

THE MOSS ADAMS LLP EMPLOYEE BENEFIT PLAN SERVICES GROUP PRESENTS



# SHIFTING GROUND

reducing risk amid regulatory changes

**MOSS ADAMS** LLP  
CERTIFIED PUBLIC ACCOUNTANTS  
BUSINESS CONSULTANTS





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# AGENDA

- New Form 5500 Reporting Requirements
- Form 5500 Red Flag Areas
- What is New This Year for the Audit of Employee Benefit Plans
- Fiduciary Liability Management Focus in Light of the New Requirements



# New Form 5500 Reporting Requirements

## Form 5500 Red Flag Areas

Stephanie J. Reagan, Partner  
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## WHAT TYPES OF RETIREMENT PLANS MUST FILE FORMS 5500/5500-SF?

- Profit sharing, 401(k), money purchase, defined benefit, ESOP, etc.
- Qualified and nonqualified deferred compensation plans
- Frozen plans
- ERISA 403(b) plans



## 403(B) PLANS EXEMPT FROM ERISA AND FORM 5500 FILINGS IF:

Deferral only 403(b) plan and is not “established by employer” if:

- Participation is completely voluntary & EEs can enforce contract
  
- ER’s involvement is limited to:
  - Letting investment vendors publicize their products
  - Requesting information
  - Receiving no direct/indirect compensation other than reasonable compensation to cover expenses
  - Summarizing or compiling information provided for EEs



## 403(B) PLANS EXEMPT FROM ERISA AND FORM 5500 FILINGS IF:

- ER's involvement is limited to: (cont.)
  - Collecting deferrals and paying to annuity contractors
  - Maintaining records
  - Reviewing plan compliance and correcting failures
  - Selecting annuity contractors - must afford EEs a reasonable choice (FAB 2010-01)

### FAB 2010-01

- Must afford EEs a reasonable choice - Generally, the plan must offer both:
  - (1) a choice of more than one vendor; and
  - (2) a choice of more than one investment product



# 403(B) PLANS EXEMPT FROM ERISA AND FORM 5500 FILINGS IF:

FAB 2010-01 (cont.)

- A single vendor plan frequently **will not** satisfy the safe harbor - exceptions:
  - An ER could limit the number of vendors to one if EEs can exchange their investments to another vendor under IRS regulations
  - A **small** ER may be able justify a single vendor if it can show that the increased administrative burdens in offering a number of vendors would cause the ER to terminate the Plan



# WHAT TAKES EMPLOYER OUT OF SAFE HARBOR - IF THE EMPLOYER:

- Authorizes transfers
- Processes distributions
- Satisfies QJSA rules
- Determines eligibility for:
  - Hardship distribution
  - QDRO
  - Loan
- Selects a TPA to make the discretionary determinations
- Refuses to include Vendor 403(b) products
- No reasonable choice...



# WHY PAY MORE ATTENTION TO 2009 FORM 5500 PLAN FILINGS?

- 2009 Form 5500s must be filed electronically!
  
- The **IRS**, **DOL** and the **Public** will have immediate access to detailed information about your plan
  
- Electronic filings more apt to trigger:
  - IRS and DOL audits
  - Participant lawsuits



# ERISA BENEFIT PLAN REPORTING

Forms 5500 (large plans) / 5500-SF (small plans)– Annual returns for retirement & welfare plans

- Due 7 months after plan year end, extension additional 2 ½ months
- Now electronically filed and immediately posted on DOL website
  - DOL, IRS & general public instant online access to filings, including:
    - ✓ Audit report
    - ✓ Plan direct and indirect expenses



# FORM 5500 COMPLIANCE

- Electronic filing emphasizes plan sponsor/fiduciary responsibilities to:
  - Prepare complete and accurate returns
  - Minimize filing errors
  - Minimize enforcement actions
- Top-hat plan exemption from Form 5500 filing
  - Nonqualified plans
  - 457(b) plans



# TOP-HAT PLAN EXEMPTION REGISTRATION STATEMENT

- A top-hat plan is generally unfunded and primarily for the purpose of providing deferred compensation for a select group of management or HCEs
- Provide the following to the U.S. Department of Labor - Employee Benefits Security Administration
  - The name and address of the employer
  - EIN of plan sponsor
  - Declaration that the plan is a top-hat plan
  - Number of such plans and employees in each
- File each year you adopt a new plan



