



March 2013

PENSION ANALYST

Important information—Plan administration and operation



Prudential
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DOL updates Delinquent Filer Voluntary Compliance (DFVC) Program

Who's affected

The Delinquent Filer Voluntary Compliance (DFVC) program is available to qualified defined benefit and defined contribution plans (including 403(b) plans) that are subject to Title I of ERISA.

The DFVC program is not available to plans that are not subject to ERISA, such as governmental plans, church plans that do not elect to be covered by ERISA ("nonelecting church plans"), non-ERISA 403(b) plans, and section 457(b) plans.

Background and summary

In 1995, the DOL created the Delinquent Filer Voluntary Compliance program to encourage plan sponsors to comply with the Form 5500 filing requirements by offering reduced penalties on voluntarily submitted late filings for plan years beginning on or after January 1, 1988. In 2002, the DFVC program was updated to reflect changes to the Form 5500 filing process and to reduce penalties.

Recently, the DOL updated the DFVC program to reflect revisions made to the program since 2002. These revisions include the:

- DOL's final rule regarding the electronic filing of annual reports under the ERISA Filing Acceptance System (EFAST2); and
- Existence of an online penalty calculator and Internet-based payment system for the DFVC Program.

The updated DFVC program is effective January 29, 2013.

Action and next steps

Plan sponsors that discover they have not filed one or more Form 5500s by the filing deadline should discuss the DFVC program with the plan's legal counsel. Prudential Retirement offers a 5500 Preparation Service. For more information about this service, please contact your Prudential representative.

In this issue

[Eligibility](#)

[DFVC submissions](#)

[Electronic filing requirement](#)

[Plan year forms](#)

[Late filings for plan years beginning before January 1, 2009](#)

[Late filings for plan years beginning on or after January 1, 2009](#)

[Form 8955-SSA or Form SSA](#)

[Penalty payments](#)

[Electronic payment](#)

[Payment by check](#)

[Penalty structure](#)

[PBGC and IRS relief](#)

[Guidelines for Top-Hat plans](#)

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RSMH080

[Paper submission](#)
[Electronic submission](#)
[Payment of penalty](#)
[Future updates to the DFVC program](#)

Eligibility

Eligibility for the DFVC program is limited to plan sponsors who:

- Are subject to the reporting requirements of Title I of ERISA; and
- Have not been notified in writing by the DOL of a failure to file a timely annual report under Title I of ERISA.

For example, certain plans such as Form 5500-EZ filers and filers electing to file a Form 5500-SF instead of a Form 5500-EZ for “one-participant plans” are not eligible to participate in the DFVC program because they are not subject to Title I.

A “one-participant plan” is a plan that covers only:

- The self-employed (e.g., sole proprietor (and spouse)); or
- One or more partners (and spouses).

DFVC submissions

Plan administrators that elect to submit a filing to the DFVC must:

- File a complete Form 5500 annual return/report, including any required schedules and attachments for each plan year they are seeking relief; and
- Pay a penalty.

Electronic filing requirement

The annual report must be filed electronically in accordance with the EFAST2 electronic filing requirements. EFAST2 is an electronic system designed to simplify and expedite the submission, receipt, and processing of the Form 5500 and Form 5500-SF.

Completed forms are submitted via the Internet to EFAST2. The EFAST2 Internet site at <http://www.efast.dol.gov/welcome.html> provides information on filing requirements and various forms and instructions.

Plan year forms

Prior to the electronic filing requirement, DFVC allowed late filers to choose to complete and file either the current version of the Form 5500 or the correct prior year forms for the plan year for which the late annual return was being filed. *For example, if a filer was making a late filing in 2008 for a 2006 plan year, the filer could have used either the 2008 plan year forms or the 2006 plan year forms.*

With the transition to electronic filing, as a general rule, filers must now use the Form 5500 or Form 5500-SF, including required schedules and attachments, for the plan year for which the late return is being filed. The Form 5500 Version Selection Tool, available at <http://www.dol.gov/ebsa/5500selectorinstructions.html> may be used to determine which plan year version of the Form 5500 and which schedules must be used for each late annual return/report.

However, there are exceptions as discussed below.

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Late filings for plan years beginning before January 1, 2009

For plan years beginning before January 1, 2009 (i.e., 2008 and earlier plan years), filers must use the latest plan year Form 5500 and schedules available and must indicate, in the appropriate space at the beginning of the Form 5500, the plan year for which the late annual report is being filed.

Filers required to file Schedules B, E, SB, MB, P, R or T for the plan year for which the late filing is being made must attach to the Form 5500 an exact image in pdf format of the correct year schedule, and any required attachments. The EFAST Internet Site at www.efast.dol.gov provides instructions on attaching pdf files to electronic filings.

Filers required to file Schedule C for a delinquent filing have the option of either:

- Attaching an exact image in pdf format of the correct year Schedule C; or
- Filing the latest available plan year Schedule C.

Section 403(b) plans must use the latest plan year Form 5500 available, but must complete only Part I and Part II, lines 1-4, and line 8 of the Form 5500.

Late filings for plan years beginning on or after January 1, 2009

For 2009 and later plan year filings that are more than three plan years late, filers must use the latest available plan year Form 5500 or Form 5500-SF and schedules for delinquent filings.

