





NATIONAL INSTITUTE *of* PENSION ADMINISTRATORS

2013 NAFE

Form 5330
 Tuesday, April 30, 2013
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What is Form 5330?

- Return of Excise Taxes Related to Employee Benefit Plans
- Filed by person liable for the tax
 - Not the plan itself
 - Generally the employer

Form 5330 (Rev. April 2009) Department of the Treasury Internal Revenue Service	Return of Excise Taxes Related to Employee Benefit Plans (Under sections 4965, 4971, 4972, 4973(a)(3), 4975, 4976, 4977, 4978, 4979, 4979A, 4980, and 4980F of the Internal Revenue Code)	OMB No. 1545-0575
Filer tax year beginning _____ and ending _____		
A Name of filer (see instructions) Number, street, and room or suite no. (If a P.O. box or foreign address, see instructions) City or town, state, and ZIP code		B Filer's identifying number (see instructions) Employer identification number (EIN) Social security number (SSN)
C Name of plan		E Plan sponsor's EIN
D Name and address of plan sponsor		F Plan year ending (MM/DD/YYYY)
H If this is an amended return, check here <input type="checkbox"/>		G Plan number

Due 7 months after end of ER tax year

1. Code §4972 10% tax on nondeductible contributions (Schedule A)
2. Code §4973(a)(3) 6% tax on excess annual additions to 403(b) custodial account (Schedule B)
3. Code §4975 tax on prohibited transactions
 - A. 15% initial penalty (Schedule C)
 - B. 100% failure to correct
4. Code §4976 100% tax on disqualified funded welfare benefit plan
5. Code §4978 10% tax on certain ESOP dispositions
6. Code §4979A 50% tax on certain ESOP allocations

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Due 8 ½ months after end of plan year

- Lines 8 – 10 all relate to funding issues
- Deadline is the later of the last day of the 7th month after the end of the employer's tax year or 8½ months after the last day of the plan year that ends within the filer's tax year
- Schedules D, E, and F
- Penalty if contribution is not made within 8½ months to the DB plan
 - Can apply to IRS to get funding waived based on substantial business hardship
 - 10% excise tax if funding is not met or do not get waiver
- Other plans may have fixed contribution but no minimum funding penalty
 - But IRS may disqualify plan for failing to follow terms

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Due July 31 after fringe benefits paid

- Code §4977 30% tax on excess fringe benefits
 - Complete Schedule G

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

15 months after end of plan year

- Code §4979 10% penalty on failure to distribute excess contributions or excess aggregate contributions within 2½ months
 - ADP/ACP corrections
 - Complete Schedule H
 - Example: Plan corrects ADP failure for calendar year 2012 by distributing \$1000 excess contributions + \$60 interest by August 1, 2013
 - Tax is \$100 (10% X \$1000)
 - Due date is March 31, 2014

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

- Code §4980 reversion tax
 - Schedule I
 - Reversion: returning excess DB assets to employer
 - Subject to ordinary income tax
 - Also subject to 50% reversion penalty
 - Can reduce to 20% if:
 - 25% of surplus transferred to replacement plan or
 - 20% of surplus allocated to participants
 - In bankruptcy
 - Exemption for plans of tax-exempt organizations
- Code §4980F \$100/person/day penalty for failure to provide notice of amendment reducing future accruals under ERISA 204(h)
 - Schedule J

- Code §4965 \$20,000 penalty for entity manager engaging in prohibited tax shelter transaction
- The Tax Increase Prevention and Reconciliation Act of 2005 provides that an entity manager of a tax-exempt organization may be subject to an excise tax on prohibited tax shelter transactions under section 4965. In the case of a plan entity, an *entity manager* is any person that approves or otherwise causes the tax-exempt entity to be a party to a prohibited tax shelter transaction. The excise tax is \$20,000 and is assessed for each approval or other act causing the organization to be a party to the prohibited tax shelter transaction.

6 month extension possible for all of these

- File 5558

Part III Extension of Time To File Form 5330 (see instructions)

4 I request an extension of time until ____/____/____ to file Form 5330.
You may be approved for up to a 6 month extension to file Form 5330, after the normal due date of Form 5330.

a Enter the Code section(s) imposing the tax ▶

a

b Enter the payment amount attached ▶

b

c For excise taxes under section 4980 or 4980F of the Code, enter the reversion/amendment date . . . ▶

c

5 State in detail why you need the extension:

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Under penalties of perjury, I declare that to the best of my knowledge and belief, the statements made on this form are true, correct, and complete, and that I am authorized to prepare this application.

