

FAQs about Reporting Delinquent Participant Contributions on the Form 5500



What is the purpose of this FAQ guidance?

The purpose of these FAQs is to provide guidance to plan administrators and accountants on complying with the requirements of the 2003 Form 5500 Annual Return/Report of Employee Benefit Plan for reporting delinquent participant contributions on Line 4a and Line 4d of the Schedules H and I.

What were the Form 5500 reporting requirements for delinquent participant contributions prior to plan year 2003?

Since 1995, the Employee Benefits Security Administration (EBSA) has pursued an aggressive enforcement project intended to safeguard employee contributions to 401(k) plans and health care and other welfare plans by investigating situations in which employers delay in forwarding participant contributions to employee benefit plans.

As part of that effort, plan administrators who are required to file Form 5500 financial information on a Schedule H (large plans) or Schedule I (small plans) must report on Line 4a of the schedule whether an employer failed to transmit to the plan any participant contributions within the time period set forth in the Department's plan asset regulation at 29 CFR § 2510.3-102. Under the regulation, amounts paid by a plan participant or beneficiary or withheld by an employer from a participant's wages for contribution to a plan are plan assets on the earliest date that they can reasonably be segregated from the employer's general assets, but in no event later than (i) for pension plans, the 15th business day of the month following the month in which the participant contributions are withheld or received by the employer and (ii) for welfare plans, 90 days from the date on which such amounts are withheld or received by the employer.

Also, when an employer is delinquent in forwarding participant contributions and holds them commingled with its general assets, the employer will have engaged in a nonexempt prohibited transaction under ERISA section 406. Line 4d on the Schedule H and Schedule I required plan administrators to report delinquent participant contributions as nonexempt prohibited transactions unless the requirements for the DOL Voluntary Fiduciary Correction Program (VFCP) were met, and the conditions of PTE 2002-51 were satisfied. Plans filing Schedule H that report nonexempt prohibited transactions on Line 4d also are required to file a Schedule G to report detailed information regarding the nonexempt prohibited transactions.

What improvements were made in the 2003 Form 5500 instructions regarding reporting of delinquent participant contributions?

The Department received comments that these reporting rules required many plans to include essentially the same information regarding delinquent participant contributions on Line 4a, Line 4d and Schedule G. Accordingly, in order to avoid unnecessary, duplicative reporting, the Department improved the requirements beginning with the 2003 Form 5500.

Beginning with the 2003 Form 5500, information on delinquent participant contributions reported on Line 4a is no longer also reported on Line 4d or Schedule G. This will simplify reporting of information on delinquent participant contributions. It does not, however, change the fact that all delinquent participant contributions required to be reported on Line 4a, except those for which the DOL VFCP requirements have been met and the conditions of PTE 2002-51 have been satisfied, are nonexempt prohibited transactions.

Does this require IQPAs to change the way they audit delinquent participant contributions?

No. In the case of employee benefit plans subject to an annual audit requirement under ERISA, an independent qualified public accountant (IQPA) conducts an audit of the plan in accordance with generally accepted auditing standards (GAAS) for purposes of rendering an opinion on whether the plan's financial statements are presented fairly in conformity with generally accepted accounting principles (GAAP). The supplemental schedules referenced in ERISA section 103(a)(3)(A) and 29 CFR §§ 2520.103-1(b) and 2520.103-2(b), including information regarding nonexempt prohibited transactions, are also subject to the IQPA's auditing procedures applied in the audit of the plan's basic financial statements, and the IQPA expresses an opinion on whether the scheduled information is presented fairly in all material respects in relation to the basic financial statements taken as a whole. The IQPA's audit report and opinion is made part of the plan's annual report as required by section 103(a)(1)(A) of ERISA.

The 2003 Form 5500 instructions state that delinquent participant contributions reported on Line 4a should be treated as part of the supplemental schedules for purposes of reporting on the plan's financial statements by the IQPA. The instructions also advise that if the information contained on Line 4a is not presented in accordance with the Department's regulatory requirements, the IQPA report must make the appropriate disclosures in accordance with GAAS.

These instructions were not intended to change or reduce the IQPA audit and reporting responsibilities. Rather, the cautions were provided to make certain that the plan continues to include delinquent participant contributions in its financial statements and supplemental

schedules and that the IQPA's report covers the delinquent contributions even though they are no longer required to be included on Line 4d or on the Schedule G.

What disclosure will satisfy the requirement that the information on Line 4a must be treated by plans subject to the audit requirement as part of the supplemental schedules for purposes of the IQPA report and opinion?

The requirement may be satisfied by including an attachment in the Form 5500 report labeled "Line 4a -- Schedule of Delinquent Participant Contributions" that sets forth the information on Line 4a regarding total aggregate delinquency for the plan year and the subtotal that constitutes nonexempt prohibited transactions. As noted above, in calculating this subtotal, plan administrators and IQPAs should understand that all delinquent participant contributions required to be reported on Line 4a are nonexempt prohibited transactions unless the delinquency has been corrected under the VFCP and the conditions of PTE 2002-51 have been satisfied. Further, the IQPA's report must include a statement on whether Line 4a and the scheduled information are presented fairly in all material respects in relation to the basic financial statements taken as a whole.

