

MEMO# 26798

December 20, 2012

Department of Labor Issues Proposed Amendments to Abandoned Plan Regulations and Class Exemption -- Comments Due by February 11, 2013

ACTION REQUESTED

[26798]

December 20, 2012

TO: PENSION COMMITTEE No. 33-12

PENSION OPERATIONS ADVISORY COMMITTEE No. 31-12

OPERATIONS COMMITTEE No. 50-12 RE: DEPARTMENT OF LABOR ISSUES PROPOSED AMENDMENTS TO ABANDONED PLAN REGULATIONS AND CLASS EXEMPTION -- COMMENTS DUE BY FEBRUARY 11, 2013

The Department of Labor (Department) has issued proposed amendments to the abandoned plan program and the related prohibited transaction exemption (PTE 2006-06). [\[1\]](#) The proposed amendments primarily focus on the ability of a chapter 7 bankruptcy trustee to act as a Qualified Termination Administrator (QTA) and utilize the existing abandoned plan program to terminate, wind up and distribute benefits from such plans. The amendments also include technical changes to the current abandoned plan regulations not related to chapter 7 plans, some of which address issues previously raised by the Institute in 2007 regarding the final abandoned plan program. As discussed below, these technical changes relate to (1) the required notification by QTAs regarding whether they or an affiliate are the subject of an investigation, examination or enforcement action by the Department, IRS or SEC concerning their conduct as a fiduciary or party in interest to an ERISA covered plan; and (2) the distribution of account balances of deceased participants.

Comments are due to the Department by February 11, 2013. We will likely submit comments reiterating the Institute's prior comments. Please contact Elena Chism (202.326.5821 or elena.chism@ici.org) or Howard Bard (202.326-5810 or howard.bard@ici.org) with any thoughts regarding the proposed amendments described herein or if you are interested in participating in a conference call regarding these issues.

Background

As you may recall, in April 2006, the Department published final regulations and a final prohibited transaction exemption regarding the termination of “abandoned” or “orphan” individual account plans. [2] In general, the regulations provide a mechanism for service providers to voluntarily take over and terminate plans believed to have been abandoned by the plan sponsor. The abandoned plan program contains three parts: (1) a procedure for financial institutions holding the assets of an abandoned plan to terminate the plan and distribute benefits to the plan’s participants and beneficiaries, with limited liability; (2) a fiduciary safe harbor for making distributions from the terminated plan with respect to participants and beneficiaries who fail to make an election regarding a form of benefit distribution; and (3) a method for filing a terminal report (Form 5500) for abandoned individual account plans. PTE 2006-06 provides prohibited transaction relief for a financial institution acting as a QTA to select and pay itself (or an affiliate) for rendering termination services to the plan. [3]

After the final regulations were issued, the Department approached the Institute to solicit feedback with respect to the final regulations and class exemption. In June 2007, the Institute submitted a letter summarizing member concerns. [4] The letter addressed issues relating to eligibility to act as a QTA, required disclosure of government examinations involving the QTA, general fiduciary liability, paying benefits to missing participants and plans funded with annuity contracts or required to distribute benefits in the form of an annuity.

Technical Changes Unrelated to Chapter 7 Plans

The proposed amendments include the following technical changes unrelated to the chapter 7 plans:

1. The amendments propose to eliminate the requirement contained in the current abandoned plan regulations requiring QTAs to state whether they (or any affiliates) are, or in the past 24 months were, the subject of an investigation, examination or enforcement action by the Department, the IRS, or the SEC, concerning their conduct as a fiduciary or party in interest with respect to any ERISA-covered plan. The preamble states that the Department proposes to eliminate this requirement for the following reasons: (a) the Department generally can determine from its own records whether a person is, or over the past 24 months was, the subject of an investigation concerning his conduct as a fiduciary or party in interest to an ERISA-covered plan; (b) by definition, QTAs tend to be large financial institutions and it may be costly for them to prepare an accurate statement; and (c) the Department believes the requirement deters some qualified persons from serving as QTAs. The Institute had previously requested that the Department clarify the scope of this obligation, noting that it may not be possible to provide such information with absolute certainty, particularly with respect to large financial institutions.
2. The amendments propose to permit a QTA to transfer the account balances of decedents to an interest-bearing, federally-insured bank or savings association account or to a state unclaimed property fund, regardless of the account balance. The current regulation provides for such a transfer only for accounts with balances of \$1,000 or less (for amounts greater than \$1,000, the account must be transferred to an individual retirement plan). The amendments allow for such a transfer only if the QTA reasonably and in good faith finds that the participant, and, if applicable, the beneficiary, are deceased, and includes in the final notice to the Department the

identity of the participant and/or beneficiary and the basis for its finding. The Institute had previously requested that the Department address several issues relating to missing participants, including deceased participants.

3. The amendments clarify that the instructions for filing the Special Terminal Report for Abandoned Plans (STRAP) are located on the Department's website – and are not included within the Form 5500 instructions.