Signature ▶

Date ▶

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Penalties

- Late filing: 5% of amount due per month (maximum 25%)
- Late payment: 0.5% of amount due per month (maximum 25%)

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Signature block

- Signed by person or entity liable for tax
 - Generally the employer
- Signed by person preparing return
 - MUST include PTIN
 - Do not need special tax status to prepare
 - Unenrolled preparer who signs return can represent taxpayer at audit of that return

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Nondeductible contributions

- Nondeductible amounts carried forward
 - Deductible in future years subject to limitations for those years
 - Example:
 - Calendar plan and tax year; PS plan
 - In each year, total participant comp = \$1,000,000; deduction limit = \$250,000
 - In 2011, ER contributes \$300,000
 - \$50,000 nondeductible in 2011
 - In 2012, ER contributes \$150,000
 - ER can deduct \$200,000 in 2012
- ER can deduct unused nondeductible contributions after plan terminates
 - Deduction limit = 25% of the comp of EEs who benefited under plan in its last 12 months

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Nondeductible contribution penalty

- Excise tax = 10% of nondeductible contribution
 - Excise tax is nondeductible
- Amount based on sum of:
 - Current year's ER contribution – Amount deductible under 404 +
 - Prior year's carryforward – (Amount returned to ER + Amount deductible under 404)
- Report and pay tax on Form 5330

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Exceptions to excise tax

- Tax-exempt organization
 - Must not be subject to unrelated business income tax
- Governmental ER
- Self-employed individual contributes minimum funding even though it exceeds earned income
- Self-employed individual insurance premiums if otherwise deductible
- Matching contributions which would cause plan to go over 404(a)(7) limit
- SIMPLE IRA contributions for domestic workers

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Can plan return nondeductible contributions?

- Only if:
 - Failure to initially qualify,
 - IRS acknowledged failure to be deductible,
 - Actuary may be able to certify for de minimis amounts
 - No IRS procedure for DC plan
 - Mistake of fact,
 - Nondeductibility isn't mistake of fact
 - Multiemployer plan: mistake of law or return of withdrawal liability payment
- Deadline to avoid penalty: Last day of deduction grace period

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Prohibited transaction rules

- Designed to prevent plan fiduciaries from causing plan to engage in transactions which involve a possible conflict of interest
 - Plan could get hurt by such transactions
 - Not required that plan suffer actual harm for transaction to be prohibited
- Code §4975 and ERISA contain PT rules
 - Similar but not identical rules
 - Code addresses transactions with “disqualified persons” and ERISA with “parties in interest”
 - We’ll focus on tax rules

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Who and what

- PT rules require identification of the plan's disqualified persons (WHO)
- Also must identify the transactions which are prohibited (WHAT)
 - Direct and indirect transactions are covered
 - Cannot escape using a "straw-person/entity"
- If transaction is prohibited, possible escape if exemption
- If not, and transaction goes ahead, the disqualified person must pay excise tax under §4975 and a plan fiduciary must "unwind the transaction"
 - Failure to unwind results in additional excise tax and possible fiduciary sanctions
 - Generally IRS will not disqualify the plan; is a tax/fiduciary issue

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

WHO (are disqualified persons)

- Plan fiduciaries
- Plan service providers
- Employer sponsoring the plan
- Employee representative (e.g., union) of EEs covered by plan
- 50% or more owner of employer or EE representative; attribution rules apply
- Family member (spouse, ancestor, lineal descendant and spouse of lineal descendant) of fiduciaries, service providers, employer, or 50% owner
- Corporation, partnership, trust or estate which is 50% or more owned by fiduciary, service provider, employer, employee organization or "50% owner"; attribution rules apply
- Officers, directors, 10% or more owners or HCEs (meaning earning 10% or more of annual wages paid by ER) of employer, employee organization, "50% owner" or "50% owned entity"
- 10% or more partners of employer, employee organization, "50% owner" or "50% owned entity"

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Ownership Attribution

- I am deemed to own my pro rata share of stock held by corporation, partnership, estate, or trust. No threshold.
- I am deemed to own stock held by:
 - My wife
 - My descendants
 - My ancestors
 - Spouse of descendants
 - My partner!

