



## **DEPARTMENT OF LABOR**

### **Employee Benefits Security Administration**

**RIN 1210-ZA15**

### **Delinquent Filer Voluntary Compliance Program**

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Notice, Changes to the Delinquent Filer Voluntary Compliance Program.

**SUMMARY:** This Notice describes changes to the Department of Labor's (Department) Delinquent Filer Voluntary Compliance Program (DFVC Program or Program). Administrators of employee benefit plans subject to Title I of the Employee Retirement Income Security Act of 1974 (ERISA) who fail to file annual reports on a timely basis can be subject to civil penalties under section 502(c)(2) of ERISA. The DFVC Program is intended to encourage delinquent plan administrators to comply with their annual reporting obligations under ERISA through the assessment of reduced civil penalties. The DFVC Program was initially adopted in 1995 and was last updated in a published Federal Register Notice on March 28, 2002 (2002 Notice). The Department's DFVC Program website has been updated periodically since 2002 to reflect the adoption of technical changes to the Program. Most recently, the DFVC Program website was updated to reflect the Department's final regulation mandating electronic filing of annual reports as part of the implementation of a wholly electronic ERISA Filing Acceptance System (EFAST2) for those reports. (See [www.dol.gov/ebsa](http://www.dol.gov/ebsa).) This Notice also describes an existing online penalty calculator and Internet-based payment system for the DFVC Program. (See <http://www.dol.gov/ebsa/calculator/dfvcmain.html>). This Notice is intended to be a

comprehensive update and restatement of the DFVC Program that incorporates the changes that have been made in the DFVC Program since the 2002 Notice.

**DATES:** The DFVC Program described herein is effective immediately on publication, and it supersedes and replaces the DFVC Program Notice published in the Federal Register on March 28, 2002 (67 FR 15062).

**FOR FURTHER INFORMATION CONTACT:** For questions regarding the DFVC Program, including making an application, contact Jennifer C. Warner or Scott C. Albert, Office of the Chief Accountant, EBSA, (202) 693-8360. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The Secretary of Labor has the authority under section 502(c)(2) of ERISA to assess civil penalties of up to \$1,100<sup>1</sup> a day against plan administrators who fail or refuse to file complete and timely annual reports as required under section 101(b) of ERISA and the Secretary's regulations. Pursuant to 29 CFR 2560.502c-2 and 29 CFR 2570.60 et seq., EBSA maintains an enforcement program for the assessment of civil penalties under section 502(c)(2) of ERISA for noncompliance with ERISA's annual reporting requirements. Under this enforcement program, plan administrators who fail to file an annual report may be assessed a penalty of \$300 per day,

---

<sup>1</sup> In accordance with the requirements of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, the Department's regulation at 29 CFR 2575.502c-2 increased the maximum civil penalty from \$1,000 a day as stated in section 502(c)(2) of ERISA to \$1,100 a day for violations occurring after July 29, 1997.

up to \$30,000 per year, until a complete annual report is filed. Plan administrators who file but file late annual reports may be assessed \$50 per day for each day an annual report is filed after the date on which the annual report was required to be filed, without regard to any extensions of time for filing. The Department may, in its discretion, waive all or part of a civil penalty assessed under section 502(c)(2) of ERISA upon a showing by the administrator that there was reasonable cause for the failure to file a complete and timely annual report or that there was reasonable cause why the penalty, as calculated, should not be assessed.

In an effort to encourage plan administrators to voluntarily comply with the annual reporting requirements under Title I of ERISA, the Department adopted the DFVC Program. The DFVC Program was initially adopted on April 27, 1995 (60 FR 20874), and amended by Notice published on March 28, 2002 (67 FR 15052). The Program permits administrators otherwise subject to the assessment of higher civil penalties for failing to file a timely annual report to pay reduced civil penalties for voluntarily complying with the requirement to file an annual report under Title I of ERISA. Eligible plan administrators have been able to avail themselves of the DFVC Program by filing their delinquent Form 5500, “Annual Return/Report of Employee Benefit Plan,” together with all required schedules and attachments (Form 5500) in accordance with applicable filing requirements, complying with the other procedures outlined in the DFVC Program, and paying a reduced penalty.

