



Financial Security...for Life.

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Submitted Electronically

February 11, 2013

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

RE: Abandoned Plan Program (RIN 1210-AB47)

Dear Sir or Madam:

On behalf of the American Council of Life Insurers (“ACLI”)¹, we are writing to comment on proposed regulations and a proposed amendment to a prohibited transaction exemption that would amend the Department’s Abandoned Plan Program under the Employee Retirement Income Security Act (“ERISA”). The proposed regulations, published at 77 Fed. Reg. 74063 (December 12, 2012) (“Proposed Regulations”) would amend § 2520.103–13 (Special terminal report for abandoned plans), § 2550.404a–3 (Safe harbor for distributions from terminated individual account plans), and § 2578.1 (Termination of abandoned individual account plans) to permit bankruptcy trustees to use the program to terminate and wind up the plans of sponsors in liquidation under chapter 7 of the U.S. Bankruptcy Code, as well as to make other technical amendments to improve the operation of the regulations. The proposed

¹ ACLI is a national trade organization with more than 300 members that represent more than 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension, 401(k) and 403(b) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

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amendment to Prohibited Transaction Exemption 2006-06 for services provided in connection with the termination of abandoned individual account plans, which was published at 77 Fed. Reg. 74056 (December 12, 2012) ("Proposed PTE") makes corresponding changes for bankruptcy trustees.

The Proposed Regulations and Proposed PTE together make up the Abandoned Plan Program (the "Program"), allowing for the termination of, and distribution of benefits from, retirement plans that have been abandoned by their sponsoring employers. The Program permits certain financial institutions holding assets of such plans to act as qualified termination administrators ("QTAs") and to wind up the plans and distribute benefits to participants and beneficiaries. Without this important program, financial institutions generally would be unable to wind up these plans, and participants in many cases would be unable to access their plan benefits.

We applaud the Department for making improvements to the Program. Our members support efforts to broaden and ease the use of the Program and feel that allowing bankruptcy trustees to serve as QTAs is a positive change that will improve the Program. ACLI appreciates the Department's significant work in establishing and updating the Program. Some ACLI members have used the Program and in doing so, have observed other areas for improvements that could expand its use.

While these comments do not pertain specifically to the amendments made in the Proposed Regulation or Proposed PTE, our members would like to suggest a number of other changes to the regulation and the PTE to increase the usefulness of the Program.

(1) Confirm that the Program is entirely voluntary.

The Proposed Regulation and Proposed PTE describe how the Program may be used and describe it as a voluntary program. However, we would like to request explicit language in the Regulation or in the preamble confirming that the program is voluntary and that service providers are under no obligation to use the Program. In this regard, please note that an insurance company typically holds assets of abandoned plans pursuant to the issuance of an annuity contract, which provides investment options under the plan. The insurance company may also provide recordkeeping services to the plan. Typically, the insurance company is not an ERISA fiduciary to the plan, nor a plan administrator, since it does not exercise discretionary authority and control over plan assets or plan administration. The common fact pattern is that without the insurance company's knowledge, the plan sponsor abandons the plan; the insurer continues to hold plan assets contained within the annuity contract and, as such, provides administrative services for such contract. Also, it is often the case that the insurance company is unaware that the plan has been abandoned for some time, while the insurer continues to perform its duties under the contract. For cost or administrative reasons, the utilization of the Program by the insurance company may not be practical or feasible. Most importantly, as discussed further under Paragraph 3 of this letter, the steps required under the Program may not be cost effective for certain abandoned plans. Therefore, the insurer should never be required or forced to use the Program.

Also, in cases where the insurance company is the only point of contact for the abandoned plan, there could be expedited distributions to plan participants, managed and approved by the Regional EBSA office on an individualized basis. (See our suggestion in item (3) below regarding a possible expedited process.)

(2) Payment of Reasonable Expenses.

Section 2578.1(d)(2)(v) of the Proposed Regulations contains rules regarding the payment of reasonable expenses for carrying out QTA's duties. Payment for necessary services must be consistent with industry rates for similar services and not in excess of rates ordinarily charged by the QTA for the same or similar services. ACLI members support this provision and feel that these rules are appropriate. However, the Proposed PTE also contains language regarding fees and expenses. Section III(i)(2) states that "[f]ees and expenses attendant to the individual retirement plan or other account, with the exception of establishment charges, may be charged only against the income earned by the individual retirement plan or other account." Since there is a requirement that funds rolled over to an IRA be invested in an investment product designed to preserve principle and maintain dollar value, particularly in the current environment, there may not be sufficient earnings available to cover ongoing expenses. Therefore, we suggest that section III(i)(2) should be removed.

(3) Plans with Few Total Assets.

