

From: Jolynne Flores [jflores@asppa.org]
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ASPPA comments to

DEPARTMENT OF LABOR
Employee Benefits Security
Administration
29 CFR Part 2520
RIN 1210-AB04
Electronic Filing of Annual Reports

Jolynne M Flores
Gov't Affairs Manager
ASPPA
4245 North Fairfax Dr., Suite 750
Arlington, VA 22203
Ph: 703.516.9300
Fx: 703.516.9308
jflores@asppa.org



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4245 North Fairfax Drive, Suite 750
Arlington, VA 22203
P 703.516.9300 F 703.516.9308
www.asppa.org

Comments on Electronic Filing of Annual Reports

Department of Labor
Proposed Regulation (RIN1210-AB04)

Submitted Electronically: e-ori@dol.gov
October 31, 2005

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The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the proposed amendments to 29 CFR part 2520 issued on August 30, 2005, relating to Electronic Filing of Annual Reports (Proposed Regulations).

ASPPA is a national society of retirement plan professionals. ASPPA's mission is to educate pension professionals and to preserve and enhance the private pension system. Its membership consists of approximately 5,500 actuaries, plan administrators, attorneys, CPAs, and other retirement plan experts who design, implement and maintain qualified retirement plans, especially for small to mid-size employers.

ASPPA supports the efforts of the Department of Labor (DOL) to improve the electronic filing process; however, the proposal to mandate electronic filing of all Form 5500 reports for years beginning after 2006 raises concerns among our membership, particularly with regard to the ambitious timeline for implementation and the increased costs of complying with the electronic filing, especially as it affects small plans.

Summary of Recommendations

The following is a summary of ASPPA's recommendations. These are described in greater detail in the Discussion of Recommendations section.

- A. Allow a plan sponsor to designate, or authorize, a third party to file Form 5500 on its behalf. This is consistent with current industry practices in which a service provider is engaged to prepare a signature-ready (paper) Form 5500 for review and signature of the plan sponsor and, in many cases, the service provider actually takes responsibility for timely mailing of the signed paper filing to EFAST.
- B. Provide reasonable opportunities for plan sponsors and their designated filers to comply with the mandatory E-filing requirement by ensuring there is adequate time between the release of fully functional third-party software and applicable filing deadlines.
- C. During the first year of implementation, provide for automatic acceptance of filings that would otherwise be rejected due to data failures.

- D. During the first year of implementation, provide plan sponsors with a one-time exception from penalties for unintentional filing violations caused by lack of familiarity with the new filing process.
- E. Establish a single E-filing system that would accommodate filings of both Form 5500 (including schedules required by the IRS) and Form 5500-EZ.
- F. Ensure that E-filing system (including filing software) can accommodate all filings relating to Form 5500, including applications for extension of time to file (Form 5558), amended prior and current year filings, late prior and current year filings (including those filed under disaster relief and DFVC), short plan year filings and DFE filings.
- G. Establish an outreach program on the mandatory E-filing system to educate filers and other users, particularly practitioners, about the system.
- H. Use the E-filing system as the basis for electronic Public Disclosure.

Discussion of Recommendations

According to statistics for the 2002 filing year, approximately 87% of Form 5500 filings were prepared using machine-print forms, indicating the use of third party software. In addition, two large software providers estimate that almost 90% of the filings prepared with their software are prepared by service providers, rather than plan sponsors. Because the overwhelming majority of Form 5500 filings are prepared with the assistance of practitioners, it is essential that any new system be workable for these stakeholders without resulting in a significant increase in costs for plan sponsors.

According to *Cost of Employee Benefits in Small and Large Businesses* (SBA Office of Advocacy – August 2005), the administrative cost per participant for small business retirement plans (200 to 500 participants) is 45% to 60% higher than for large-business plans. For plans with five or fewer employees, the difference is as high as 800%. Further, the DOL specifically notes in the proposed rule that it anticipates a “significant impact on a substantial number of small entities.”

In a recent informal survey of 200 benefit plan service providers (servicing nearly 30,000 plans) about the mandatory E-filing proposal, 73% of respondents expect costs to increase anywhere from \$250 up to \$750 per filing per year. For many small plans, this could represent more than a 10% increase in annual administrative fees and will increase the existing disparity between large and small plans noted above. Many plan sponsors will consider a 10% increase in administrative costs too high, leading them to question the economic benefit of continuing to provide the plan. It is crucial that any change in filing requirements not have a significant adverse impact on a plan sponsor’s decision to maintain the employee benefit plan.