Chapter 7 Plans

The proposed amendments expand the current abandoned plan program to include plans of companies that are in liquidation under chapter 7 of the U.S. Bankruptcy Code, [5] provide for the ability of a chapter 7 bankruptcy trustee to serve as a QTA and utilize the current abandoned plan program framework. The following provisions are included in the proposed amendments:

- A chapter 7 plan would be considered abandoned on the date the plan sponsor's bankruptcy proceeding commences (when a bankruptcy court enters an order for relief under the U.S. Bankruptcy Code).
- Notwithstanding the general rule that a QTA is qualified only if it (1) is eligible to serve as a trustee or issuer of an individual retirement plan within the meaning of section 7701(a)(37) of the Internal Revenue Code, and (2) holds the assets of the plan that is abandoned, the proposed amendments provide that a chapter 7 bankruptcy trustee may serve as a QTA without meeting these requirements.
- A bankruptcy trustee serving as a QTA may terminate and wind up the plan himself - or appoint an eligible designee to assume these duties. Any eligible designee appointed by the bankruptcy trustee must be eligible to serve as a trustee or issuer of an individual retirement plan within the meaning of section 7701(a)(37) of the Internal Revenue Code and hold the assets of the plan that is abandoned. The bankruptcy trustee retains a duty to monitor the eligible designee, for which the bankruptcy trustee may be compensated.
- Unlike a non-bankruptcy trustee QTA, a bankruptcy trustee acting as a QTA (or an eligible designee, based on information provided by the bankruptcy trustee) has an affirmative duty to collect known delinquent contributions if it would be cost effective to do so.
- Although a non-bankruptcy trustee QTA is not required to conduct an inquiry or review to determine whether or what fiduciary breaches may have occurred prior to its becoming a QTA, a bankruptcy trustee acting as a QTA (or an eligible designee) is required to report to the Department any activity that it believes may be evidence of fiduciary breaches involving plan assets by a prior plan fiduciary, such as embezzlement.
- The amendments include a "rule of accountability" applicable to a bankruptcy trustee acting as a QTA. Under this rule, a bankruptcy trustee, or an eligible designee, would not be able to seek a release from liability under ERISA or assert a defense of derived judicial immunity (or similar defense) in action brought against the bankruptcy trustee or its designee arising out of its conduct under the regulation.
- The amendments modify the notification and distribution requirements applicable to chapter 7 plans. Participants must be informed that the plan termination occurred as a result of liquidation under the bankruptcy code and the final notice to the Department includes specific information about the identity of the bankruptcy trustee and, if applicable, an eligible designee. Further, a bankruptcy trustee serving as a QTA does not have the authority to designate itself (or an affiliate) as the transferee of distribution proceeds.

Additionally, the amendments include different standards for fees that a bankruptcy trustee acting as a QTA may pay itself versus the standards applicable when a bankruptcy trustee acting as a QTA appoints an eligible designee. When the QTA is the bankruptcy trustee, the fees must be consistent with industry rates for the same or similar services charged by QTAs who are not bankruptcy trustees. Eligible designees, on the other hand, must meet an additional standard contained in the current regulation: the fees may not be in excess of rates ordinarily charged by the QTA (or affiliate) for the same or similar services rendered to plans that are not terminated as abandoned plans, if the QTA (or its affiliate) provides such services to other customers.

PTE 2006-06 Amendment

Concurrent with the proposed regulation changes, the Department issued a proposed amendment to PTE 2006-06, the exemption allowing a QTA to select and pay itself or an affiliate to provide services to the plan in connection with the termination of the plan. The PTE amendment expands the definition of a QTA to include bankruptcy trustees and their eligible designees.

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endnotes

[1] A copy of the proposed regulatory amendments is available here: <http://www.gpo.gov/fdsys/pkg/FR-2012-12-12/pdf/2012-29500.pdf>. A copy of the proposed amendments to PTE 2006-06 is available here: <http://www.gpo.gov/fdsys/pkg/FR-2012-12-12/pdf/2012-29556.pdf>.

[2] For a description of the final regulations see [Memorandum](#) to Pension Members No. 30-06 [20005], dated May 4, 2006.

[3] In February 2007, as a result of the Pension Protection Act provision allowing for direct rollovers by non-spouse beneficiaries to inherited IRAs, the DOL amended the abandoned plan regulations to provide for such distributions.

See [Memorandum](#) to Pension Members No.13-07 [20875], dated February 16, 2007.

[4] See [Memorandum](#) to Pension Committee No. 17-07, Pension Operations Advisory Committee No. 17-07 [21248], dated June 14, 2007.

[5] Under amendments federal bankruptcy law enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, if a company in liquidation sponsored an individual account plan, the company's chapter 7 bankruptcy trustee must perform the functions that would otherwise be required of the bankrupt entity with respect to the plan.

should not be considered a substitute for, legal advice.