These are the
broadest
attribution rules

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

WHAT (is prohibited)

- Sales, exchanges, leases of property
- Loans or other extensions of credit
- Furnishing goods, services, facilities
- Transfer to, use by a disqualified person of plan assets or income
- Fiduciary self-dealing or “kickbacks”
 - **Act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or**
 - Receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Nature of prohibition

- Intent of parties and economic outcome of the transaction to either the plan or the other parties not relevant
 - It doesn't matter that the plan wasn't hurt
 - It doesn't matter that the plan got a good deal
- Example:
 - Company owner serves as trustee and takes a \$1000 fee from the plan for doing so
 - Fee is reasonable
 - It doesn't matter: It is self-dealing

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

PT correction

- Undo the transaction to the extent possible
 - Not put plan in worse position than if transaction did not occur, applying highest fiduciary standards
- Correction depends on transaction type
 - Rescind a sale, terminate a lease, pay-back a loan
- Sometimes correction may result in another separate PT
 - In some cases, DOL says these corrections are exempt

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Excise tax calculation

- Initial tax is 15% of “amount involved”
 - Applies to each year or partial year the transaction is in place; taxable year of the disqualified person
 - “Amount involved” depends on transaction type
 - Sale: is greater of sale price or Fair Market Value (FMV)
 - Loan/lease: is greater of FMV interest or rent OR interest/rent paid
 - Late deferral deposit: fair market interest for use of the \$; use §6621(a) underpayment rate
 - Continuing transactions (loans, leases) create new PT each year resulting in pyramiding of excise tax
- 100% tax on amount involved if PT uncorrected
 - Can abate 100% tax if corrected within 90 days after IRS gives notice as to 100% tax; 15% tax cannot be reduced

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Calculation of excise tax/correction

- On 10/01/13, plan X loaned corporation X \$50,000
- At the time of the loan, fair market value loan interest rate was 8%
- Plan made the loan to X at an interest rate of only 5%
- On 3/31/15, X repaid the loan, plus interest of \$3,750
- On 1/01/15, fair market value of the loan interest rose from 8% to 9%
- *Compute the excise tax by completing Form 5330 for 2013, 2014 and 2015 with respect to the prohibited loan transaction*

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

2013 (Form 5330 Sch. C — Tax on Prohibited Transactions)

Transaction Number	Date of transaction	Description	Amount Involved	Initial tax on PT
(i)	10-1-13	Loan	\$1,000	\$150
(ii)				
(iii)				
Tax due – Add amounts in column (d)				\$150

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

2014 (Form 5330 Sch. C — Tax on Prohibited Transactions)

Transaction Number	Date of transaction	Description	Amount Involved	Initial tax on PT
(i)	10-1-13	Loan	\$1,000	\$150
(ii)	1-1-14	Loan	\$4,000	\$600
(iii)				
Tax due – Add amounts in column (d)				\$750

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

2015 (Form 5330 Sch. C — Tax on Prohibited Transactions)

Transaction Number	Date of transaction	Description	Amount Involved	Initial tax on PT
(i)	10-1-13	Loan	\$1,000	\$150.00
(ii)	1-1-14	Loan	\$4,000	\$600.00
(iii)	1-1-15	Loan	\$1,125	\$168.75
Tax due – Add amounts in column (d)				\$918.75

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Employee contribution deadlines

- Employee contributions become plan assets on “the earliest date on which such contributions can reasonably be segregated from the employer’s general assets” (ASAP)
 - Safe harbor for plans with fewer than 100 participants on first day of plan year: 7 business days after payday
 - 80/120 rule for Forms 5500 does NOT apply to safe harbor
 - No safe harbor for large plans
 - Large plan can probably get contribution in faster (we’ve seen DOL auditors enforce 3-5 days)
- Absolute deadline:
 - General: 15th business day of following month
 - SIMPLE IRA: 30th day of following month
 - Welfare plan: 90 days after receipt or withholding
- Also applies to participant loans

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Correcting late deferrals

- Repay deferrals (and loan repayments)
- Calculate and pay lost earnings
 - If lost earnings not paid at time deferrals repaid, must pay lost earnings on lost earnings
- Pay prohibited transaction excise tax
- Report late deferrals on Form 5500