## **B. Overview of Changes to the DFVC Program**

This Notice is intended to be a comprehensive update of the 2002 Notice that incorporates intervening changes that have been made in the DFVC Program. A discussion of the changes follows.

The DFVC Program was initially adopted in 1995, and was last updated and restated in a published Federal Register Notice on March 28, 2002 (2002 Notice). The Department's DFVC Program website has been updated periodically since then to reflect the adoption of certain technical changes to the Program. For example, most recently, the DFVC Program website was updated to reflect the Department's final regulation mandating electronic filing of annual reports as part of the move to a wholly electronic ERISA Filing Acceptance System (EFAST2) for such reports. (See [www.dol.gov/ebsa](http://www.dol.gov/ebsa).) Also, an electronic online payment option was added to the DFVC Program website that uses an online calculator to help filers accurately calculate the applicable penalty payment. (See [www.dol.gov/ebsa/calculator/dfvcmain.html](http://www.dol.gov/ebsa/calculator/dfvcmain.html)). The electronic payment process is a more efficient process that minimizes the possibility of filer error, but a paper-based penalty payment system is also available under the DFVC Program. Under the paper-based payment system, when filers make a payment by check, they mail the check to a separate DFVC Program address that is provided on the Department's website and must include a paper copy of the Form 5500 that had been electronically filed with EFAST2. Although a complete Form 5500 with schedules and attachments must be electronically filed with EFAST2, only the Form 5500 without the schedules and attachments must be sent to the DFVC Program address with the penalty payment. This additional step of mailing a paper copy of the Form 5500 to a DFVC Program address is eliminated for filers who use the online payment system, thus reducing the burden for those who choose the online payment system.

## 1. Filing Requirements Under EFAST2 for the DFVC Program

Prior to the Department's migration to the wholly electronic EFAST2 system for filing and processing Form 5500 annual reports, the DFVC Program permitted delinquent filers to choose to complete and file either the current year version of the Form 5500 or the correct prior year forms for the plan year for which the delinquent annual return/report was being filed. Thus, for example, if making a late filing in 2008 for a 2006 plan year, a filer could have used either the 2008 plan year forms that were being processed under the original EFAST system (EFAST) (but entering the correct 2006 plan year dates on the space provided at the beginning of the Form 5500) or the 2006 plan year forms. An electronic filing requirement was adopted as part of the Department's migration from the EFAST paper-based filing and processing system to the EFAST2 wholly electronic filing and processing system (EFAST2).<sup>2</sup> The migration to EFAST2 is now completely implemented for all filing years, and paper filings of any kind (e.g., mail, fax) are no longer accepted for either timely or delinquent filings.

As a complement to the establishment of the new EFAST2 wholly electronic filing and processing system, the Department, along with the Internal Revenue Service (IRS) and the Pension Benefit Guaranty Corporation (PBGC), published a final notice of adoption of revisions to annual return/report forms (Forms Revisions) at 72 FR 64731 (Nov. 16, 2007). The Forms Revisions was intended to facilitate the move to the wholly electronic filing system under

---

<sup>2</sup> The Department published in the Federal Register on July 21, 2006 (71 FR 41359), a final rule that established an electronic filing requirement for the Form 5500 and the new Form 5500-SF, "Short Form Annual Return/Report of Small Employee Benefit Plan" filed under part 1 of Title I of ERISA for any plan year beginning on or after January 1, 2008. The electronic filing requirement was delayed for filings for plan years beginning on or after January 1, 2009. 72 FR 64710 (Nov. 16, 2007).

