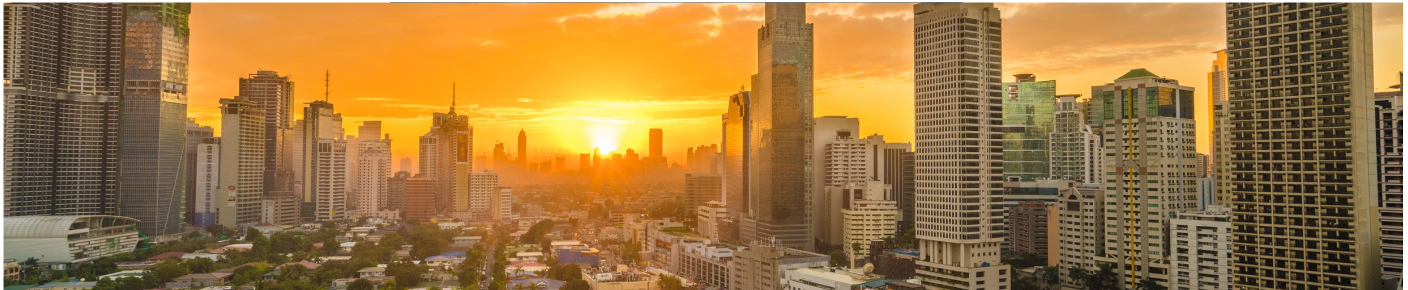
EB Communicator
WINTER 2017
*Employee Benefit News Critical to Your Business*
BROWN EDWARDS
*certified public accountants*



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# Is Your Health Plan Ready for a HIPAA Audit?

*Contributed by Joanne Szupka*

The U.S. Department of Health & Human Services (HHS) has begun the next phase of audits in conjunction with its review of policies and procedures implemented by covered entities (and those entities' business associates) to meet the Health Insurance Portability and Accountability Act (HIPAA) Privacy, Security and Breach Notification rules.

## Background

In 2009, the Health Information Technology for Economic and Clinical Health Act (HITECH) mandated that HHS conduct periodic audits of both covered entities and business associates to ensure that covered entities and business associates are complying with the HIPAA Privacy, Security and Breach Notification Rules. A company's health plan is classified as a covered entity.

There are three distinct components to these rules:

- The Privacy Rule addresses protected health information (PHI).
- The Security Rule addresses electronic protected health information (ePHI).
- The Breach Notification Rule addresses providing notification following a breach of unsecured PHI.

## Pilot Program Results

The pilot program or Phase I of the audits occurred in 2011 and 2012 and included 115 covered entities. 47 out of the 115 covered entities were health plans, which represented approximately 41 percent of the total population. No business associates were selected for an audit under the pilot program.

*Continued*

*Being knowledgeable, proactive and prepared are key elements, in our opinion, to avoiding panic should your plan be picked for a regulatory exam.*

The findings and observations in the pilot program were divided among the three rules as follows:

- Privacy Rule – 30 percent
- Security Rule – 60 percent
- Breach Notification Rule – 10 percent

Additionally, 57 percent of the health plans audited had no complete or accurate risk assessment program. While other causes were noted, the general conclusion of the Phase I audits was that non-compliance was due to the entity unaware of the HIPAA requirements.

### Phase II

Phase II is currently on-going and will include covered entities and their business associates and will be a combination of desk audits and on-site audits. Desk audits have occurred in 2016 with on-site audits scheduled for 2017. In July 2016, 167 covered entities were notified via email that they were selected for a desk audit. Under the program, a covered entity selected for a desk audit may also be eligible for selection with an on-site audit.

Each desk audit is limited to a review of seven controls and is split into two separate audits.  One audit examines the Security Rule controls while the other audit assesses compliance with the Privacy and Breach Notification Rules. If it is an on-site audit, the plan will also be evaluated against a comprehensive set of HIPAA compliance controls.

Regardless of audit location or type, a listing of documents will be requested from the entity. These documents may include privacy policies, procedure manuals, training materials, incident response plans and risk analysis.

### Best Practices

Even if your company's health plan is not selected for a HIPAA audit, Phase II is a good reminder of the importance of regulatory audit readiness and good fiduciary practices. Being knowledgeable, proactive and prepared are key elements, in our opinion, to avoiding panic should your plan be picked for a regulatory exam. Below are some of the action steps that plan sponsors may want to consider for the company's health plan(s):

- Educate yourself on the HIPAA requirements.

