

February 11, 2013

Submitted Electronically

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

Attn: Abandoned Plan Regulations; RIN 1210-AB47

Ladies and Gentlemen:

The Investment Company Institute¹ supports the Department of Labor's initiatives to address abandoned defined contribution plans through the implementation of a program in which service providers are permitted to help participants obtain their benefits in an expeditious manner. While we are pleased that certain issues of concern to our members were addressed in the recently proposed amendments to the abandoned plan program regulations,² we are disappointed that many of the issues we previously raised with the Department were not addressed.

As you know, in October 2006, the Institute and several of its members participated in a conference call with the Department during which Institute members raised various concerns that have presented obstacles to their participation in the program. In a subsequent letter dated June 14, 2007 ("2007 letter") (copy enclosed), the Institute provided the Department with further detailed explanation of such issues.³ While the proposed amendments sufficiently address two issues raised in

¹ The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$14.2 trillion and serve over 90 million shareholders.

² 77 FR 74063 (December 12, 2012).

³ We note that the Institute had previously raised several of these issues with the Department in our comment letter on the proposed regulations. See Letter to Department of Labor from Thomas T. Kim, Associate Counsel, Investment Company Institute, dated May 9, 2005.

our letter (*i.e.*, the required disclosure of government examinations and the distribution of account balances of deceased participants), it is unfortunate that the other concerns presenting obstacles to our members' participation in the abandoned plan program were not dealt with by the Department. Although more fully described in our attached 2007 letter, for your convenience we have provided below a summary of these issues. Additionally, we have provided comments on the decedent transfer and eligible designee appointment provisions contained in the proposed amendments. We believe these additional changes or clarifications are necessary to successfully implement a more widely-used abandoned plan program.

Acting as a QTA

Under the proposed amendments, to act as a QTA (or to be able to serve as an eligible designee appointed by a chapter 7 bankruptcy trustee), an entity must (1) be eligible to serve as a trustee or issuer of an individual retirement plan within the meaning of Internal Revenue Code section 7701(a)(37) and (2) hold assets of the plan. As we explained in our 2007 letter, we believe changes or clarifications to this definition may be necessary so that more financial institutions are eligible to serve as QTAs, particularly with respect to self-trusteed plans. In a self-trusteed plan, the financial institution may merely act as a recordkeeper and therefore not "hold" assets of the plan in a legal sense, thereby not meeting the regulatory requirements to act as a QTA. In this regard, it would be helpful to for the Department to clarify that holding legal title is not required to act as a QTA. In addition, the Department could expand the definition of a QTA to include parties (such as third-party administrators) that hold participant-level records for the plan.⁴

Fiduciary Liability

As is detailed in our 2007 letter, many Institute members continue to be concerned about potential ongoing financial liability after the abandoned plan is terminated and assets are distributed, particularly with respect to missing participants. We continue to recommend that the general liability relief under section 404(a) be available where a QTA undertakes reasonable and diligent efforts to comply with the requirements for winding up the affairs of the plan. Our members are concerned that the QTA could have continuing liability subsequent to the winding up of the affairs of the plan for subsequent actions taken by the transferee of the assets. For example, the QTA might be considered to have a continuing responsibility to monitor the efforts of the transferee bank or savings association to

⁴ As stated the Institute's 2005 comment letter on the proposed abandoned plan regulation, if the Department is concerned about unregulated entities serving as QTAs, the Department could address this by expanding the definition of QTA to include entities regulated by the SEC, which would cover a broader range of parties.

locate the participant or to ensure that the fees associated with the account remain unchanged (*i.e.*, that the fees continue to be charged only against earnings). We recommend that the Department clarify that a QTA which has substantially complied with the conditions set forth in the regulation has no continuing liability subsequent to the winding up of the plan for subsequent actions taken by the transferee of the assets.

Missing Participants

The proposed amendments would allow 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). While this change will be very helpful, the proposed amendments do not address other issues previously raised by the Institute regarding missing participants. As detailed in our attached letter, the Institute recommends that the Department clarify several aspects of the regulations with respect to missing participants, as follows:

- We recommend that the regulations include a de minimis exception for very small accounts where the cost of locating a participant would use up the account balance.
- For accounts of missing participants that are too large to fall under a de minimis rule, we continue to recommend that the PBGC implement a program to allow for the transfer of missing participant accounts to the PBGC.⁵
- We continue to recommend that the Department clarify that the use of the QTA's own IRA is not required when the account balance is greater than \$1,000 or meets the minimum balance requirement for an IRA of the QTA.
- We continue to recommend that the Department consider expanding the options for small accounts with assets of \$1,000 or less. In the absence of the PBGC option, Institute members would like to be able to transfer these small accounts to a bank or savings account or state unclaimed property fund, even if the account balance meets IRA minimum balance requirements.
- We continue to recommend that the Department clarify that an IRA provider accepting a transfer of assets from a QTA is not subject to the same limitation on fees that appears in PTE 2006-06, the class exemption for a QTA designating itself as the

⁵ Although the Pension Protection Act of 2006 amended ERISA section 4050 to allow terminating defined contribution plans to transfer assets of missing participants to the PBGC, effective when final regulations are prescribed, as of this date, the PBGC has not prescribed final regulations.