If plans are required to file a Schedule SB or Schedule MB for a delinquent filing, filers must attach as a pdf image a correct Schedule SB or MB, including required attachments, for the plan year for which the delinquent filing is being made. *For example, in February 2014, a plan administrator discovers that the plan did not file its 2009 Form 5500. The 2013 Form 5500 and schedules are available through EFAST2 on January 1, 2014. Because the 2009 plan year is more than three years earlier than the latest available plan year Form 5500 available for filing, the plan administrator must use the current year 2013 Form 5500 and applicable schedules.* However, the plan administrator must attach as a pdf image a correct year Schedule SB, including required attachments.

Form 8955-SSA or Schedule SSA

Filers cannot submit the Schedule SSA (Form 5500) "Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits" or IRS Form 8955-SSA to EFAST2 under the DFVC program. Required information on deferred vested participants, even for 2008 and prior plan years must be filed directly with the IRS.

Information regarding Form 8955-SSA and filing delinquent information on separated participants with deferred vested benefits is available from the IRS at www.irs.gov/ep.

Penalty payments

Electronic payment

One of the enhancements to the DFVC program has been the addition of an online payment option. The electronic payment process is a more efficient process that lessens the possibility of filing errors. Plan administrators may pay the applicable penalty by submitting an electronic payment in accordance with the online penalty calculator and the DOL's payment system on the DOL's website at <https://www.askebsa.dol.gov/dfvcepay/calculator>.

Payment by check

Plan administrators may also send the penalty payment by check made payable to the Department of Labor at the following address, along with a paper copy of the electronically submitted Form 5500 or Form 5500-SF (without attachments or schedules):

DFVCP
P.O. Box 71361
Philadelphia, PA 19176-1361

Penalty structure

The chart below indicates the DFVC penalties for small and large plans.

Small plan**	Large plan***
<p>\$10 per day, up to \$750 per annual report, or in the case of a DFVC submission relating to more than one delinquent annual report for the plan, \$1,500 per plan.</p> <p>\$10 per day, up to \$750 for plans sponsored by tax-exempt organizations under IRC Section 501(c)(3). The \$750 cap applies regardless of the number of late annual reports filed for the plan at the same time.</p>	<p>\$10 per day, up to \$2,000 per annual report. If more than one late Form 5500, the maximum is \$4,000 per plan.</p>

** A “small plan” is a plan with fewer than 100 participants at the beginning of the plan year. However, if a plan has no more than 120 participants at the beginning of the plan year, the plan administrator can choose to classify it as a small plan if it was classified as a small plan in the previous year.

*** A “large plan” is a plan with 100 or more participants at the beginning of the plan year. However, if a plan has no fewer than 80 participants at the beginning of the plan year, the plan administrator can choose to classify it as a large plan if it was classified as a large plan in the previous year.

The plan administrator is personally liable for payment of penalties. Penalties paid under the DFVC program may not be paid from plan assets.

PBGC and IRS relief

The DFVC program does not provide relief from late filing penalties that may be assessed by the Internal Revenue Service (IRS) or the Pension Benefit Guaranty Corporation (PBGC) for failing to timely file a Form 5500 Annual Return/Report. However, the IRS expects to issue separate guidance on penalty relief for delinquent Form 5500 and Form 5500-SF Annual Returns/Reports where the conditions of DFVC and IRS’ requirements (once guidance is issued) are satisfied. In addition, the PBGC has agreed that it will not assess a penalty against a plan administrator for late filing of a Form 5500 and Form 5500-SF where the conditions of the DFVC program have been satisfied.

Guidelines for Top-Hat plans

Pension plans for a select group of management or highly compensated employees (top-hat plans) are subject to the reporting and disclosure obligations under Part 1 of Title I of ERISA that requires the annual filing of a Form 5500. However, sponsors of top-hat plans may be exempt from the annual reporting requirements if they file a statement with the DOL.

The sponsor of a top-hat plan that did not timely file a statement to request an exemption from the Form 5500 filing requirement may file the applicable notice and statement under the DFVC program in lieu of filing any past due annual reports. To do so, the plan sponsor must send the required statement to:

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U.S. Department of Labor
Employee Benefits Security Administration
Apprenticeship and Training Plan Exemption
200 Constitution Avenue, NW, N-1513
Washington, DC 20210

If a plan sponsor has more than one top-hat plan participating in the DFVC program at the same time, a single statement covering all plans may be filed.

The plan sponsor must also make a submission to the DFVC program, either on paper or electronically.

Paper submission

If the filing is on paper, the plan administrator must complete the most current Form 5500 Annual Return/Report (without schedules or attachments), items 1a-1b, 2a-2c, 3a-3c, and use plan number 888 for all top hat plans. The paper copy must be signed and dated, and be accompanied by a check for \$750 made payable to the Department of Labor. The check should be mailed to:

DFVCP
P.O. Box 71361
Philadelphia, PA 19176-1361

Electronic submission

For electronic submissions to the DFVC program, plan sponsors must follow the calculator instructions for online payment located at <http://www.dol.gov/ebsa/calculator/dfvcpmain.html>.

The applicable \$750 penalty amount is for each DFVC submission regardless of the number of plans maintained by the same plan sponsor for which notices and statements are being filed or the number of participants covered by the plan or plans.

Payment of penalty

The plan administrator is personally liable for payment of penalties. Therefore penalties paid under the DFVC program may not be paid from plan assets.

Future updates to the DFVC program

The DOL intends the DFVC program to be of indefinite duration. The DOL intends to modify this program from time to time. Future updates will be made available through the DOL website at www.dol.gov/ebsa.

Pension Analyst by Prudential Retirement

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