- Perform a review of the HIPAA documents to ensure that the documents are complete, up-to-date and readily available along with any HIPAA training and compliance with those trainings. The protocol that HIPAA auditors will use during an audit has been released (here) and indicates that, unless otherwise specified, the requested documents should be the versions in use as of the date of the audit notification/document request.

- Inspect your company's HIPAA Security Risk Analysis. A security risk analysis is intended to be an accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity and

availability of ePHI. While the security risk analysis focuses solely on ePHI, it is generally recommended that sponsors should take steps to address the security of PHI of both paper and oral form, if applicable to your company's health plan. The Security Rule requires the security risk analysis to be documented and updated on an as-needed basis. If it has been a few years since the plan sponsor has looked at the health plan's security risk analysis, a prudent step is to consider implementing a review.

*Going forward under the new system, a Required Amendment List (RA List) will be published on an annual basis, which will contain all the necessary regulatory amendments a plan must adopt in order to maintain its qualified status.*

# Insights From Our Specialists

## Changes to the Determination Letter Program

*Contributed by Kimberly Flett and Jenny Ludwig*

Effective January 1, 2017, plan amendment requirements as well as the determination letter program for individually designed plans will undergo some significant changes. The Internal Revenue Service (IRS) provided much-anticipated guidance on these changes with the release of Revenue Procedure (Rev. Proc.) 2016-37 in June 2016.

Under the new system, the accustomed 5-year remedial amendment cycle for individually designed plans (Rev. Proc. 2007-44) will cease to exist once Cycle A concludes under the current model on January 31, 2017. Going forward under the new system, a Required Amendment List (RA List) will be published on an annual basis, which will contain all the necessary regulatory amendments a plan must adopt in order to maintain its qualified status. All amendments on the list must be adopted by the end of the second calendar year following the date the list is published (list is expected to be made available shortly after October 1st of each year).

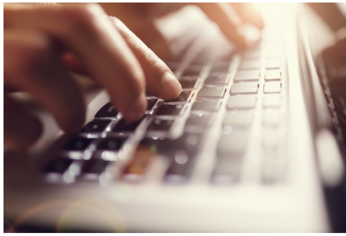
With Rev. Proc. 2016-37, individually designed plans may only apply for a determination letter for initial plan qualification and plan termination, as detailed further below:

**Initial Qualification** - If a plan has never received a favorable determination letter then an application can be submitted in association with Form 5300.

**Plan Termination** - An application for a favorable determination letter may be submitted with Form 5310 when a plan is being terminated. The filing must be received no later than the later of one year of the effective date of the plan termination or one year from the date on which the action terminating the plan is taken. The application to the IRS must not be filed any later than 12 months after the distribution of all plan assets.

The IRS is still considering whether applications will be accepted for other reasons than the two previously mentioned (in particular, future law changes or plans that may not be able to adopt pre-approved documents). While Rev. Proc. 2016-37 brings changes to the requirement that a plan operate under the appropriate compliance standards, any plan-specific operational plan amendments are still required by the end of the plan year the amendment is put into effect. An Operational Compliance List identifying compliance issues will be issued by the IRS to assist sponsors.

Additional guidance in *Rev. Proc. 2016-51* modifies the Employee Plans Compliance



*The Department of Labor (DOL) has indicated that the purpose of the changes is to modernize the financial statement and investment information filed about employee benefit plans, update service provider and fee information …*

Resolution System (EPCRS) correction program for these changes to the determination letter program. Opinion and advisory letter for pre-approved plans will still maintain the current six-year cycle.

## Significant Proposed Form 5500 Changes

*Contributed by Kimberly Flett*

In July 2016, the government agencies that administer the *Form 5500 Annual Return/Report of Employee Benefit Plan* (Form 5500) announced proposed changes to the Form 5500 which are expected to significantly impact the degree of plan details reported as well as the amount of time and effort to properly complete the form. Changes are effective for the 2020 Form 5500 for plan years beginning on or after January 1, 2019, with certain changes potentially required sooner including new compliance questions. The Department of Labor (DOL) has indicated that the purpose of the changes is to modernize the financial statement and investment information filed about employee benefit plans, update service provider and fee information, require Form 5500 reporting by all group health plans, and provide greater DOL and IRS agency collaboration through new compliance questions. The proposed revisions were open for comment, with an extended deadline of December 5, 2016.

Some of the notable proposed changes include:

- Individual changes to schedules that includes the addition of a new Schedule J for group health plans with questions specific to the Public Health Service Act. Small group health plans that have been previously exempt from filing will now need to report coverage on Form 5500. This will increase the number of plan sponsors filing Form 5500 for health plan coverage. Schedule E for ESOP plans will be reinstated (this Schedule was previously removed) and Schedule I for small plans will be eliminated and replaced by Schedule H with an audit report exemption.

