AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

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Employee Benefits Security Administration
Regulations and Interpretations
Employee Benefits Security Administration
Room N–5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

SUBMITTED VIA REGULATIONS.GOV

Re: Amendments to the Abandoned Plan Program regulations interim final rules RIN 1210–AC04.

To Whom it May Concern:

The American Retirement Association (ARA) is writing in response to the request for comments on the interim final rules amending the Abandoned Plan Program (the "Rule").

ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the American Society of Enrolled Actuaries ("ASEA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has over 35,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Discussion

ARA applauds the Department of Labor's (DOL's) expansion of the Abandoned Plan Program to provide a more effective and efficient procedure for Chapter 7 trustees to terminate plans of bankrupt plan sponsors. While ARA generally supports the requirements of the Rule, ARA recommends the DOL make several changes to ensure Chapter 7 trustees are not unduly restricted in terminating plans, which will promote use of the program and protect plan participants.

1. Qualification of Eligible Designee

Under the Rule, only a plan asset custodian or someone who has served as a bankruptcy trustee within the previous five years can serve as an eligible designee. This limitation is unduly restrictive and should be expanded to include anyone eligible to appear before the bankruptcy court.

The class of individuals who have served as a bankruptcy trustee during the past five years is very limited. It is common for there to only be one trustee for large regions and that person will serve for many years. Therefore the Rule effectively limits the class of eligible designees to one or two people who reside in the region of the debtor (where the bankruptcy case will be heard). This restriction is unnecessary as bankruptcy trustees do not have any special knowledge of ERISA or retirement plans. Therefore, there is little to no value in limiting the

ASPPA ASEA NAPA NTSA PSCA

class of eligible designees to people who have recently served as trustees. Rather, anyone duly licensed to appear before the bankruptcy court could obtain the requisite knowledge and skill to represent the plan's interests before the court. In fact, because bankruptcy trustees do not have specialized knowledge or skills relating to ERISA, the Rule may actually increase fees because the trustee will have to pay not only the eligible designee, but the designee's special counsel—rather than being permitted to simply designate independent counsel that specializes in ERISA and retirement plans. Permitting this broader class of eligible designees would permit interested parties to develop specialized skills in handling these plan terminations, which would result in more effective and efficient terminations.

2. Required Appointment of Eligible Designee

The Rule also addresses the potential conflict of interest that can arise if the same bankruptcy trustee is assigned to represent the interests of the estate and to take reasonable steps to collect delinquent contributions on behalf of the plan by requiring the appointment of an eligible designee if the delinquent contributions (including both employee and employer contributions) are more than de minimis. ARA agrees with the principle behind this rule, but disagrees with the Rule's definition of de minimis.

The Rule provides that the delinquent contributions are de minimis if the amount is $2,000 or less or the amount likely to be collected (*i.e.,* a realizable value) from the estate property, net of all enforceable liens and applicable exemptions, is $2,000 or less. The preamble to the Rule notes that the DOL selected this $2,000 threshold because it "estimates that $2,000 fairly represents what it typically would cost to review the bankruptcy case and to file a liquidated proof of claim." ARA believes this threshold is significantly understated. Not only would typical rates in metropolitan areas likely be greater than $2,000, the threshold entirely ignores the cost to participants of delayed plan termination. The plan's service providers will continue to charge monthly administration fees for the entire duration of the plan—and even though the administrative tasks are limited once the sponsor files for bankruptcy, the contract with the service provider typically does not provide for a reduction in fees. As a result, the plan will continue to pay the administrative fees of an ongoing plan—often several thousand dollars per quarter (or more for larger plans) until the plan can be terminated and all assets distributed. Filing a claim for contributions will mean that the plan is not terminated until the claim is resolved, which can take more than a year. As a result, the actual cost of pursuing a liquidated claim for contributions is closer to $15,000 or more.

ARA recommends that the DOL revise the Rule to provide that delinquent contributions are de minimis if the trustee reasonably determines the realizable value of those contributions is less than the estimated cost of filing a liquidated proof of claim ($2,000 will be deemed a reasonable estimate, but the trustee may make a different determination based on facts and circumstances) *plus* the additional cost of maintaining the plan through determination of any such claim.

Revision of the Rule to acknowledge these realities will promote efficient termination of plans and reduce the ultimate fees participants must pay, while balancing the legitimate interest of ensuring plans obtain independent representation when such representation is likely to add value to participants.

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ARA appreciates the opportunity to work with the Department on these issues of great importance to our diverse membership of retirement marketplace participants. We would welcome the opportunity to discuss these comments further with you. Please contact Kelsey Mayo, ARA's Director of Legislative Affairs, at Kmayo@USARetirement.org with respect to any questions regarding the matters discussed herein. Thank you for your time and consideration.