# ELECTRONIC FILING – SIGNER CREDENTIALS

- See Appendix A for instructions
- The email address you use should be one you can easily access and monitor regularly
- Your filing credentials - User ID and PIN – you cannot share this with anyone, including a service provider - electronic signature has same legal force as hand signature
- User ID and pin code provided by the DOL should be PRINTED and KEPT in safe place



# NEW FORM 5500 SCHEDULE C REPORTING DETAIL OF PLAN EXPENSES

Must now report:

- Identifying info who received more than \$5,000 in total direct and **indirect** compensation
- Descriptions of the services performed and nature of compensation received
- Relation of the service provider to the plan sponsor or any party of interest
- Amount of total direct compensation



# NEW FORM 5500 SCHEDULE C REPORTING DETAIL OF PLAN EXPENSES

Must now report:

- Eligible indirect compensation (“EIC”) – certain fees or expense reimbursements – on next slide
- Total amount of indirect compensation that was not EIC
- Whether the service provider supplied a formula or other method for determining the amount of some or all of indirect comp



## NEW FORM 5500 SCHEDULE C REPORTING DETAIL OF PLAN EXPENSES

Examples of indirect compensation include:

- Fees and expense reimbursement payments received by a person from mutual funds, CCTs, PSAs, and other separately managed accounts in which the plan invests that are charged against the fund or account and reflected in the value of the plan's investment
- Management fees fund pays to investment advisor



# NEW FORM 5500 SCHEDULE C REPORTING DETAIL OF PLAN EXPENSES

Examples of indirect compensation include:

- Sub-transfer agency fees
- Shareholder servicing fees
- Account maintenance fees
- 12b-1 fees
- Other – such as finders fees, soft dollar revenue, float revenue, and brokerage commissions



# NEW FORM 5500 SCHEDULE C REPORTING DETAIL OF PLAN EXPENSES

- Requires that plan administrators identify each service provider that fails or refuses to provide information necessary to complete the form
- Requires reporting of gift, entertainment, and other non-monetary compensation
  - Must be tax deductible
  - Non-taxable to recipient
  - Valued at less than \$50
  - Aggregate value of gifts from one source less than \$100 in a calendar year
  - Can disregard gifts under \$10



## OTHER FORM 5500 CHANGES

- Sch. SB - Board of Actuaries will require actual (wet) signature
  - Will need to scan schedule and attach to filing
  - Need to also enter data electronically
- New Form 8955 – SSA - SSAs will be filed with the IRS – hard copy
  - Do not include with 5500 filing
  - Do not publicly disclose SSNs
  - Due date: Same as 5500 Extension: Form 5558
- New questions on Sch. H
  - Delinquent forwarding of loan repayments
  - Failure to provide any benefit due under plan
  - Blackout periods more than 3 business days



# FORM 5500 RED FLAG AREAS

- Form 5500 Line 5 & 6 Participant numbers for prior and current year - could indicate partial plan termination
  
- Line 8 Plan characteristics
  - ERISA 404(c) plan
  - Leased employees
  - Controlled group
  
- Sch. SB – underfunding very visible



# FORM 5500 RED FLAG AREAS

## ➤ Sch. C

- All plan expenses disclosed including indirect expenses and non-monetary compensation
- Termination of an actuary or plan auditor and reason

## ➤ Sch. H

- Total plan losses
- Expenses as a percentage of plan assets
- Type of audit opinion – qualified /adverse
- Part IV Compliance questions
  - ✓ Failure to remit contributions/loan repayments timely?  
If yes, complete Sch. G, Form 5330(s) & VFCP because of questions in the attachment to be answered



## FORM 5500 RED FLAG AREAS

Participant Contributions Transferred Late to Plan	Total that Constitute Nonexempt Prohibited Transactions			Total Fully Corrected Under VFCP and PTE
Check here if Late Participant Loan Repayments are included: <input type="checkbox"/>	Contributions Not Corrected	Contributions Corrected Outside VFCP	Contributions Pending Correction in VFCP	2002–51