- Schedule H will be expanded to incorporate information on alternative investments, hard-to-value assets and investments through collective investment vehicles through the inclusion of new categories, such as the following: derivatives, foreign investments, limited partnerships, venture capital, private equity, hedge funds, self-directed brokerage accounts and tangible personal property. Plan sponsors will need to report the number and type of investment funds offered, including the default investment for the plan. Plan fees will be classified in greater detail including salaries, audit and recordkeeping fees. Additional changes will include reporting information currently on the Schedule H, Line 4i – Schedule of Assets (Held at End of Year) and Schedule H, Line 4j - Schedule of Reportable Transactions attachments directly onto the body of the Schedule H in order to present this information within the filing in a data compliance format necessary for the electronic filing requirements.

- Schedule C will include more information regarding fee disclosure requirements for small plan filers and a separate Schedule C for each service provider.

*Although the revisions are not effective immediately, plan sponsors, service providers and practitioners should begin to consider how to address the impact of changes once the Form 5500 is finalized.*

- New questions throughout that focus on plan participation and compliance including reporting of any enhanced contribution details, monitoring uncashed checks for plan distributions, confirming whether 401(k) plan participants were provided required fee disclosures, whether required minimum distributions were made to 5 percent owners and if any hardship distributions were made during the year. Additionally, plan coding descriptions will be replaced with "yes" and "no" responses.
- Audit requirements may be affected due to changing the audit count threshold on participants with actual account balances (rather than including in the count employees who are eligible to participate but do not have an account balance).
    - There are new required disclosures related to the plan auditor
    - The auditor's communications with those charged with plan governance
    - The audit firm's peer review information
    - Inclusion of the plan's limited audit scope certification (for plans for which a limited scope audit was performed)

Although the revisions are not effective immediately, plan sponsors, service providers and practitioners should begin to consider how to address the impact of changes once the Form 5500 is finalized, including:

- Service provider/recordkeeping systems will need to be upgraded to provide more detailed information (such as for investments held) for plan sponsors to meet the new requirements.
- Form 5500 preparers will need to gather more information in regards to completing the detailed compliance questions.

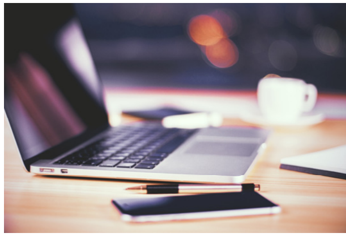
Small business sponsors of health plans that did not previously need to report may be subject to the new filing requirements.

## Current Trends in Employee Stock Ownership Plans

*Contributed by Jay Powers*

### Recruitment Tool

Our firm has seen recent interest by business owners in using an employee stock ownership plan (ESOP) as an employee recruitment tool. An ESOP can enable a sponsoring employer to provide company shares to all full-time employees based on compensation and/or company tenure at no cost to the employees at the time when an ESOP is established within the company. Including a Management Incentive Plan (MIP), which is typically used by the majority of ESOP-owned companies, can also provide a separate pool of phantom equity that can be allocated to key participants on a more discretionary basis and, as a result, all employees may receive added benefits from the ESOP plan (the ESOP acts as a benefit plan similar to a 401(k) plan) and certain key employees can be awarded both ESOP shares and MIP grants.



*Some of the most important estate planning benefits may not be monetary in nature. For example, a sale to an ESOP allows an owner to retain significant day-to-day operational interest in the business and a similar role on the company's board of directors, if desired.*

Our ESOP Advisory Group recently assisted a company with implementation of an ESOP where the company's location was in a part of the country that the founders felt was less desirable to the caliber of financial institutional professionals that the company's founders (former Wall Street executives) were seeking to recruit. The company found that offering target talent the opportunity to become an owner through an ESOP was an effective recruitment tool that offset the negatives associated with the location.

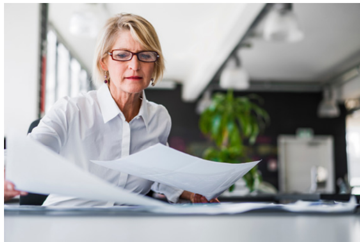
## Estate Planning Tool

Another practice that has gained popularity is the use of an ESOP as an estate planning tool. A significant potential tax planning benefit for owners is the Internal Revenue Code (IRC) Section 1042 Rollover, which permits the selling shareholders to defer paying capital gains taxes on the sale of stock to an ESOP, as long as the company is a C Corporation at the time of sale and the ESOP purchases at least 30 percent of the company's stock. Additionally, if the ESOP transaction is financed in part by seller notes, this allows the owners to generate interest income. A secondary benefit of the seller notes is detachable warrants, which is an equity incentive with the potential for significant future upside to the holder of the seller note.