IRA provider for missing participant distributions (*i.e.*, fees may be charged against earnings only).

Decedent Transfers

With respect to decedents, in the preamble to the proposed amendments, the Department solicited comments on whether the proposed conditions allowing for the transfer of decedent balances to an appropriate bank account or state's unclaimed property fund, regardless of the size of the account balance, sufficiently safeguard the rights of participants and beneficiaries. As an example, the Department sought comment on whether a QTA should be prohibited from making such a transfer if it has knowledge that a decedent of the deceased has a claim.

In some instances, a deceased participant's or beneficiary's heirs may claim a right to the decedent's plan account, although it may be unclear whether the claim is valid. Additionally, there are circumstances when a participant may designate his estate as his beneficiary or where the plan's terms provide that the participant's estate is his beneficiary in the absence of another designation. As the proposed amendments do not clarify whether the decedent transfer provisions override the valid rights of a claimant or the designation (either by the decedent or by default) of a decedent's estate as his beneficiary, we recommend that the proposed amendments clarify that the decedent transfer provisions do not apply if a the QTA has received a claim with respect to the account from any person or if the participant's beneficiary is his estate.

Further, many times a potential QTA will not have a record of a deceased participant's beneficiary designation, as that information may be maintained by the plan sponsor or plan administrator. We therefore recommend that the proposed amendments clarify that a QTA may follow the decedent provisions contained in the regulation if it has determined that a participant is deceased and the QTA has no record of a beneficiary designation.

Annuities

Our 2007 letter noted certain obstacles specific to plans funded with annuity contracts or otherwise required to distribute benefits in the form of an annuity. As discussed in our prior letter, these issues, which are not easily resolved, include (1) the inability of QTAs to obtain payment for services in circumstances where the annuity contract does not permit the deduction of service fees from the annuity, and (2) small account balances in plans subject to the qualified joint and survivor annuity (QJSA) requirements of the Internal Revenue Code. In the first case, an inability to obtain payment for services could discourage providers from assuming QTA responsibilities. In the second case, particularly where the plan cannot be amended to eliminate the annuity distribution option (such as a

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money purchase plan), finding an annuity for the small accounts may be difficult and not economically feasible.

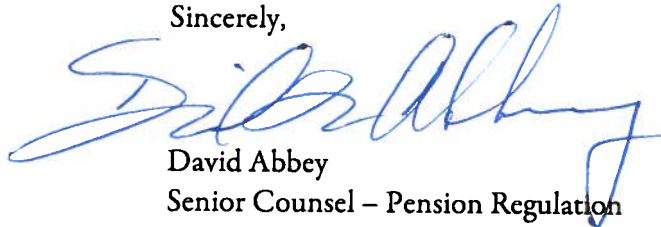
Appointment of an Eligible Designee

The proposed amendments provide that a bankruptcy trustee may designate an eligible designee to serve as the QTA. However, there are no provisions in the proposed amendments providing for acceptance of such an appointment by the eligible designee. Given that such a designation results in the assumption of fiduciary responsibility by the eligible designee, a bankruptcy trustee should not be permitted to unilaterally appoint an eligible designee without the eligible designee's written consent to accept the designation. We therefore recommend that the amendments clarify that an eligible designee must accept such designation before it becomes effective.

* * *

We would be pleased to meet and discuss these issues further with the Department and will follow up with you in the near future to discuss whether such a meeting would be beneficial. In the meantime, please contact me (david.abbey@ici.org or 202/326-5920) or Howard Bard (howard.bard@ici.org or 202/326-5810) if you have any questions.

Sincerely,



David Abbey
Senior Counsel – Pension Regulation

Attachment



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June 14, 2007

Jeffrey Turner
Chief, Division of Regulations
Employee Benefits Security Administration
U.S. Department of Labor
Suite N-5669
200 Constitution Avenue, NW
Washington, DC 20210

Re: Abandoned Plan Regulation

Dear Mr. Turner:

The Department requested that the Investment Company Institute solicit feedback from its members on any concerns or reluctance they have to use the final rule and exemption established by the Department in April 2006 for terminating abandoned individual account plans. We were pleased to assist the Department. After speaking to several member companies, we held a conference call on October 16, 2006 with you, members of your staff, and representatives from various Institute member companies, during which Institute members raised various concerns that have presented obstacles to their participation in the program. This letter further explains the issues raised by Institute members.