2 0 1 3 N I P A A N N U A L F O R U M & E X P O

<http://www.dol.gov/ebsa/calculator/main.html>

- IRS interest rates posted on DOL website
 - Used in computing lost earnings
- Used in DOL calculator

Start	End	Rate
4/1/2001	6/30/2001	8%
7/1/2001	12/31/2001	7%
1/1/2002	12/31/2002	6%
1/1/2003	9/30/2003	5%
10/1/2003	3/31/2004	4%
4/1/2004	6/30/2004	5%
7/1/2004	9/30/2004	4%
10/1/2004	3/31/2005	5%
4/1/2005	9/30/2005	6%
10/1/2005	6/30/2006	7%

Start	End	Rate
7/1/2006	12/31/2007	8%
1/1/2008	3/31/2008	7%
4/1/2008	6/30/2008	6%
7/1/2008	9/30/2008	5%
10/1/2008	12/31/2008	6%
1/1/2009	3/31/2009	5%
4/1/2009	12/31/2010	4%
1/1/2011	3/31/2011	3%
4/1/2011	9/30/2011	4%
10/1/2011	6/30/2013	3%

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Late Deposits

- Online calculator tailor made for late deposits
- No need to go back and compute earnings participant by participant
- **Theory:** Calculator available only for VFCP
- **Practice:** Calculator good enough for some DOL investigators
 - Small % of late deferrals use VFCP
 - Difference between calculator and computation under old rules very small

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Examples

- SmallCo 3 months late in depositing \$10,000 deferrals
 - Calculator says interest = \$180
 - SmallCo deposits \$10,180, doesn't file VFCP
 - Has to file 5330 and pay about \$27 penalty tax
 - DOL audits
 - Says SmallCo must compute actual loss = \$300
 - SmallCo must deposit additional \$120
 - SmallCo potentially liable for \$24 penalty
- But, if BigCo is 3 months late depositing \$500,000, VFCP could be worth it (could save \$8,550)

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Late deposit is a PT (prohibited transaction)



- DOL treats late deposit as “transfer to, or use by or for the benefit of a party in interest, of any assets of the plan”, a prohibited transaction
- PTE 2002-51: No prohibited transaction if file VFCP submission and:
 - repay late deferrals within 180 days
 - provide notice to interested parties within 60 days of the submission, and
 - the employer has not sought this relief within the last 3 years
- Otherwise, file Form 5330 and pay prohibited transaction excise tax

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

PT tax: 15% of “amount involved”

- Example: Employer 1 month late in depositing \$60,000.
- Reasonable interest rate = 5%
 - IRS deficiency rate on date of failure works here: Rev. Rul. 2006-38
 - But it’s simple interest with annual changes
 - So you can’t use calculator
- Amount involved for “use” of money = $5\% \times \$60,000 \times \frac{1}{12} = \250
- PT Tax = \$38 ($250 \times 15\%$) if corrected during same year
- Price rises if error continues beyond end of year

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Amount involved for 3 year PT

- Company fails to deposit \$10,000 on March 1, 2010
 - Company corrects error March 31, 2012

Date	Principal	Rate	Time	Amount Involved
3/1/2010	\$10,000.00	4%	0.83836	\$335.34
1/1/2011	\$10,335.34	3%	1.00000	\$310.06
1/1/2012	\$10,645.40	3%	0.24590	\$78.53

- Interest rate
 - First year:** rate on date of failure
 - Thereafter:** rate on first day of year

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Computing tax for 3 year PT

Transaction Date	Taxable Period	2010 Return	2011 Return	2012 Return
3/1/2010	3/1/2010 to 3/31/2012	\$335.34	\$335.34	\$335.34
1/1/2011	1/1/2011 to 12/31/2011		\$310.06	\$310.06
1/1/2012	1/1/2012 to 3/31/2012			\$78.53
Total		\$335.34	\$645.40	\$723.93
15% of total		\$50	\$97	\$109

- Total excise tax for all years = \$256
- DOL calculator says lost earnings = \$788.48

2 0 1 3 N I P A A N N U A L F O R U M & E X P O

Is there a de minimis exception to avoid preparing Form 5330?

- No
- If you file under VFCP for a late deposit, you can prevent a PT, and avoid giving notice to the participants if:
 - You complete Form 5330
 - Send it to the DOL with the VFCP application
 - The amount of the tax does not exceed \$100
 - The employer deposits the tax into the plan