Some of the most important estate planning benefits may not be monetary in nature. For example, a sale to an ESOP allows an owner to retain significant day-to-day operational interest in the business and a similar role on the company's board of directors, if desired. This opportunity to preserve the legacy of the business and to control how much of the company is sold to the ESOP can be an attractive feature to business owners.

## Tax Planning and Business Transition Tool

A long-standing, but continuing trend is selling an S Corporation business to an ESOP to obtain the potential tax advantages to the business. Selling 100 percent of the stock in an S Corporation (a pass-through entity) to an ESOP creates a corporate entity that could eliminate paying income tax moving forward. This, in turn, may allow the company to repay the debt that funded the buyout of the owners more rapidly; the deleveraging of the debt on the balance sheet may potentially promote a quicker recovery of company value. The tax savings may be used for such purposes as boosting capital expenditures, advertising, or as capital in the acquisition of a target company.



*ASU 2015-10, Technical Corrections and Improvements, includes a change in the definition of "Readily Determinable Fair Value" (RDFV) that has the potential to change previously reported fair value hierarchy levels.*

## New Reporting Guidance

*Contributed by Darlene Bayardo and Chelsea Smith Brantley*

Plan sponsors should be aware of the following guidance that impacts reporting and disclosures for EBPs:

Accounting Standards Update (ASU) 2015-07, *Fair Value Measurement (Topic 820): Disclosures for Investments in Certain Entities That Calculate Net Asset Value per Share (or its Equivalent)*, removes the requirement to categorize investments for which fair values are measured using Net Asset Value (NAV) as a practical expedient in the fair value hierarchy. However, it is required to disclose the amount measured using NAV as a practical expedient so that financial statement users can reconcile the fair value of investments included in the fair value hierarchy to total investments measured at fair value on the statement of net assets available for benefits. The ASU is effective for fiscal years beginning after December 15, 2016, with early adoption permitted and should be applied retrospectively for all periods presented.

ASU 2015-10, *Technical Corrections and Improvements,* includes a change in the definition of "Readily Determinable Fair Value" (RDFV) that has the potential to change previously reported fair value hierarchy levels for many investments that previously used the NAV as a practical expedient in both retirement accounts in plan sponsor financials as well as investments reported in EBP financial statements. Based on the revised definition of RDFV, investments such as pooled separate accounts (PSAs) and common/collective trusts (CCTs) may no longer qualify to use NAV as the practical expedient.

ASU 2015-12, *Plan Accounting: Defined Benefit Pension Plans (Topic 960), Defined Contribution Pension Plans (Topic 962), Health and Welfare Benefit Plans (Topic 965): (Part I) Fully Benefit-Responsive Investment Contracts, (Part II) Plan Investment Disclosures, (Part III) Measurement Date Practical Expedient*, reduces the complexity in EBP plan accounting. The guidance in each part of the ASU is effective for fiscal years beginning after December 15, 2015. Early adoption was permitted for all three parts individually or in aggregate. Parts I and II of the ASU should be applied retrospectively, while Part III should be applied prospectively.

## On the Horizon

*Contributed by Joanne Szupka*

Sponsors of terminated or potentially terminating defined contribution and defined benefit plans will be interested to know that the Pension Benefit Guaranty Corporation (PBGC) is looking to expand its Missing Participant Program to cover terminated 401(k) and other defined contribution plans as well as certain defined benefit plans not currently covered by the PBGC program. PBGC anticipates having the expanded program available in 2018 for plans that terminate after 2017.

One option previously available to plan sponsors was the IRS Letter Forwarding Program that was terminated in August 2012. The lack of a central database of missing defined contribution participants for terminated plans makes it difficult for participants to locate their accounts. Plan sponsors attempting to meet their fiduciary responsibilities to terminated plan participants currently have only had the guidance in the DOL's Field Assistance Bulletin No. 2014-01 to follow. Once implemented,

*Effective August 1, 2016, the potential penalty for failure to timely file a Form 5500 to the DOL was increased from $1,100 per day to $2,063.*

PBGC's expanded program (which would be voluntary for defined contribution plans) is expected to simplify locating retirement benefits for participants of terminated plans and to assist plan fiduciaries in complying with their responsibilities relative to plan terminations.

