July 2, 2024

Interim Final Rule for Abandoned Plans Released

The Department of Labor (DOL) has issued an interim final rule, expanding the Abandoned Plan Program regulations to also include plans of employers who are in liquidation under Chapter 7 of the U.S. Bankruptcy Code. The DOL has also released a corresponding amendment to prohibited transaction exemption (PTE) 2006-06, *Class Exemption for Services Provided in Connection with the Termination of Abandoned Individual Account Plans*.

Background

In 2006, the DOL created the Abandoned Plan Program that allows certain financial organizations that hold qualified plan assets from plans that have been abandoned by an employer to terminate and distribute benefits from the plan. These financial organizations are referred to as qualified termination administrators (QTAs). This program, however, did not apply to plans of employers who filed for Chapter 7 bankruptcy.

In 2012, the DOL published proposed amendments to the 2006 rule that permitted a QTA to follow similar procedures when terminating an abandoned plan of an employer that filed Chapter 7 bankruptcy as any other plan being terminated under the Abandoned Plan Program. The DOL also proposed to extend PTE 2006-06 to bankruptcy trustees, allowing them to function as a QTA and pay themselves from plan assets for services required to terminate an abandoned plan.

In releasing the interim final rule and amendment to PTE 2006-06, the DOL considered the comments made in response to the 2012 proposed rule. The interim final rule modifies the Special Terminal Report for Abandoned Plans (STRAP) that QTAs file with the DOL and creates an optional online method used to file the STRAP and other notices. The DOL also expands the Abandoned Plan Program to include individual pension plans covered by the Employee Retirement Income Security Act of 1974 (ERISA), whose sponsors are under Chapter 7 bankruptcy. While the U.S. Trustee Program maintains authority and oversight of bankruptcy trustees, the DOL emphasizes that a bankruptcy trustee's use of the Abandoned Plan Program and attendant procedures are governed by ERISA and therefore subject to DOL oversight.

Modifications to the STRAP

The DOL modified several aspects of the STRAP under DOL Regulation 2520.103-13, including creating a stand-alone document that now contains eight categories. These categories contain more detailed information, such as the type of defined contribution plan being terminated under the Abandoned Plan Program (e.g., single-employer, multiemployer, multiple-employer) and the total number of distributions from the terminating plan. And, because the STRAP is now a stand-alone document (previously filed as part of Form 5500), a penalties and perjury statement has also been added. A list of required categories is shown below.

- Information that identifies the plan, the QTA, and the bankruptcy trustee (if applicable).
- Total plan assets as of the plan's deemed termination date (before any reduction for termination expenses and distributions to participants and beneficiaries).

- Amount of the total termination expenses paid by the plan, itemized for each service provider.
- Total benefits distributed while winding up the plan and a statement explaining whether any of the distributions were transfers of assets for participants or beneficiaries who failed to elect a form of distribution after receiving a written notice detailing their account balance and distribution options.
- Information on any assets that have no readily ascertainable fair market value, including the fair market value and valuation method of such assets.
- The total number of distributions.
- The number of distributions to missing participants that is included in the total number of distributions.
- A statement that the information provided is true and complete based on the QTA's knowledge and that the information is being provided under penalty of perjury.

The DOL will publish further instructions regarding these categories on its website and is also developing an optional online filing method for the STRAP. It is anticipated that online filing will become the exclusive filing method pending the adoption of the final regulations. There is no change to the STRAP's filing due date.

Safe Harbor for Distributions from Terminated Individual Account Plans

The interim final rule adds references about the new rules for Chapter 7 ERISA Plans (see below) to DOL Reg. 2550.404a-3. This section provides a safe harbor for fiduciaries that meet certain requirements when processing distributions from a terminated individual account plan. Specifically, for abandoned plans, the interim final rule allows for the transfer of a deceased participant's account balance to an appropriate bank account or State unclaimed property fund in the participant's name (even if the account balance exceeds $1,000) when the QTA reasonably and in good faith verifies that

- the participant is deceased,
- the designated beneficiary is deceased or cannot be identified,
- the participant's estate is not the designated beneficiary, and
- the QTA has no actual knowledge of any claims by any person to the deceased participant's account.

When the beneficiary is the participant's estate, these rules may also be used if the following applies.

- The QTA makes a facts and circumstances-based, reasonable, and good faith effort to determine whether an estate exists before a transfer is permitted under this rule (the mere fact that an executor or administrator of an estate has not affirmatively contacted the QTA is not sufficient evidence to conclude that an estate does not exist).
- The QTA reasonably and in good faith cannot establish an individual retirement plan for the benefit of the participant's estate.
- The QTA has no actual knowledge of any claims by any person to the deceased participant's account.

The QTA must also document all relevant findings under this rule and include this information in the Abandoned Plan Program Final Notice provided to the DOL.