EFAST2, streamline the annual reporting process, update the annual reporting forms to reflect current issues and priorities, and incorporate new reporting requirements under the Pension Protection Act of 2006 (PPA). Among other changes, the Forms Revisions provided that certain schedules (Schedule SSA (Form 5500) “Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits” and Schedule E (Form 5500) “ESOP Annual Information”) were being removed from the Form 5500 series beginning with filings for the 2009 plan year.<sup>3</sup> The Forms Revisions also expanded information collection on service provider fees for large plans on the Schedule C (Form 5500) “Service Provider Information,” particularly with respect to indirect compensation. Further, for 2008 and later plan years, to comply with new reporting requirements under the PPA, the Forms Revisions replaced the Schedule B (Form 5500) “Actuarial Information,” with two actuarial schedules: Schedule MB (Form 5500) “Multiemployer Defined Benefit Plan and Certain Money Purchase Plan Actuarial Information” and Schedule SB (Form 5500) “Single-Employer Defined Benefit Plan Actuarial Information.” The Schedule R (Form 5500) “Retirement Plan Information” was also expanded for plan years 2008 and later to comply with other PPA reporting requirements, particularly for multiemployer plans, and to improve reporting on pension funding information, especially for very large pension plans. The Forms Revisions also eliminated the limited reporting exception for Internal Revenue Code (Code) section 403(b) plans starting with the 2009 plan year.

To reflect the move to the EFAST2 wholly electronic processing system and the Forms Revisions, the Department previously announced, via the DFVC Program and EFAST2 websites, that filers must use the most current year EFAST2 form and schedules available for filing in

---

<sup>3</sup> Other IRS schedules, including Schedule P (Form 5500), “Annual Return of Fiduciary of Employee Benefit Trust,” and Schedule T (Form 5500), “Qualified Pension Plan Coverage Information,” were eliminated for years prior to the years covered by the Forms Revision.

EFAST2 (entering the correct plan year dates on the space provided at the beginning of the Form 5500), except they must instead attach as a pdf image file the correct year Schedules B, SB, MB, E, P, R, and T, as applicable, for delinquent filings for 2008 and earlier plan years (i.e., plan years that commenced prior to January 1, 2009). Such delinquent filers required to file pension funding, retirement plan, and other information on those schedules would thus file information in accordance with the rules that applied to the delinquent plan year in question.<sup>4</sup> Where a filing delinquency is for a 2009 or later plan year, the delinquent filer generally must use the correct plan year form and schedules unless the filing is for a plan year that is more than three years prior to the most recent plan year forms available for filing in EFAST2. In such cases, delinquent filers must use the most current versions of Form 5500/5500-SF available for filing in EFAST2 and the most current version of any required schedules, except pension plan delinquent filers required to file a Schedule SB or Schedule MB must attach as pdf images completed correct year schedules so that they file actuarial information regarding the plan in accordance with the rules that applied to the delinquent plan year in question. Further, recognizing that the 2009 plan year changes for the Schedule C impose new and substantially expanded annual reporting requirements for service provider fees, and in particular indirect compensation received by service providers from sources other than the plan or plan sponsor, filers have the option of attaching a pdf image file of the correct year Schedule C when filing delinquent annual returns/reports for plan years prior to the 2009 plan year. Also, in light of the elimination of the limited reporting exception for Internal Revenue Code (Code) section 403(b) plans starting with the 2009 plan year, for 2008 and prior plan year filings, Code section 403(b) plans subject to Title I of ERISA continue to be able to avail themselves of the limited pension plan reporting

---

<sup>4</sup> Copies of prior year schedules are available on the Department's and/or IRS's websites for filers to print out and complete, and then create pdf files to attach to their EFAST2 electronic filing.

option for delinquent filings for those years by answering only certain questions on the most current year EFAST2 form that mirrors the reporting requirements that applied under the limited pension plan reporting option for 2008 and prior plan years.

The Department added to its website an online tool to help filers determine which versions of Forms 5500/5500-SF and schedules to use when filing delinquent annual reports or amending prior year annual reports under EFAST2. Filers enter the beginning date of the plan year for which the late filings are made and the tool identifies the correct versions of the Forms 5500/5500-SF to use. The Department also does not expect the process of determining the proper forms to file will be difficult for most filers. Although EFAST2 at its start up on January 1, 2010, was capable of processing 2009 and 2010 plan year forms, that capability will expand and EFAST2 ultimately will process forms for the most current year available for filing and the three prior plan year forms. Because the majority of delinquent filings submitted under the DFVC Program historically have been no more than three years late, the Department expects that most delinquent filers will be able to use the correct year Form 5500/5500-SF and schedules when correcting their delinquency under EFAST2.