# FORM 5500 RED FLAG AREAS

Sch. H

- Part IV Compliance questions
  - Prohibited transactions? Fill out Sch. G
  - Fidelity bond?
  - Loss from Fraud or dishonesty?
  - List of assets held for investment, any nonreadily ascertainable valued assets?
  - Failed to provide benefits when due?
  - Blackout period? Provide required notice? \$100/day per participant penalty for failure to provide notice



# What is New This Year for the Audit of Employee Benefit Plans

Catrina Blackwell, Partner  
Moss Adams LLP



## FASB Statement No. 168 (codification)

- Effective for periods ending after 9/15/09
- FASB Accounting Standards Codification (ASC) became source of authoritative U.S. accounting and reporting standards
- FASB ASC superseded all existing accounting standards
- Intended to simplify accounting research
- Not intended to change GAAP
- Change in references in footnotes



## FASB Statement No. 165 (ASC 855) *Subsequent Events*

- Effective for periods ending after 6/15/09
- Establishes general standards of accounting for and disclosure of subsequent events
- Update of subsequent events up through issuance
- Additional Subsequent Event footnote includes language:
  - *“The Plan has evaluated subsequent events through May 4, 2010, which is the date the financial statements were issued.”*



## FSP FAS 157-4 (ASC 820-10)

- Disclosure of FASB Statement No. 157 information by major security types
- Further disaggregation of FASB No. 157 disclosures to provide enhanced transparency
  - Equity securities (segregated by industry, company size, or investment objective)
  - Debt securities (segregated by US, states and foreign governments)
  - Mortgage-back securities (segregated by residential and commercial)
  - Collateralized debt vs. other debt obligations



## *SAS 115 Communicating Internal Control Related Matters Identified in an Audit*

- Contains revised definitions of the terms material weakness and significant deficiency
- Revises the list of deficiencies in internal control that are indicators of material weakness.
- Will change written communication to management and those charged with governance of material weaknesses and significant deficiencies
- Effective for periods ending on or after 12/15/09



## Form 5500 – Changes to Schedule C

### ➤ Audit Impact

- Schedule C will not balance to Schedule H
- Auditors will review Schedule C to see if it is consistent with financial statements
- Are expenses paid in accordance with plan document?
- Are expenses paid from the Plan appropriate based on plan document and ERISA?
- Plan paying disallowable expenses = operational error or prohibited transaction
- Will be communicated in SAS 115 letter



## Form 5500 – Changes to Schedule R

- Audit impact
  - Minimal
  - Auditor may want to review new questions on ESOP's, single employer plans and multi-employer plans



## Form 5500 – Electronic filing

- Audit impact
  - Timing and coordination between auditor and plan sponsor is critical to meet filing deadlines
    - Cannot leave to last minute
    - Expect difficulties
  - Plan administrator and/or plan sponsor must have electronic filing credentials
  - Auditor's will not be doing anything with the EFAST system
  - Plan sponsor must attach a PDF version of the financial statements to the 5500 filing
  - DOL will know immediately if no auditor's report is attached
  - Filings posted by DOL to Public Disclosure Website



# Fiduciary Liability Management Focus in Light of the New Requirements

Stuart Hack, JD, CLU, Partner  
Sunlin Consulting



## NEW FACTORS THAT HAVE HEIGHTENED EXPOSURE

- Electronic filing of Form 5500
- Performance of Target Date funds and other QDIA's in the recession
- DOL audits
- Class action lawsuits alleging excessive plan expenses
- Congress and DOL interest in expense disclosure
- Increased IRS audits
- Investment performance in participant-directed accounts during the "recession"



## ERISA 404 (a)

- Imposes a “prudent man standard of care” for qualified plan fiduciaries.
  
- For the exclusive purpose of:
  - providing benefits to participants and their beneficiaries; and
  
  - defraying reasonable expenses of administering the plan;



## ERISA 404 (a)

- With the care, skill, prudence, and diligence
  - that a prudent man acting in a like capacity and familiar with such matters
  - would use in the conduct of an enterprise of a like character and with like aims;
  
- By diversifying the investments of the plan
  - so as to minimize the risk of large losses,
  - unless under the circumstances it is clearly prudent not to do so; and..."



