged by the plan sponsor or administrator. The preparer of the Form 5500, in many cases, merely compiles information from these other sources (e.g., participant count from the recordkeeper; Schedule A information from insurers; Schedule C information from service providers; financial information from trust companies; actuarial schedules from the enrolled actuary, etc.). The preparer performs a "due diligence" review and evaluates the information for reasonableness. In the absence of any

indication of incompleteness, incorrectness or inconsistency, the preparer is able to rely in good faith on the information provided by other service providers. The plan sponsor or plan administrator often uses providers, other than the return preparer, to ensure the plan is compliant with the exceedingly complex rules relating to plan qualification. In circumstances such as these, contacting the return preparer for information on qualification issues is simply a waste of time for both the IRS and the return preparer.

Apart from whether the return preparer has been authorized by the filer as the person or entity to provide information on qualification, the public identification of a specifically named preparer is virtually unprecedented. As the Instructions emphasize, the Form 5500 is public information readily available on the Internet and as a result, could lead to the following situations:

- The return preparer being inappropriately targeted in lawsuits as a responsible plan official or fiduciary which is rarely the case.
- Inappropriate contact by individual plan participants (or their representatives) regarding entitlement to plan benefits, claims, etc. The preparer is rarely a plan fiduciary and in many cases is not an authorized representative for benefit claim matters.
- The use of the information to identify the entire client list of a return preparer/service provider by simply searching the public disclosure database. ASPPA is aware of no other circumstances in which the Federal government is responsible for the dissemination of what might be considered proprietary information.

In addition, a large number of Form 5500 filings are generated by fully automated systems, with limited or no human intervention in the creation of the report. The report is forwarded to the plan administrator, usually with a list of open items which the plan administrator must complete on the report before it may be submitted to EFAST2. The plan administrator itself manages the filing with EFAST2. In this instance, it is unclear who, if anyone, would be identified on the preparer line.

The concerns outlined herein could be addressed and the quality of information collected improved if modifications were made to the proposal. Rather than assuming the preparer is the party best situated to provide information on plan qualification, a better approach to follow is that taken in tax returns such as Form 945 or Form 1120. For example, Form 945, in Part 4, specifically asks, "Do you want to allow an employee, a paid tax preparer, or another person to discuss this return with the IRS." Similarly, adjacent to the signature line on Form 1120 is a check box that is used to authorize the IRS "... to discuss this return with the preparer shown below". By following this approach, particularly that used by Form 945, it would ensure that the preparer is the proper party and authorized to provide information about the return. If not, the preparer would still be identified while allowing the plan administrator/plan sponsor to authorize a different party for the purpose of providing information about the return. In addition, like Form 945 and Form 1120, the authorization should expire 1 year from the due date (without regard to extensions) for filing the Form.

In addition, the current proposal could be modified to take advantage of the current features of the EFAST2 system to capture preparer information without making this information publicly available. The current EFAST2 registration system includes a User Type of *Filing Author*. [Paid] Preparers could be required to obtain EFAST2 credentials as a *Filing Author* and to insert them (not in the form of a signing ceremony, but in a manner similar to the insertion of the *RefAckId* in an amended filing) in the EFAST2 filing. The individual's name would not appear on the report.

This approach may not work for those filers who submit the paper SUP; however, the ability to mask the preparer information through EFAST2 will likely encourage filers to forgo the paper filing in favor of including the data in the EFAST2 submission.

With regard to the Public Disclosure Website, any indication that the filing is associated with a registered *Filing Author* should be presented in the same fashion as is used to indicate the signer's credentials are valid, such as:

Filed with valid filing author credentials disclosed.

It should be noted that IRS Notice 2008-13 designates the Form 5500 as a “second tier” information return rather than an actual tax return. This distinction is ignored in the proposed Instructions. As such, it is unclear whether the preparer of the Form 5500 is even a tax return preparer under IRC § 7701 (which is cited in the Federal Register promulgation as the authority for making this question mandatory). Although prior comment letters by ASPPA have asked for guidance on what information collected on Form 5500 is information that is or may be reported on another taxpayer's tax return, no such guidance has ever been provided. Nevertheless, ASPPA has been supportive of providing preparer information. Collection of this data, however, should not result in public dissemination of propriety information or otherwise impair normal business practices by making public the client list of an established service provider, nor should it expose the preparer to undue liability.

ASPPA recommends that the IRS follow the model provided by Form 945 (and to a lesser extent Form 1120) which permits the filer (i.e., plan sponsor and/or plan administrator) to specifically authorize whether the preparer or some other designee should be contacted by the IRS for information about the return; and

ASPPA further recommends that the public disclosure of the preparer's name be limited by following the protocols already presently in use for “filing authors” in the EFAST2 system.

III. Use of Plan Characteristic Codes

On line 8 of the current Form 5500 (line 9 of Form 5500-SF), filers are required to enter Plan Characteristic Codes (“Codes”) that describe plan features and benefits. It is generally understood that such codes reflect features spelled out in the plan document, whether or not those features were actively engaged during the year. For example, a plan

containing a profit sharing feature inserts code 2E, even in reporting years for which there was no profit sharing contribution made to the plan or allocated to participants.