The Department also wants to emphasize that filers cannot submit the Schedule SSA (Form 5500) “Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits” or IRS Form 8955-SSA (in pdf format or otherwise) to EFAST2 or under the DFVC Program. Required information on deferred vested participants, even for 2008 and prior plan years, must be filed directly with the IRS and is outside the purview of the DFVC Program. More information regarding Form 8955-SSA and filing delinquent information on separated

participants with deferred vested benefits is available from the IRS. (See the IRS website at [www.irs.gov/ep](http://www.irs.gov/ep).)<sup>5</sup>

## 2. Technical Updates

The Department believes that the most expeditious way to keep filers informed of the most current information for participating in the DFVC Program and making civil penalty payments is to post new information about the DFVC Program on its website ([www.dol.gov/ebsa](http://www.dol.gov/ebsa)). Thus, rather than periodically amending the DFVC Program with further Federal Register notices for non-substantive, technical changes, such as eliminating references to obsolete addresses for mailing penalty payments, this Notice includes several technical revisions to the DFVC Program so that it is better integrated with the DFVC Program website that is used for announcing non-substantive, technical adjustments to the Program. DFVC Program information will also continue to be available by telephoning the EFAST2 Help Line at 1-866-463-3278 (toll free), or by contacting the Department's Office of Chief Accountant, Division of Reporting and Compliance, DFVC Program Coordinator, at 202-693-8360. (This is not a toll-free number).

## 3. Relief from IRS and PBGC Penalties for Late Filing of an Annual Return/Report

---

<sup>5</sup> In IRS Announcement 2011-21, 2011-12 IRB 567, the IRS designated Form 8955-SSA "Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits," as the form to be used to satisfy the reporting requirements of § 6057(a) of the Internal Revenue Code for plan years beginning on or after January 1, 2009, and sets forth the due dates for filing the Form 8955-SSA for the 2009 plan year and subsequent plan years.

Although the DFVC Program does not provide relief from late filing penalties under the Code or Title IV of ERISA, PBGC agreed to provide certain penalty relief under ERISA section 4071 of Title IV of ERISA for delinquent filings of the annual reports by Title I plans when the conditions of the DFVC Program were satisfied. See Section 5.03 of this Notice. Also, the IRS expects to issue separate guidance to provide certain penalty relief under the Code for delinquent Form 5500 and Form 5500-SF Annual Returns/Reports filed for Title I plans where the conditions of this DFVC Program and any requirements imposed by the IRS under such separate guidance have been satisfied. See Section 5.02 of this Notice.

As has always been the case under the DFVC Program, plans required to file the Form 5500 series under the Code that are not subject to Title I of ERISA are not eligible to participate in the DFVC Program described in this Notice.

### **Executive Order 12866**

Under Executive Order 12866, the Department must determine whether a regulatory action is “significant” and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as “economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or

planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, OMB has determined that this action is not significant under section 3(f)(4) of the Executive Order. Accordingly, OMB has not reviewed this action.

### **Paperwork Reduction Act**

The Department, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. Chapter 35). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

The DFVC Program is designed to encourage plan administrators to file delinquent Form 5500s through the assessment of reduced civil penalties. The DFVC Program was adopted by the Department in 1995, amended in 2002, and approved under OMB Control #1210-0089, which currently is scheduled to expire on May 31, 2014. This notice does not implement a substantive or material change to the information collection request (ICR); therefore, the Department has not requested OMB review at this time.

## **Regulatory Flexibility Act**

This document constitutes an enforcement policy of the Department and is not being issued as a general notice of proposed rulemaking. Therefore, the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., does not apply.