Acting as a QTA

Under the regulation, to act as a Qualified Termination Administrator (QTA), an entity must (1) be eligible to serve as a trustee or issuer of an individual retirement plan within the meaning of Internal Revenue Code section 7701(a)(37) and (2) hold assets of the plan. Changes or clarifications to this definition may be necessary to give financial institutions comfort that they are eligible to serve as a QTA, particularly with respect to self-trusteed plans.

In a self-trusteed plan, the owner of the business serves as trustee and the financial institution administering, or providing investment services to, the plan is not a trustee or custodian of plan assets. In this situation, some Institute members that we surveyed believe the financial institution has no authority to act as a QTA. In a self-trusteed plan, a portion of plan assets may be invested with the financial institution, but the institution does not have legal title and may not know where all of the plan's assets are located. This type of arrangement does not involve the issuance of ownership certificates – the financial institution merely acts as a recordkeeper and does not “hold” assets in the legal sense. One possible solution to this problem would be for the Department to provide a procedure for appointing a new trustee for the plan. In addition, the Department could clarify that legal title is

not required to act as a QTA – that is, if the entity is eligible to serve as an IRA trustee or issuer, the entity need not be the actual trustee for the abandoned plan. This clarification is important, although, as described below, it will not resolve all issues relating to QTA status.

The application of other laws (*e.g.*, trust or banking laws) may prevent the QTA from acting without direction from the actual trustee. Logistical problems also could arise. The financial institution may have had a relationship with the plan sponsor as an investment provider, but no knowledge of the plan's third party administrator, which could be the only entity with access to all the plan's records. The inability to identify where plan records are located would make it virtually impossible for the potential QTA to carry out its duties.¹

Another problem can arise if the institution holding self-trusteed assets (*e.g.*, a mutual fund family) is not itself eligible to serve as an IRA trustee even though an affiliated entity may be eligible. Our members explained on the conference call that moving plan assets to an affiliate that is eligible to serve as trustee of an individual retirement plan may not be possible. There is no legal mechanism for making a transfer with respect to assets that have been abandoned by the sponsor, and affiliated entities may not be comfortable either initiating or accepting a transfer of assets without direction from the actual trustee.

The issues involved in determining whether an institution has authority to act as a QTA and where to find relevant records are complex and we believe additional discussion could be beneficial. The Institute would be pleased to discuss these issues further with the Department.

Disclosure of Government Examinations

The regulation requires a QTA to notify the Department whether the QTA or any affiliate (as defined in the regulation) is, or within the past 24 months has been, the subject of an investigation, examination, or enforcement action by the Department, Internal Revenue Service, or Securities and Exchanges Commission concerning the entity's conduct as a fiduciary or party in interest with respect to any ERISA plan. The Department should clarify the scope of this obligation. The members that we sampled noted that it may not be possible to gather this information with absolute certainty, particularly with respect to a large organization with many affiliates. Furthermore, many examinations (such as those of the SEC) are conducted on a routine basis and should not need to be disclosed. We recommend that the QTA be required to provide information only on non-routine examinations *to the best of the QTA's knowledge*.

¹ In its comment letter on the proposed abandoned plan regulation, the Institute recommended that the QTA definition be expanded to include parties that hold participant-level records for the plan. See Letter to Department of Labor from Thomas T. Kim, Associate Counsel, Investment Company Institute, dated May 9, 2005. If the Department is concerned about unregulated entities serving as QTAs, the Department could address this by expanding the definition of QTA to include entities regulated by the SEC, which would cover a broader range of parties.

Fiduciary Liability

Many Institute members are concerned about potential ongoing fiduciary liability after the abandoned plan is terminated and assets are distributed, particularly with respect to missing participants. A financial institution acting as a QTA accepts significant fiduciary responsibility, notwithstanding the Department's guidelines for winding up the plan and the fiduciary safe harbor for missing participants. The QTA must prudently select and monitor service providers to carry out the termination activities and has fiduciary responsibility for choosing an annuity provider where the Internal Revenue Code's survivor annuity requirements apply. (For missing participants, the decision to escheat assets could carry liability and the QTA's attempts to locate the missing could be questioned later. It would be helpful if general liability relief under section 404(a) were available where the QTA undertakes *reasonable and diligent* efforts to comply with the requirements for winding up the affairs of the plan. A substantial compliance approach would provide more incentive for service providers to take on QTA responsibilities.

Missing Participants

In our conference call, Institute members discussed the difficulties in dealing with small accounts of missing participants – particularly finding IRAs or bank accounts willing to accept small account balances – and the complexities associated with state unclaimed property laws.² We believe a number of clarifications or changes to the final regulation would be helpful in this regard. First, a de minimis exception for very small accounts would be helpful where the cost of locating a participant would use up the account balance. Although the general guidelines for winding up the affairs of a plan permit a QTA to treat as forfeited an account balance that is less than the estimated share of plan expenses allocable to the account, this provision may not go far enough. The fiduciary safe harbor for making distributions to missing participants should include a similar forfeiture rule that specifically covers the estimated costs of locating the participant, in addition to the estimated share of plan expenses allocable to the account.