Line 4 (SUP). The information requested at line 4 of the SUP represent features that must be plainly stated in the plan document and, therefore, would logically be collected in the same manner as other plan document features. Currently, the information requested at line 4a of the SUP is collected when any plan containing a 401(k) feature reports code 2J on line 8 / 9. The other data requested at line 4 of the SUP could be coded as follows:

- 2U = 401(k)(3) safe harbor
- 2V = 401(m)(2) safe harbor
- 2W = ADP current year testing

Line 8 (SUP). Similarly, Plan Characteristic Code 3J provides information about US-based plans covering residents of Puerto Rico. On its face, it appears that collecting information about whether the plan is maintained in a U.S. territory could be easily accomplished by creating another code. In addition, it would be helpful for the IRS to clarify whether it is intending to collect information (a) about plans that, in part, cover residents of a U.S. territory, or (b) whether the IRS wants to identify plans which exclusively cover residents of a U.S. territory.

ASPPA recommends that the IRS expand the Plan Characteristic Code section of the existing Form 5500 series to collect SUP items which are a function of the plan document (i.e., Part III, line 4 of the SUP and its Instructions) or that are similar to items already collected in that section ((i.e., Part III, line 8 of the SUP / line 7 of the Instructions).

IV. Modify Existing Financial Data Formats

The Form 5500 series reports currently require financial statement details, including the amount of distributions paid during the reporting year. [See line 2e (Schedules H / I) and line 2d (Form 5500-SF).] However, certain payments on account of corrective distributions and/or certain deemed distributions of participant loans are separately accounted for on those same schedules.

The proposed information collection at line 11 of the SUP (line 9 of the Instructions) should be accomplished by further bifurcation of the financial statement sections of the forms/schedules rather than collecting that data on the SUP. This approach allows for simpler reconciliation of the data reported on the Form 5500 series and for a uniform format, regardless of which Form 5500 series is filed.

ASPPA recommends that the IRS modify the financial sections of the existing Form 5500 series to collect the distribution information described at Part III, line 11 of the SUP (line 9 of the Instructions).

V. Revise Coverage Testing Disclosure

Coverage testing questions appeared on the Form 5500 series in several different formats prior to the implementation of EFAST2 for plan years beginning in 2009. For plan years beginning before 2005, quite specific detail was required to be presented on Schedule T. Beginning with the 2005 plan year and running through the 2008 plan year, an overly simplified coverage question was inserted at line 9 of Schedule R, similar to line 5 of the SUP. The simplified format relied entirely on the preparer following the instructions to properly complete the item. For example, certain plans did not need to complete the line if the plan, by design, satisfied IRC §410(b).

While the format utilized before 2005 was detailed, it was likely that the IRS was collecting compliance information that allowed for more effective analysis by the Agency because filers were more fully disclosing plan features and information. The subsequent simplified format was of very limited use in evaluating the complexity associated with a plan's coverage testing.

A more useful format would be to employ check boxes, along with clear instructions, that would allow for more specific and uniform disclosure of coverage testing methods. For example, by crafting line 5 as shown below, filers could clearly identify coverage testing methods used by the plan for the reporting year:

Exceptions - check the box for each statement that describes the plan or the employer, then skip to line 6.

- | | |
|--------------------------|--|
| <input type="checkbox"/> | The employer employs only HCEs. |
| <input type="checkbox"/> | No HCEs benefited under the plan at any time during the plan year. |
| <input type="checkbox"/> | The plan benefits only collectively-bargained employees. |
| <input type="checkbox"/> | The plan benefits all nonexcludable NHCEs, including leased employees and self-employed individuals. |
| <input type="checkbox"/> | The plan is treated as satisfying the minimum coverage requirements of IRC Section 410(b)(6)(C). |
| <input type="checkbox"/> | The plan uses the three-year testing cycle rule in Revenue Procedure 93-42. |

If no Exception above applies, check all that apply below:

- | | |
|--------------------------|---|
| <input type="checkbox"/> | The plan was permissively aggregated with another plan of the employer for coverage testing purposes. |
| <input type="checkbox"/> | The plan was required to be disaggregated for coverage testing purposes. |
| <input type="checkbox"/> | The plan was permissively disaggregated for coverage testing purposes. |

Coverage testing satisfied using:

Ratio Percentage Test

- | | |
|--------------------------|---------------------|
| <input type="checkbox"/> | 401(k) feature |
| <input type="checkbox"/> | 401(m) feature |
| <input type="checkbox"/> | Nonelective feature |
| <input type="checkbox"/> | ESOP feature |
| <input type="checkbox"/> | Excludable |
| <input type="checkbox"/> | Non-excludable |

Average Benefits Test

- | | |
|--------------------------|---------------------|
| <input type="checkbox"/> | 401(k) feature |
| <input type="checkbox"/> | 401(m) feature |
| <input type="checkbox"/> | Nonelective feature |
| <input type="checkbox"/> | ESOP feature |
| <input type="checkbox"/> | Excludable |
| <input type="checkbox"/> | Non-excludable |

ASPPA recommends that the IRS use check boxes at Part III, line 5 of the SUP to collect more specific data regarding the plan's coverage testing.