## **Unfunded Mandates Reform Act**

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, this regulatory action does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and will not impose an annual burden of \$100 million or more on the private sector.

## **Federalism Statement**

Executive Order 13132 outlines fundamental principles of federalism and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. This action does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically

enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this enforcement policy do not alter the fundamental reporting requirements or penalty provisions of Title I of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

### **Congressional Review Act**

The DFVC Program is subject to the provisions of the Congressional Review Act (5 U.S.C. 801 et seq.) and will be transmitted to Congress and the Controller General for review. The Program is not a “major rule” as that term is defined in 5 U.S.C. 804 because it is not likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic or export markets.

### **Section 1--Delinquent Filer Voluntary Compliance (DFVC) Program**

The DFVC Program is intended to afford eligible plan administrators (described in Section 2 of this Notice) the opportunity to avoid the assessment of civil penalties under section 502(c)(2) of the Employee Retirement Income Security Act (ERISA) otherwise applicable to

administrators who fail to file timely annual reports for plan years beginning on or after January 1, 1988. Eligible administrators may avail themselves of the DFVC Program by complying with the filing requirements and paying the civil penalties specified in Section 3 or Section 4, as appropriate, of this Notice.

## **Section 2--Scope, Eligibility and Effective Date**

.01 Scope. The DFVC Program described in this Notice provides relief from assessment of civil penalties under section 502(c)(2) of ERISA applicable to plan administrators who fail or refuse to file timely annual reports. Relief under this Program does not extend to penalties that may be assessed for annual reports that are determined by the Department of Labor (Department) to be incomplete or otherwise deficient.

.02 Eligibility. The DFVC Program is available only to a plan administrator that complies with the requirements of Section 3 or Section 4, as appropriate, of this Notice prior to the date on which the administrator is notified in writing by the Department of a failure to file a timely annual report under Title I of ERISA.

.03 Effective Date. The DFVC Program described herein shall be effective [**insert date of publication in the Federal Register**]. The Department intends this DFVC Program to be of indefinite duration; however, it may be modified from time to time or terminated in the sole discretion of the Department. The DFVC Program requirements and procedures, as updated

from time to time, will be available through the Department's website at [www.dol.gov/ebsa](http://www.dol.gov/ebsa) and through the Department's public disclosure room.

### **Section 3--Plan Administrators Filing Annual Reports**

.01 General. A plan administrator electing to file a late annual report under this DFVC Program must comply with the requirements of this Section 3.

#### .02 Filing A Complete Annual Report.

(a) Requirement To File The Delinquent Annual Return/Report. The plan administrator must file in accordance with this section a complete Form 5500 Series annual return/report, including any required schedules and attachments, for each plan year for which the plan administrator is seeking relief under this DFVC Program.

(b) Requirement To File Electronically With EFAST2. The annual return/report must be filed electronically in accordance with the EFAST2 electronic filing requirements. EFAST2 is an all-electronic system designed to simplify and expedite the submission, receipt, and processing of the Form 5500 and Form 5500-SF. Under EFAST2, filers choose between using EFAST2-approved third party vendor software to prepare and submit the Form 5500 or Form 5500-SF or a free internet-based filing tool (IFILE) designed for individual filers and service providers who choose to not use EFAST2-approved third party software. Completed forms are

submitted via the Internet to EFAST2. See the EFAST2 Internet site at [www.efast.dol.gov](http://www.efast.dol.gov) for information on electronic filing requirements and to view forms and instructions.

(c) Requirements Relating To The Plan Year Forms And Schedules That Must Be Used In The Delinquent Filing. Plan administrators must use the plan year forms and schedules for the delinquent annual return/report filing as described in this paragraph (c). The Form 5500 Version Selection Tool, available at [www.dol.gov/ebsa/5500selectorinstructions.html](http://www.dol.gov/ebsa/5500selectorinstructions.html), incorporates the requirements in this paragraph (c) and may be used by plan administrators to determine which plan year version of the Form 5500 and which schedules must be used for each delinquent annual return/report.