## PLAN FIDUCIARY; ANYONE WHO

- Exercises control or authority over the management of the plan or the plan's assets;
- Provides investment advice for a fee; or
- Has discretionary authority over the plan's administration



# MOST COMMON FIDUCIARIES

- Plan sponsor
- Administrative and investment committees and their individual members
- Compensation committees and board members on the committees, individually
- Members of the Board who appoint committee members



# COMMON LAWSUIT ALLEGATIONS

- Excessive investment fees
- Expenses charged to participant accounts unreasonable
- Failure to monitor investments resulting in lost investment earnings
- Excluding eligible participants



## DOL AUDIT ISSUES

- Investment Policy and monitoring documentation
- ERISA 404(c) compliance – please also see Appendix B for list of most common 404(c) compliance failures
- Late deferral remittances & loan repayments



# HOW TO MANAGE EXPOSURE (BEST PRACTICES)

- Periodically evaluate management of exposure
  - 404(c) compliance to avoid responsibility for results of participant investment allocations
  - 404(a) investment selection and monitoring
  - Plan expenses
  - Selection and monitoring of service providers
  - Documentation of decisions and criteria



# HOW TO MANAGE EXPOSURE (BEST PRACTICES)

- Allocate plan responsibilities and document accountability
  - see Plan Governance Review Worksheet in Appendix B
  
- Outsource duties that exceed expertise of committees
  
- Document, Document, Document



# Fiduciary Liability Management Focus in Light of the New Requirements (cont.)

R. Murray McBride, Partner  
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# KEY FIDUCIARY INVESTMENT RESPONSIBILITIES

- Prepare written Investment Policy Statements
- Document investment decisions
- Use “Prudent Experts” to make specific investment decisions
- Diversify assets with respect to specific risk/return objectives
- Monitor activities of money managers
- Monitor and control expenses
- Avoid conflicts of interest



# INVESTMENT POLICY STATEMENT

- Statement of purpose
- Investment objectives
- Roles and responsibilities
- Allowable asset categories
- Criteria for selection & monitoring of fund managers
- Default Fund
- Benchmarks



# SELECTION & MONITORING CRITERIA

- General parameters
- Performance
- Risk Profile
- Style consistency



## SELECTION & MONITORING CRITERIA

Fund Name	Fidelity Contrafund	Fidelity Leveraged Co Stock	Baron Growth	Royce Low Priced Stock	Fidelity Div International
Asset Category	Large Growth	Mid Blend	Small Growth	Small Value	Foreign Stock
Morningstar Equity Style	Large Growth	Mid Value	Mid Growth	Small Growth	Large Growth
Morningstar Fixed Income Style	-	-	-	-	-
Morningstar Rating	★★★★★★	★★★	★★★★★★	★★★	★★★★★
<b>Performance</b>					
Trailing 1, 3 and 5-year Portfolio Returns in top 50% of portfolio's peer group	Satisfactory	Weak 4Q08	Satisfactory	Marginal	Marginal
Moving 5-year returns in top 50% 4 out of 5 periods	Satisfactory	Satisfactory	Satisfactory	Marginal	Satisfactory
Fund Performance beats benchmark over 3 and 5-year periods	Satisfactory	Weak 4Q08	Satisfactory	Weak 4Q08	Marginal
1 year return not in bottom quartile	Satisfactory	Weak 4Q08	Satisfactory	Weak 4Q08	Satisfactory



## SELECTION & MONITORING CRITERIA

Fund Profile					
At least 3 years of investment performance	Satisfactory	Satisfactory	Satisfactory	Satisfactory	Satisfactory
At least 3 years with current fund manager	Satisfactory	Satisfactory	Satisfactory	Satisfactory	Satisfactory
Assets > \$100 million	Satisfactory	Satisfactory	Satisfactory	Satisfactory	Satisfactory
Total Fund Operating Expenses below median in category	Satisfactory	Satisfactory	Satisfactory	Marginal	Satisfactory
Risk Profile					
Alpha in top 50% versus peer group	Satisfactory	Satisfactory	Satisfactory	Satisfactory	Satisfactory
Sharpe Ratio of Fund in top 50% relative to peer group	Satisfactory	Satisfactory	Satisfactory	Satisfactory	Satisfactory
Standard Deviation of Fund < 150% Standard Deviation of Benchmark	Satisfactory	Marginal	Satisfactory	Satisfactory	Satisfactory
Beta within range of 0.8 to 1.2	Satisfactory	Weak 4Q07	Marginal	Satisfactory	Satisfactory
Risk Return plot not in bottom right of scattergram	Satisfactory	Weak 4Q08	Satisfactory	Weak 4Q08	Satisfactory