For accounts of missing participants that are too large to fall under a de minimis rule, we strongly urge the Department and the PBGC to permit transfer of defined contribution plan assets to the PBGC. It is important to have this option because the other alternatives for dealing with missing participant accounts are problematic, as described later. The Pension Protection Act of 2006 amended ERISA section 4050 to allow terminating defined contribution plans to transfer assets of missing participants to the PBGC, effective when final regulations are prescribed. We believe this alternative would provide QTAs with a failsafe solution for distributing missing participant accounts. Should the

² State laws for unclaimed property may have varying rules, including extensive mailing requirements and specified periods of time during which the property holder must not have had contact with the individual. It is unclear whether these requirements would be preempted by ERISA.

missing participant or beneficiary ever attempt to recover his or her assets, the PBGC would be a simple and easy place for the individual to turn.

Another way to encourage more institutions to act as QTAs would be to clarify the circumstances under which a QTA is permitted to transfer assets to an IRA of another institution. As discussed in our call, the regulation appears to require use of the QTA's own IRA unless the account balance is \$1,000 or less *and* the account is less than the minimum balance requirement for an IRA of the QTA financial institution. The Department should clarify that use of the QTA's own IRA is not required when the account balance is greater than \$1,000 or meets the minimum balance requirement for an IRA of the QTA. The Department seemed amenable to these clarifications when we spoke.

The Department should consider expanding the options for small accounts with assets of \$1,000 or less. In the absence of the PBGC option, Institute members would like to be able to transfer these small accounts to a bank or savings account or state unclaimed property fund, even if the account balance meets IRA minimum balance requirements. As discussed during our call, many service providers offer low minimum balance requirements for IRAs as a service to plan clients with mandatory cashout provisions or to attract new IRA investors who will be actively contributing to the account. If no new contributions are made to the account, as is likely with a missing participant account, the costs of maintaining the IRA could quickly erode the value of the assets. Therefore, even if a QTA (or another IRA provider) offers an IRA with a minimum balance requirement lower than the value of the missing participant's account, it may not be feasible to transfer the account to an IRA, and the other options would be useful.

Another issue is whether an IRA provider accepting a transfer of assets from a QTA is subject to the same limitation on fees that appears in the class exemption for a QTA designating itself as the IRA provider for missing participant distributions (*i.e.*, fees may be charged against earnings only). The Department indicated during our call that it did not intend to impose this limitation outside of the class exemption. While we maintain that this limitation should not be imposed at all, clarification that it does not apply outside the class exemption will help QTAs find other providers willing to accept small accounts.

Finally, additional problems arise when a QTA discovers that a missing participant is deceased and the QTA has no beneficiary information. In order to transfer the deceased participant's account, depending on the terms of the plan document, the QTA may have to deal with state intestacy laws, which vary state to state and could result in months of delay. Institute members believe that a safe harbor for deceased participant situations would be helpful. For example, where there is no beneficiary information available, the regulation could provide that the deceased participant is treated as a missing participant and the account may be transferred to the PBGC under to the authority described above.

Jeffrey Turner
June 14, 2007
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Annuities

Plans funded with annuity contracts or otherwise required to distribute benefits in the form of an annuity pose unique problems for potential QTAs. QTAs may encounter difficulties in obtaining payment for services when annuities are involved. Many annuity contracts do not permit deduction of service fees from the annuity. In that case, the QTA would have no way of getting paid. This issue is not easily resolved and could prevent or discourage many providers from assuming QTA responsibilities.

For plans subject to the qualified joint and survivor annuity (QJSA) requirements of the Internal Revenue Code, small account balances present problems. If the plan cannot be amended to eliminate the annuity distribution option (as is the case with a money purchase plan), finding an annuity for the small amount is extremely difficult. Annuities for very small amounts are not economically feasible. Although the QJSA rule is not under the Department's jurisdiction, we believe it is appropriate to raise the issue here.

* * *

The Institute and its members appreciate this opportunity to assist the Department with implementation of the abandoned plan program. We would be pleased to meet and discuss these issues further with the Department. We will follow up with you soon to discuss whether a meeting would be beneficial. In the meantime, please contact me (202/326-5821 or ebarone@ici.org) or Mary Podesta (202/326-5826 or podestra@ici.org) if you have any questions.

Sincerely,

/s/ Elena Barone

Elena Barone
Assistant Counsel – Pension Regulation

cc: Joseph Grant, Internal Revenue Service