(1) General Rule. Except as provided in subparagraphs (2) and (3) of this section 3.02(c), filers must use the Form 5500 or Form 5500-SF, including required schedules and attachments, for the plan year for which the delinquent annual return/report is being filed.

(2) Delinquent Filings For Plan Years Commencing Before January 1, 2009. Except as provided in subparagraphs (A), (B), and (C) of this section 3.02(c)(2), for plan years commencing 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 delinquent annual return/report is being filed.

(A) Filers required to file a Schedule B, Schedule E, Schedule SB, Schedule MB, Schedule P, Schedule R, or Schedule T for the plan year for which the delinquent 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, completed with blue or black ink in accordance with the applicable instructions for the schedule. See the EFAST2 Internet site at [www.efast.dol.gov](http://www.efast.dol.gov) for instructions on attaching pdf files to electronic filings.

(B) Filers required to file Schedule C for the plan year for which the delinquent filing is being made have the option of attaching an exact image in pdf format of the correct year Schedule C, as applicable, completed with blue or black ink in accordance with the correct year instructions, instead of filing the latest plan year Schedule C available. See the EFAST2 Internet site at [www.efast.dol.gov](http://www.efast.dol.gov) for instructions on attaching pdf files to electronic filings.

(C) Filers filing for Code section 403(b) plans for plan years commencing before January 1, 2009, 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.

CAUTION: The Form 5500-SF cannot be used to file a delinquent annual return/report for any plan years commencing before January 1, 2009 (i.e., 2008 or earlier plan years).

(3) Delinquent Filings For Plan Years Beginning On Or After January 1, 2009, That Are More Than Three Plan Years Late. In the case of a delinquent filing for a plan year beginning on or after January 1, 2009, that is for a plan year more than three plan years earlier

than the latest plan year for which the Form 5500 and Form 5500-SF are available for filing, filers must use the latest available plan year Form 5500 or, if eligible, Form 5500-SF, and schedules, completed in accordance with the applicable instructions. In the case of plans required to file a Schedule SB or Schedule MB for the delinquent plan year, filers must attach as a pdf image a correct year Schedule SB or MB, including required attachments, for the plan year for which the delinquent filing is being made, completed with blue or black ink in accordance with the instructions for those schedules. **Example:** In February 2014, a plan administrator for a single employer defined benefit pension plan discovers that the plan did not file its 2009 Form 5500. The 2013 Form 5500 and schedules were made available for filing 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 (2013), the plan administrator must use the current year (2013) Form 5500 and applicable schedules, except that the plan administrator would attach as a pdf image a correct year Schedule SB, including required attachments.

**CAUTION:** If Form 8955-SSA or Schedule SSA was required to be filed, for purposes of reporting information required by section 6057(a) of the Code, for the plan year for which a delinquent filing is being made, the filer must not under any circumstances submit the form or schedule to EFAST2 with the delinquent annual return/report. Instead, a Form 8955-SSA (and not a Schedule SSA) must be submitted directly to the IRS in accordance with applicable IRS guidance. See [www.irs.gov/ep](http://www.irs.gov/ep).

**Note:** For informational copies of the Forms, visit [www.dol.gov/ebsa/5500main.html](http://www.dol.gov/ebsa/5500main.html) and [www.irs.gov/ep](http://www.irs.gov/ep). To file, go to [www.efast.dol.gov](http://www.efast.dol.gov). For more information on filing electronically, see the EFAST2 Internet site at [www.efast.dol.gov](http://www.efast.dol.gov).

**.03 Payment Of Applicable Penalty Amount.**

(a) The plan administrator shall pay the applicable penalty amount by submitting electronic payment in accordance with the online penalty calculator and the web payment system on the Department's website at [www.askebsa.dol.gov/dfvcpay/calculator](http://www.askebsa.dol.gov/dfvcpay/calculator). Plan administrators may also send the penalty payment by check by mail to the address specified on the Department's website, along with a paper copy of the electronically submitted Form 5500 or Form 5500-SF (without schedules or attachments). Annual returns/reports for multiple plans may not be included in a single DFVC Program submission. A separate submission to the DFVC Program (including a separate electronic payment for the applicable penalty amount) must be made for each plan. Online penalty payments cannot be supplemented later to add additional filings. Additional delinquent annual return/report filings will require a new online submission and a new applicable penalty calculation.