A. Third-party Filings

As stated above, there is a prevalent use of third-party software to prepare Form 5500 filings. In ASPPA's June 4, 2004, comment letter responding to the EFAST Request for Comments, ASPPA recommended that a transmitter-based process be established in addition to any Web-based facility in order to accommodate the role that practitioners play in coordinating the filing of Form 5500 by most plan sponsors.

In the latest update to its E-filing program "My PAA," the Pension Benefit Guaranty Corporation (PBGC) introduced a feature that allows a "responsible person" to file on behalf of a plan sponsor by uploading forms and data from third-party software. The PBGC recognized that plan sponsors are not universally committed to making required plan filings electronically and, therefore, the PBGC responded with an alternative that still results in the use of its E-filing solution.

ASPPA recommends that the E-filing system allow plan sponsors to designate, or authorize, a third party to file Form 5500 on their behalf. This is a critical element of a successful E-filing system. The following are recommendations to facilitate transmitter-based filings:

1. The preamble to the Proposed Regulations notes that plan sponsors may be required to register for a secure filing account. This registration presents an opportunity to have plan sponsors authorize a third-party filer. ASPPA recommends that such registration be accomplished either by paper (similar to current Form EFAST1) or online.
2. Under a transmitter-based process, the transmitter would be able to file electronically on behalf of any plan sponsor. As part of this process, the transmitter would be certifying that it has the authority to submit on behalf of the plan sponsor. Using the PBGC's My PAA as a model, for example, the certification would confirm that the transmitter has written representation from the plan administrator that the filing is made under penalties of perjury and, further, that the transmitter has a written authorization from the plan administrator to certify the filing.
3. A plan sponsor should be permitted to designate any individual or entity as its third party filer. However, if any limitation is imposed on who may serve as a third party filer, at a minimum, any practitioner subject to Treasury Circular 230 should be permitted to serve as a designee. Again, using the PBGC's My PAA model, "an Enrolled Actuary is always treated as being a responsible person at an appropriate level of authority" for purposes of certifying and submitting the electronic filing. However, the PBGC's system also anticipates that an un-enrolled preparer would be permitted to act as a "responsible person." For the new E-filing program, ASPPA recommends that DOL consider practitioners subject to Circular 230 as being responsible persons at an appropriate level of authority, with additional provisions made for unenrolled preparers.
4. A system whereby each plan is registered should be avoided. The problem with such an approach is that someone with more than one plan will have to go online to register each plan separately. For some larger public companies, this means 10, 20, 30 or more plans would need to be registered.

- 5. The system should accommodate more than one signer for each plan. Some plan sponsors may need two designated signers to allow for travel schedules or other availability issues that can surface with key individuals at a plan sponsor.

B. Extension of Due Date for 2007 Filings

In a normal filing year, practitioners typically have 9½ months (including extensions) from the plan year-end to prepare Form 5500 reports. The original release of EFAST for preparing 1999 plan year filings did not occur until May 2000, leaving service providers with less than five months to install the new software, train staff and adopt new internal procedures to accommodate the new forms. In the informal survey cited above, 90% of respondents indicated a transition period of at least one year was needed (over half responded in favor of a two-year transition period).

Any new software system requires rigorous testing by prospective end-users (beta testing) before the system is released for use by the public. In addition, end-users need time to install, train and develop internal procedures to accommodate any new systems. This means that additional time may be needed to ensure that there is adequate time for plan sponsor and practitioners to prepare and file their Form 5500 reports.

ASPPA recommends that the DOL adequately anticipate difficulties that will be encountered by the public by automatically extending the due date of 2007 plan year filings. In order to ensure that there is adequate time to file Form 5500 reports, the extension should be based on when third-party software vendors have their systems approved by the DOL and not based on the date the DOL releases the system requirements to the third-party software vendors.

C. Automatic Acceptance of Filings in First Implementation Year

ASPPA urges DOL to adopt a policy that limits correspondence regarding deficient filings for the 2007 plan year. Practitioners responding to an informal survey were overwhelmingly (80%) in favor of a system that has immediate validity and accuracy checks, but 90% need at least a one-year transition period to work out the complications that would reject E-filings.

ASPPA recommends that the DOL automatically accept filings during the first year of mandatory E-filing. This will ensure that filings are not rejected due to validity and accuracy checking programs that may contain errors in the first year of the new system.