Has the Department developed a model for the Line 4a Schedule of Delinquent Participant Contributions that plan administrators and IQPAs can use?

Yes. The schedule could use the format set forth below or a similar format on the same size paper as the Form 5500.

2003 Form 5500 Line 4a - Schedule of Delinquent Participant Contributions

Participant Contributions transferred Late to Plan	Total that Constitute Nonexempt Prohibited transactions
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Although not required, plan administrators may want to include information regarding the extent to which the delinquencies have been corrected under the VFCP for which the conditions of PTE 2002-51 have been satisfied, delinquencies otherwise corrected, and uncorrected delinquencies. In those cases, the schedule could use the format set forth below:

2003 Form 5500 Line 4a - Schedule of Delinquent Participant Contributions

Participant Contributions transferred Late to Plan	Total that Constitute Nonexempt Prohibited transactions			Total Fully Corrected Under VFCP and PTE 2002-51
	Contributions Not Corrected	Contributions Corrected Outside VFCP	Contributions Pending Correction in VFCP	

What disclosure is required if the IQPA determines that the Line 4a information is not presented in accordance with DOL's regulatory requirements?

As with any other information required to be presented on supplemental schedules, when the auditor concludes that the scheduled information required by Line 4a does not contain all the required information or contains information that is inaccurate or is inconsistent with the plan's financial statements, the auditor must consider, depending on the nature of the problem and the type of information, either modifying his or her report by adding a paragraph to disclose the omission of the information, or expressing a qualified or an adverse opinion on the supplemental schedules, as appropriate. See **AICPA Audit and Accounting Guide for Audits of Employee Benefit Plans** at paragraphs 13.09 through 13.19.

Must all delinquent participant contributions be reported on Line 4a or only those that are nonexempt prohibited transactions?

Schedule H and Schedule I filers must report all delinquent participant contributions for the plan year on Line 4a regardless of whether they have been corrected under the VFCP and the conditions of PTE 2002-51 have been satisfied.

Must delinquent participant contributions continue to be reported on Line 4a for every year until they are corrected?

If participant contributions were transmitted to the plan late during Year 1, and the violation was not corrected until sometime during Year 2, the total amount of the delinquent contributions should be included on Line 4a of the Schedule H or I for Year 1 and should be carried over and reported again on Line 4a of the Schedule H or I for each subsequent year until the year after the violation is corrected.

Are there any circumstances where delinquent participant contributions still should be reported on Line 4d or Schedule G?

Delinquent participant contributions must be reported on Line 4a and should not be reported on Line 4d or Schedule G.

What prohibited transactions result from an employer being delinquent in forwarding participant contributions to the plan?

With respect to the prohibited transaction provisions of ERISA section 406, the employer of employees covered by the plan is a party in interest with respect to the plan under ERISA section 3(14)(C). The failure to segregate and forward participant contributions to a plan from the general assets of the employer in the time frames prescribed by 29 CFR § 2510.3-102 would result in a prohibited use of plan assets in violation of section 406(a)(1)(D) of ERISA. Similarly, because an employer who retains plan assets commingled with its general assets would be a fiduciary with respect to those assets pursuant to ERISA section 3(21)(A)(i), any

actions taken by the employer with respect to the participant contributions that become plan assets, other than the actual contribution of such assets to the employee benefit plan's trust or the actual payment of welfare benefits for employees, would be a violation of ERISA section 406(b)(1) and (2).

Although the failure to forward participant contributions in a timely fashion would not, in itself, constitute an extension of credit between the plan and the employer in violation of section 406(a)(1)(B), depending on the particular facts and circumstances, a separate arrangement, agreement or understanding to extend credit to pay the delinquent amounts to the plan could occur that would give rise to a violation of section 406(a)(1)(B). Such arrangement, agreement or understanding could be express or implied. For example, a fiduciary's consistent failure to exercise diligence in its collection efforts regarding participant contributions may serve as the basis to assert that an implied understanding existed to extend credit between the fiduciary and the employer.

Can delinquent transmittal of participant loan repayments be included on Line 4a, or must they be reported as nonexempt prohibited transactions on Line 4d and Schedule G?

In Advisory Opinion 2002-02A, the Department stated that participant loan repayments paid to or withheld by an employer for purposes of transmittal to an employee benefit plan are sufficiently similar to participant contributions to justify, in the absence of regulations providing otherwise, the application of principles similar to those underlying the participant contribution regulation for purposes of determining when such repayments become assets of the plan. Delinquent forwarding of participant loan repayments is eligible for correction under the VFCP and PTE 2002-51 on terms similar to those that apply to delinquent participant contributions. Accordingly, the Department will not reject a 2003 Form 5500 report based solely on the fact that delinquent forwarding of participant loan repayments is included on Line 4a of the Schedule H or Schedule I. Filers that choose to include such participant loan repayments on Line 4a must apply the same supplemental schedule and IQPA disclosure requirements to the loan repayments as apply to delinquent transmittals of participant contributions.

Who should I contact if I need more information or if I have additional questions?

Questions concerning this guidance may be directed to the EFAST Help Line at 1-866-463-3278, Monday through Friday from 8:00 am to 8:00 pm, Eastern Time.