(b) The applicable penalty amount shall be determined as follows:

(1) In the case of a plan with fewer than 100 participants at the beginning of the plan year (or a plan that would be treated as such a plan under the "80-120" participant rule described in 29 CFR 2520.103-1(d) for the subject plan year) (hereinafter "small plan"), the applicable

penalty amount is \$10 per day for each day the annual report is filed after the date on which the annual report was due (without regard to any extensions), not to exceed the greater of: \$750 per annual report or, in the case of a DFVC Program submission relating to more than one delinquent annual report for the plan, \$1,500 per plan.

(2) In the case of a plan with 100 or more participants at the beginning of the plan year (other than a plan that is eligible to use and uses the “80-120” participant rule) (hereinafter “large plan”), the applicable penalty amount is \$10 per day for each day the annual report is filed after the date on which the annual report was due (without regard to any extensions), not to exceed the greater of: \$2,000 per annual report or, in the case of a DFVC Program submission relating to more than one delinquent annual report for the plan, \$4,000 per plan.

(3) In the case of a DFVC Program submission relating to more than one delinquent annual report for a plan, the applicable penalty amount shall be determined by reference to paragraph (b)(2) if for any plan year for which the submission is made the plan was a “large plan.”

(4) In the case of a plan administrator filing an annual report for a “small plan” that is sponsored by a Code section 501(c)(3) organization (including a Code section 403(b) plan), the applicable penalty amount is \$10 per day for each day the annual report is filed after the date on which the annual report was due (without regard to any extensions), not to exceed \$750 per DFVC Program submission, including DFVC Program submissions that relate to more than one delinquent annual report for the plan. This paragraph (b)(4) shall not apply if, as of the date the

plan administrator files pursuant to this DFVC Program, there is a delinquent or late annual report due for a plan year for which the plan was a “large plan.”

.04 Liability For Applicable Penalty Amount.

The plan administrator is personally liable for the payment of civil penalties assessed under section 502(c)(2) of ERISA; therefore, civil penalties, including amounts paid under this DFVC Program, shall not be paid from the assets of an employee benefit plan.

**Section 4--Plan Administrators Filing Notices For Apprenticeship And Training Plans And Statements For “Top Hat” Plans**

.01 General. Administrators of apprenticeship and training plans, described in 29 CFR 2520.104-22, and administrators of pension plans for a select group of management or highly compensated employees, described in 29 CFR 2520.104-23(a) (“top hat plans”), who elect to file the applicable notice and statement described in 29 CFR 2520.104-22 and 29 CFR 2520.104-23, respectively, as a condition of relief from the annual reporting requirements may, in lieu of filing any past due annual report and paying otherwise applicable civil penalties, comply with the requirements of this Section 4. Administrators who have complied with the requirements of this Section 4 shall be considered as having elected compliance with the exemption(s) and/or alternative method of compliance prescribed in 29 CFR 2520.104-22 or 2520.104-23, as appropriate, for all subsequent plan years.

.02 Filing Applicable Notice Or Statement With The U.S. Department Of Labor.

The plan administrator must prepare and file a notice or statement meeting the requirements of 29 CFR 2520.104-22 or 29 CFR 2520.104-23, as appropriate.

The apprenticeship and training plan notice described in 29 CFR 2520.104-22 shall be sent to the Employee Benefits Security Administration in accordance with the instructions in that regulation.

The “top hat” plan statement described in 29 CFR 2520.104-23 shall be sent to the Employee Benefits Security Administration in accordance with the instructions in that regulation.

**Note:** A plan sponsor maintaining more than one “top hat” plan may file a single statement covering multiple plans. See 29 CFR 2520.104-23(b).

.03 Payment Of Applicable Penalty Amount.