D. Exemption from Penalties in First Implementation Year

Problems will occur with any new system, especially if there is not a reasonable opportunity for service providers to gradually transition to it and for DOL to correct such deficiencies. As recently as October 13, 2005, EFAST applied upgrades to its electronic filing system that prevented some users of the existing system from uploading forms only four calendar days prior to the filing deadline. With the large demand placed on a new system, malfunctions are inevitable. If such malfunctions arise at or near the filing deadline, service providers may be faced with the possibility of being unable to resolve the problems and to timely file forms for a number of their clients.

ASPPA recommends that the DOL provide a one-time exemption from penalties for unintentional filing violations caused by technological malfunctions and lack of familiarity with the new filing process.

E. Accommodation of all Related Schedules

The DOL's proposal notes that Schedules E, SSA, and part of the information currently reported on Form 5500-EZ, or on Schedule R (relating to coverage) are not open to public inspection and, therefore, could not be subject to mandatory E-filing. To encourage, facilitate, and simplify filing by plan sponsors, a new E-filing system must accommodate all types of Form 5500 filings currently being made, including any schedules not open to public inspection. Again citing the informal survey, 91% of respondents felt the problems preventing a single E-filing system must be resolved to make the system workable and prevent a substantial cost increase to plan sponsors.

ASPPA recommends that the DOL establish a single E-filing system that accommodates all filings currently being made on both Form 5500 and Form 5500-EZ.

F. Accommodation of all Related Filings

In an ideal world, all Form 5500 filings would be made on a timely basis; plan years would always be 12 months long; and there would never be a need to revise data previously submitted. The reality is that a variety of plan activities may require Form 5500 filings at other than annual intervals.

ASPPA recommends that a flexible system be created that is able to handle common filing situations that arise. Addressing the following situations at the outset will avoid confusion and allow the public to continue to manage filing responsibilities in a timely fashion. The new processing system must be capable of handling:

- Applications for automatic extensions of time to file Form 5500, currently achieved by filing Form 5558;
- Amended filings for plan years that begin prior to 2007, whether the original filing was made on paper or by the current electronic filing method;
- Late filings, including those from years prior to 2007, whether submitted under DFVC or disaster relief, as well as for reasonable cause;
- Short plan year filings, including those for 2007 that are due before 01/01/2008. This is particularly important to small plan filers that terminate plans and want to close-out plan affairs quickly;
- Short plan year filings for 2008 and due before 01/01/2009; and
- Direct Filing Entity (DFE) filings, including those for years that begin in 2006. For reporting purposes, DFEs (other than GIAs) use the form year in which the filing year ends. For example, a master trust with a reporting year of 11/01/2006 to 10/31/2007 files information on the 2007 form for that period.

G. Establishment of Outreach Program

The implementation of a new E-filing system will have an impact on all filers and practitioners who assist their clients with filings. The best way to minimize the impact of the new system and ensure that the program is successful is to educate filers and practitioners about the system.

ASPPA recommends that the DOL establish an outreach program on the mandatory E-filing system to educate filers and other users, particularly practitioners, about the system.

H. Establishment of Electronic Public Disclosure

Much of the information being submitted on Form 5500 and Form 550-EZ is subject to public disclosure. Presumably, once these forms are submitted electronically, it would be easier for the DOL to provide the public disclosure electronically. Providing electronic public disclosure would be beneficial to the public, including plan participants.

ASPPA recommends that the DOL use the E-filing system as the basis for implementing electronic Public Disclosure.

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ASPPA recognizes the importance of a system of reporting and disclosure to help ensure the health of the U.S. employer-sponsored pension system. ASPPA supports the orderly transition of reporting and disclosure from the current paper-based system to an electronic system. ASPPA encourages DOL to learn from its experiences with EFAST and those of other agencies, and to work to ease the burden on all stakeholders associated with the transition.

These comments were prepared by ASPPA's Reporting and Disclosure subcommittee of the Government Affairs Committee and were primarily authored by its Chair, Janice M. Wegesin, CPC, QPA, its Vice-Chair, Adam C. Pozek, QKA, and Peter Gould, CPC, QPA, QKA. Please contact us if you have any questions or comments regarding the matters discussed above. Thank you very much for your consideration of these comments.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director

/s/

Teresa T. Bloom, Esq., APM
Chief of Government Affairs

/s/

Ilene H. Ferenczy, Esq., CPC, Co-chair
Gov't Affairs Committee

/s/

George J. Taylor, MSPA, Co-chair
Gov't Affairs Committee

/s/

Sal L. Tripodi, Esq., APM, Co-chair
Gov't Affairs Committee

/s/

Robert M. Richter, Esq., APM, Chair
Administrative Relations Committee