## Increases in Certain ERISA Civil Penalties

*Contributed by Kimberly Flett*

The DOL published in the Federal Register on June 30, 2016 adjustments to civil monetary penalties that impacts items under Employee Retirement Income Security Act (ERISA) reporting requirements.  Effective August 1, 2016, the potential penalty for failure to timely file a Form 5500 to the DOL was increased from $1,100 per day to $2,063. Additional increases for ERISA violations include failure to furnish retirement plan benefit statements from $11 to $28 per employee; failure to furnish actuarial reports upon request from $1,000 per day to $1,632; failure to furnish a blackout notice or notice of the right to divest employer securities from $100 per day to $131. There have been no changes to the IRS Form 5500 late filing charges, which currently is $25 per day to a maximum of $15,000 or the Delinquent Filer Voluntary Compliance Program (DFVCP) of the DOL. The cap on the DFVCP fees range from $1,500 for a small plans filing more than one year of returns to $4,000 for large plans.

## ACA Reporting Deadline Changes

*Contributed by Joanne Szupka*

The IRS issued Notice 2016-70 on November 18, 2016 providing employers an additional 30 days to deliver Affordable Care Act (ACA) reporting forms to employees.  The extended deadline is March 2, 2017, and applies **only** to the 2016 Form 1095-C (*Employer-Provided Health Insurance Offer and Coverage*), and Form 1095-B (*Health Coverage*).

*The changes represent years of lobbying by the American Institute of Certified Public Accountants (AICPA) for a more logical timing in the tax return due dates.*

## Want a Sneak Peek at the 2016 Form 5500?

*Contributed by Joanne Szupka*

The DOL’s Employee Benefits Security Administration has released advance informational copies of the 2016 Form 5500 annual return/report. The “Changes to Note” section of the 2016 instructions highlight important modifications to the Form 5500 and Form 5500-SF and the applicable schedules and instructions including the IRS compliance questions, administrative penalties, Schedules H, I and SB.

## Filers Instructed to Not Answer Compliance Questions on 2016 Form 5500

*Contributed by Kimberly Flett*

Once again, the IRS has instructed that filers should not answer the Compliance Questions included on the 2016 Form 5500. Similar to the 2015 Form 5500,, the IRS has stated that compliance questions on the 2016 Form 5500 should also not be completed for the upcoming filing season. Questions include:
Form 5500: Preparer Information (Page 1)
Schedule H: Lines 4o, 6a-d
Schedule I: Lines 4o, 6a-d
Schedule R: Part VII (Lines 20a-b, 21a-b and 22a-b)

Form 5500 SF: Preparer Information (Page 1), Lines 14a-d and Part IX (Lines 15a-b, 16a-b, 17a-b, 18 and 19)
Form 5500 EZ: Preparer Information (Page 2), Lines 4a-d, 13a-b, 14 and 15

## Updates for Defined Benefit Plans

*Contributed by Joanne Szupka*

In October 2016, the Society of Actuaries (SOA) released the Mortality Improvement Scale MP-2016 (MP-2016 Scale). The MP-2016 Scale includes three additional years of historical U.S. population mortality data and incorporates data now through 2014. The MP-2016 Scale rates continue the trend of decreasing rates as they are generally lower than MP-2015 Scale rates (which were, in turn, also lower than the MP-2014 Scale rates). The SOA anticipates that most 2016 pension obligations calculated using the MP-2016 Scale will be approximately 1.5 - 2.0 percent lower than the obligations calculated using the MP-2015 Scale.

The PGBC has released the 2017 Premium Rates. Premium rates will increase for single-employers, including the flat rate and the variable rate premiums and the flat rate premium for multiemployers. For further details refer to http://www.pbgc.gov/prac/prem/premium-rates.html.

## 2016 Tax Return Due Date Changes and Impact on Retirement Plan Contribution Dates

*Contributed by Joanne Szupka*

Certain tax return and extension due dates will change for taxable years ending on or after December 31, 2016, based on provisions included in the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 that was signed into law in July 2015. The changes represent years of lobbying by the American Institute of Certified Public Accountants (AICPA) for a more logical timing in the tax return due dates, especially to have pass-through entity returns and the resulting Form K-1s due before individual and corporate tax returns affected by such information.

The primary impact is to the due date for partnership tax returns, which will now be due a month earlier, while most C Corporation tax returns will be due a month later (with special circumstances for certain C Corporation returns with a June 30th year end). Even though these changes are expected to generally be helpful to companies, it is important to watch the dates as C Corporations have a number of due dates to keep track of depending on the year end of the corporation (this was done in order to balance the bill's impact on tax revenue over a ten-year period).

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