We have concerns in situations in which our member companies hold low balances of abandoned plan assets. It is common that the abandoned plan has but a few thousand or even a few hundred dollars of assets. It may be impractical to go through the entire Program and charge the plan for these services. In fact, by charging the plan, a company may significantly deplete or even eliminate the remaining plan assets, contradicting the Program policy to provide prompt and efficient termination of abandoned plans and to maximize the account balances paid to participants. We would encourage the Department to consider a special, limited and expedited QTA process in situations when the plan has only a small amount of total assets. The Regional EBSA office could approve immediate distributions to remaining participants where such persons can be located. To satisfy the requirements of such an expedited QTA process, our members would consider completing, for the Regional EBSA office, a pre-Termination Report - i.e., total assets of the plan as of the deemed termination date, termination expenses anticipated to be paid by the plan, and the total amount of vested distributions to be made. This report would be reviewed by the Regional office as a condition of the company engaging the expedited QTA process.

(4) Small Account Balances and State Escheat Laws.

If a QTA is attempting to distribute benefits, and a participant does not respond within thirty days, the Program generally requires the QTA to distribute the participant's account balance to an IRA in the participant's name. (See § 2578.1(d)(2)(vii), which requires benefits to be distributed in accordance with the rules in § 2550.404(a)-3). An exception exists for account balances of \$1,000 or less, which may be transferred to an interest-bearing, federally-insured bank or savings association account or to the unclaimed property fund of a State, if certain conditions are satisfied. (See § 2550.404a-3(d)(1)(iii).)

We have concerns with the under \$1000 balance requirement. First, we feel the balance is too low and should be raised to \$5,000. It is difficult and expensive to set up an IRA for very small account balances. We would like to be able to distribute the balance to an FDIC account or to the State escheat program for account balances of \$5,000 or less.

We also have concerns with conflicts between the Program and the State unclaimed property fund requirements. More specifically, the Program requires that the distribution be made directly to the State unclaimed property fund of the participant's last known address. However, most State escheat laws require that a check be sent to the participant and that it remain uncashed for a certain period of time before the unclaimed property fund accepts the monies. Thus, by complying with a State abandoned property law which requires that the check be sent to the participant and that it remain uncashed for a certain period of time, we cannot be in compliance with the escheat requirements of the Program.

We therefore request that the Program acknowledge that distributions could be made to the State unclaimed property fund pursuant to the State unclaimed property fund requirements.

(5) Benefits Subject to QJSA.

Using the Program to terminate plans such as money purchase pension plans has proven difficult since they must comply with all of the qualified joint and survivor annuity ("QJSA") rules in Internal Revenue Code §401(a)(11)(B)(ii). Some of the difficulties that QTAs have in trying to comply with the QJSA rules with respect to missing participants may include:

- The QTA may not be aware if the participant is still living;
- The QTA may not be aware if the participant is married, and if so may not have the date of birth of the spouse;
- The QTA may have difficulty finding an insurance company that will issue an annuity to a missing person; and
- The QTA may have difficulty finding an insurance product that can be used for this purpose.

The Department recognized these difficulties and in Section (d)(2)(vii)(B)(2) of the Proposed Rule, provided that "If a qualified termination administrator determines that the survivor annuity requirements in sections 401(a)(11) and 417 of the Internal Revenue Code (or section 205 of ERISA) prevent a distribution under paragraph (d)(2)(vii)(B)(1) of this section, [it shall distribute benefits] in any manner reasonably determined to achieve compliance with those requirements." We would appreciate examples of these situations to give QTAs more guidance in dealing with these issues. We would like to help plans with benefits subject to the QJSA rules such as money purchase pension plans participate in the Program and feel that additional information on this point would facilitate this effort.

(6) Form of Program.

Because the Program is currently made up of a number of regulations and a prohibited transaction exemption, changes to the Program require the Department to go through the

process of proposing regulations, accepting comments, and issuing final regulations, which cannot be done frequently or quickly. We suggest that if it is possible, the program could be structured more like the Department's Delinquent Filer Voluntary Compliance ("DFVC") Program, which is published as a Notice or the IRS's Employee Plans Compliance Resolution System ("EPCRS"), which is published with a Revenue Procedure. This would facilitate making continual revisions and improvements to the Program on an ongoing basis, while still allowing for public comment. While we understand the Department's position that it needs a rule to authorize the Program, perhaps such rule could be structured to provide a more flexible framework upon which the Department can issue opinions or other subregulatory guidance to facilitate changes to the Program.

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On behalf of the ACLI member companies, thank you for consideration of these comments. As stated above, we welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on these important issues.

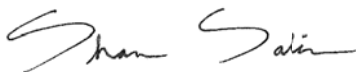
Sincerely,



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