# SELECTION & MONITORING CRITERIA

Style Consistency					
Adheres to Stated Fund Objectives	Satisfactory	Marginal	Marginal	Marginal	Satisfactory
Status					
Overall Status	Satisfactory	Watch 4Q08	Satisfactory	Satisfactory	Satisfactory
Action	Retain	Mid Year Review	Retain	Retain	Retain
Key					
Meets/Exceeds Criteria					
Average or Minor Violation					
Significant Violation	In those cells with a red flag, the date is the date first flagged.				



# DEFAULT FUND

- Qualified Default Investment Alternative
  - Fiduciary protection
- Types of fund
  - Target Date funds
  - Single balanced fund
  - Managed accounts
- Administrative requirements
  - Initial & annual notices
  - Participant ability to move assets out
  - Monitoring



# APPENDIX A



# ELECTRONIC FILING – SIGNER CREDENTIALS

- Go to [efast.dol.gov](http://efast.dol.gov)
- Click on “Register”
- Read Privacy Stmt then check “acceptance” tab
- Enter Register Profile Information including email address – s/b one you can easily access and monitor regularly



# ELECTRONIC FILING – SIGNER CREDENTIALS

- Select “filing signer” then next
- Registration Confirmation page click OK
- DOL will send email with link to receive your filing credentials - User ID and PIN
- Click on the link to “Register – Challenge Verification Page” answer challenge question then click “next”
- “Register – Pin Agreement” where you will agree not share this with anyone (including service provider) Click “acceptance agreement”



## ELECTRONIC FILING – SIGNER CREDENTIALS

- On next page: “register – Signature Agreement” - Click “acceptance agreement” - Electronic signature has same legal force as hand signature
- Next page “Register – Finalize” the DOL provides you with your user ID and pin code –**PRINT THIS PAGE**
- Next page “Register –Password” you select 10-16 character password which allows you to access User ID and pin code. Click “save”. Last page “Register – Confirmation” - you are done!



# APPENDIX B



## MOST COMMON 404(c) GAPS

- Failure to name the fiduciaries responsible for:
  - Providing investment information
  - Receiving and carrying out participant investment directions
- Failure to designate “core” investment options
- Failure to have a process to select and monitor investment classes for participant investment allocations



# Plan Governance Review Worksheet

TASKS	PLAN SECTION	RESPONSIBLE PARTY	COMMENTS <i>(including summary of findings vs. best practices and recommended changes)</i>
Review of plan design, changes in the law and design amendments			
Identification of eligible employees, enrollment			
Determination of eligible compensation for deferrals, employer contributions & testing			
Managing discrimination testing compliance – 410(b), 401(a)(4), 401(k)&(m), 415			
Managing plan distributions, including compliance with required minimum distribution rules			



# Plan Governance Review Worksheet

<b>TASKS</b>	<b>PLAN SECTION</b>	<b>RESPONSIBLE PARTY</b>	<b>COMMENTS</b> <i>(including summary of findings vs. best practices and recommended changes)</i>
Monitoring plan expenses			
Managing plan loans			
Selecting fiduciaries			
Educating fiduciaries			
Monitoring fiduciary performance			
Developing an investment policy or strategy			
Selecting investment options and monitoring investment performance			



# Plan Governance Review Worksheet

TASKS	PLAN SECTION	RESPONSIBLE PARTY	COMMENTS <i>(including summary of findings vs. best practices and recommended changes)</i>
Developing a participant investment “advice” program			
Managing a program for participant communications, required disclosure material and education			
Assuring 404(c) compliance			
Managing vendors			
Managing company stock funds			
Other			