VI. Simplify Plan Document Questions

The Notice indicates the IRS has two reasons for requesting information about the formal document that governs plan provisions and operation, both of which relate to improving the ability of the IRS to tailor other potential correspondence to the plan sponsor / plan administrator. However, lines 6a-6d, as presented in the draft format, will result in confusing and inaccurate responses which will not assist in a meaningful way the deployment and allocation of IRS compliance resources.

Form 5500 series data collection is most meaningful when it is fact-specific and does not rely on the interpretation of the reader. For example, it is simple to indicate the date of the most recent amendment to the plan; however, isolating the reason for the amendment requires expertise and, in some instances, a professional opinion.

Line 6a asks whether the plan has timely adopted the amendments required for all tax law changes, while line 6b requires the date of the last plan amendment/restatement for the required tax law changes (with specific codes for the past three major tax laws). The examples that follow illustrate some of the difficulties that filers will encounter when attempting to provide accurate (and useful) information for these lines.

1. A plan did not timely adopt amendments (or required interim amendments) for EGTRRA; however, the plan subsequently followed procedures under EPCRS for non-amenders and brought the plan up to date. What would be the correct answer for line 6a?
2. A calendar year profit sharing plan that uses a volume submitter document has not been restated for PPA by December 31, 2015, although all interim amendments required by PPA have been adopted. What would be the correct answer for line 6b?
3. A calendar year 401(k) plan is amended and restated for PPA using a pre-approved document before December 31, 2014. Line 6b reflects this information for the 2015 reporting period. As a result of changing service providers in August 2016, however, the plan adopts a different pre-approved PPA document. What would be the correct answer for 6b?

Taken together with the data requested at lines 6c and 6d, a simpler data collection approach may yield data that is more useful for other compliance initiatives. Consider that Plan Characteristic Code 3E is inserted on line 8 of the current Form 5500 (line 9 of Form 5500-SF) to indicate that the sponsor utilizes a master, prototype, or volume submitter plan (i.e., a pre-approved pension plan) that is the subject of a favorable opinion or advisory letter from the IRS. Other Codes indicate whether the plan is a defined benefit plan, profit sharing, or money purchase type plan.

The IRS will collect the information necessary to accomplish the goals stated in the Notice if line 6 is modified as follows:

6a. Enter the date of the most recent plan amendment ____/____/____.

6b. If Code 3E is inserted on line 8 of Form 5500 / line 9 of Form 5500-SF, enter the serial number and date of the related IRS opinion or advisory letter.

_____ / ____/____.

6c. If the plan is individually designed and received its own favorable determination letter from the IRS, enter the date of the most recent IRS letter ____/____/____.

ASPPA recommends that the IRS simplify the line 6 inquiries relating to plan documents to ensure that filers prepare fact specific information in a uniform manner.

VII. Clarify Instructions with Regard to Purpose of Form, Who Must File, and Penalties

It would be more meaningful to filers if the IRS were to use clear language in developing Instructions rather than relying on references to sections of the Code, Regulations, or other published guidance (e.g., IRS Notices or Announcements, Revenue Procedures, etc.). For example, it would be helpful if the instructions directly state that filers required to provide SUP information (or its electronic equivalent) are only those filers (other than DFE filers) that report a three digit plan number at line 1b that is less than 500.

The IRS should also modify the instructions to clarify whether the requirement to file electronically is affected by whether the plan sponsor and the plan administrator are different entities. The *Who Must File* section of the draft Instructions allows for some ambiguity and potential misinterpretation, particularly in situations where the plan administrator is not the same entity / person as the plan sponsor.

Similarly, under *Penalties*, it appears the IRS may apply failure to file penalties to the entire Form 5500 series report when a paper Form 5500-SUP is not filed when required (and the information has not been filed electronically). In addition, there is no indication of how this filing should be made if the Form 5500 series is being submitted late utilizing the Department of Labor's Delinquent Filer Voluntary Compliance (DFVC) program, or whether *reasonable cause* for any late filing will be considered. ASPPA urges the IRS to incorporate these aspects into any final Instructions.

ASPPA recommends that the IRS provide more specific information regarding which filers are required to provide the SUP information electronically, the application of certain penalties, and define any late filing remedies.

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These comments were prepared by ASPPA's Reporting and Disclosure Subcommittee of the Government Affairs Committee, Kizzy Gaul, Chair. We welcome the opportunity to discuss these issues with the Service. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at (703) 516-9300 with respect to any questions regarding the matters discussed herein.

Thank you for your time and consideration.

Sincerely,

/s/

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/s/

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