(a) The plan administrator of each such apprenticeship and training or “top hat” plan shall pay the applicable penalty amount by submitting electronic payment in accordance with the online penalty calculator and the web payment system on the Department's website. (See <http://www.dol.gov/ebsa/calculator/dfvcpmain.html>). The plan administrator may also pay the penalty by mailing a check to the address specified on the Department’s website, along with a

paper copy of the most current Form 5500 with only items 1a-1b, 2a-2c, and 3a-3c completed. Use plan number 888 for all top hat plans and 999 for all apprenticeship and training plans. The Form 5500 prepared for DFVCP payment verification purposes should **not** be filed with EFAST2.

**Note:** A paper submission of the Form 5500 to the DFVC program is in addition to the submission of the statement described in regulation section 29 CFR §2520.104-22 or 29 CFR 2520.104-23 that is filed directly with the Department.

(b) The applicable penalty amount for apprenticeship and training and “top hat” plans is \$750 for each DFVC Program submission, without regard to the number of plans maintained by the same plan sponsor for which notices and statements are filed pursuant to Section 4 and without regard to the number of plan participants covered under such plan or plans.

.04 Liability For Applicable Penalty Amount.

The plan administrator is personally liable for the payment of civil penalties assessed under section 502(c)(2) of ERISA; therefore, civil penalties, including amounts paid under this DFVC Program, shall not be paid from the assets of an employee benefit plan.

**Section 5--Waiver Of Right To Notice, Abatement Of Assessment And Plan Status**

.01 Payment of a penalty under the terms of this DFVC Program constitutes, with regard to the filings submitted under the Program, a waiver of an administrator's right both to receive notices of intent to assess a penalty under 29 CFR 2560.502c-2 from the Department and to contest the Department's assessment of the penalty amount.

.02 Although this Notice does not provide relief from late filing penalties under the Code, the IRS has provided the Department with the following information. The Code and the regulations thereunder require information to be filed on the Form 5500 Series Annual Return/Report and provide the IRS with authority to impose or assess penalties for failing or refusing to timely file an annual return/report. The IRS expects to issue separate guidance to provide certain penalty relief under the Code for delinquent Form 5500 and Form 5500-SF Annual Returns/Reports filed for Title I plans where:

(a) The conditions of this DFVC Program have been satisfied (including filing Schedules E, P, R, and T, as applicable); and

(b) Any requirements imposed by the IRS in such separate guidance are satisfied.

The relief under this notice is available only to the extent that a Form 5500 is required under Title I of ERISA. Plans that are not subject to Title I of ERISA are ineligible to participate in the DFVC Program.

.03 Although this Notice does not provide relief from late filing penalties under Title IV of ERISA, the Pension Benefit Guaranty Corporation (PBGC) has provided the Department with the following information. Title IV of ERISA and the regulations thereunder require information to be filed on the Form 5500 and Form 5500-SF Annual Returns/Reports and provide the PBGC with authority to assess penalties against a plan administrator under ERISA section 4071 for late filing of the Form 5500 Series Annual Return/Report. The PBGC has agreed that it will not assess a penalty against a plan administrator under ERISA section 4071 for late filing of a Form 5500 or Form 5500-SF Annual Return/Report, as appropriate, filed for a Title I plan where the conditions of this DFVC Program have been satisfied.

.04 Acceptance by the Department of a filing and penalty payment made pursuant to this DFVC Program does not represent a determination by the Department as to the status of the arrangement as a plan, the particular type of plan under Title I of ERISA, the status of the plan sponsor under the Code, or a determination by the Department that the provisions of 29 CFR 2520.104-22 or 29 CFR 2520.104-23 have been satisfied.

Signed at Washington, DC, this 18th day of January, 2013.

---

Phyllis C. Borzi  
Assistant Secretary, Employee Benefits Security Administration  
U.S. Department of Labor

**BILLING CODE 4510-29-P**

[FR Doc. 2013-01616 Filed 01/28/2013 at 8:45 am; Publication Date: 01/29/2013]