New Rules for Chapter 7 ERISA Plans

The DOL's interim final rule creates special rules for plans of employers in Chapter 7 bankruptcy—Chapter 7 ERISA Plans—under new paragraph (j) of DOL Reg. 2578.1. These plans are now defined as "individual account plans of sponsors in liquidation under Chapter 7 of the United States Bankruptcy Code" and because of the added section, corresponding updates were also made to the remainder of DOL Reg. 2578.1.

- **Deemed Abandonment.** Chapter 7 ERISA Plans will not be subject to the existing "finding of abandonment" rules, and instead will be considered "deemed abandoned" upon an entry of an order for relief under Chapter 7 of the Bankruptcy Code, except when the Chapter 7 proceeding is dismissed or converted under a different Bankruptcy Code chapter before a deemed termination as described in DOL Reg. 2578.1(c).

Once a Chapter 7 ERISA Plan is deemed abandoned, the definition of a QTA under DOL Reg. 2578.1(g) will not apply. Instead, only the bankruptcy trustee or an "eligible designee" appointed by the bankruptcy trustee may be the QTA.

- **Bankruptcy Trustees.** For a Chapter 7 ERISA Plan, a bankruptcy trustee may include an elected trustee or an interim trustee appointed after the order for relief has been entered.
- **Eligible Designees.** The interim final rule defines an "eligible designee" serving a Chapter 7 ERISA Plan as
    - an entity that accepts the QTA designation in writing and is eligible to serve as a QTA (i.e., the entity is eligible to serve as a trustee or issuer of an IRA and holds the assets of the plan on whose behalf it will serve as the QTA), or
    - an "independent bankruptcy trustee practitioner", which is a person who has served within the previous five years as a bankruptcy trustee in a case under Chapter 7 of the Bankruptcy Code who accepts the designation in writing, acknowledges its ERISA fiduciary status in writing, and is not the trustee for the plan sponsor's Chapter 7 case.

A bankruptcy trustee must make a reasonable effort to determine if the Chapter 7 ERISA Plan is owed any employee and employer contributions and the amount, if applicable. Bankruptcy trustees will be required to appoint an eligible designee when the Chapter 7 ERISA Plan is owed more than a de minimis amount of employee and employer contributions. A de minimis amount is defined as any amount equal to or less than $2,000 or any amount greater than $2,000 if the property from which delinquent contributions is collected has a realizable value that is equal to or less than $2,000 (net of all enforceable liens and applicable exemptions). The bankruptcy trustee must also meet the following conditions if an eligible designee is required to be retained.

- Notify the eligible designee with respect to the amount of delinquent employee and employer contributions.
- Establish procedures for the eligible designee to have reasonable access to documents in the bankruptcy trustee's possession (e.g., payroll records, participant lists, plan documents, and trust statements).
- Select and monitor the eligible designee in accordance with ERISA Sec. 404(a)(1)(A) and (B).

Once a QTA is determined (i.e., bankruptcy trustee or eligible designee), that entity will be required to notify the DOL of its intent to serve as a QTA.

- **Notice of Intent to Serve as a QTA.** The written Notice of Intent must include information about the QTA (e.g., address, phone number), the plan (e.g., plan sponsor's EIN), the Chapter 7 filing (e.g., statement that the plan is deemed abandoned), any evidence of fiduciary breaches, the plan assets (estimated value on the date of the order for Chapter 7 relief), and the service provider's information (e.g., name, address). The notice must also include a statement that verifies the information provided in the notice is true and complete based on the knowledge of the entity choosing to serve as a QTA and that the information is provided under penalty of perjury.

The rules for wrapping up operations for a Chapter 7 ERISA Plan are generally the same as under the 2006 regulations, except that a QTA for a Chapter 7 ERISA Plan must 1) take reasonable steps to collect delinquent contributions if the plan is owed more than a de minimis contribution amount, and 2) report any activities that the QTA believes provides evidence of a breach of fiduciary duty by a prior plan fiduciary.

QTAs that satisfy these conditions are entitled to reasonable compensation as well as fiduciary liability relief provided by the interim final rule. The fee provisions generally provide that plan assets may be used to pay reasonable expenses associated with terminating the plan (as compared with industry rates for ordinary plan administration), but higher fees incurred by an eligible designee related to collecting delinquent contributions may also be considered.

Finally, bankruptcy trustees or eligible designees acting as a QTA for the benefit of terminating a Chapter 7 ERISA Plan will not be able to request a release of liability under ERISA or assert an immunity (or similar) defense in any legal action arising out of their conduct under the interim final rule.

Next Steps

Because of the extended time that has expired since the release of the proposed regulation in 2012, the DOL deemed it prudent to accept comments regarding the interim final rule up to July 16, 2024, the same date as the interim final rule's effective date. The DOL requests comments on several aspects of the interim final rule, including the possibility to extend the Abandoned Plan Program to include sponsors of abandoned plans that are in liquidation under Chapter 11 bankruptcy.

Ascensus will continue to follow any new guidance as it is released. Visit ascensus.com for the latest developments.

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