

# Spring Cleaning for Retirement Plans: Mop Up Missing Participants and Abandoned Plans



ASPPA

Making Retirement Plans Work

*Part of the American Retirement Association*

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# Introduction

Important maintenance/clean-up items for retirement plans:

- Uncashed checks
- Cashout distributions
- Missing participants
- Abandoned plans

# Uncashed Checks

- Investments are liquidated and distributions checks are written – where does the money go while waiting for checks to clear?
  - Plan operating/checking account?
  - Separate trust?

# Uncashed Checks

- Does the plan have a process to periodically review and follow up on:
  - Checks that are returned?
  - Checks that just don't get cashed?

# Uncashed Checks

- ERISA issues
  - The money is still a plan asset until the check is cashed
    - How is it invested?
    - Who gets the earnings? (float?)
    - Reportable on Form 5500
    - Plan audit?
    - Bonding?

# Uncashed Checks

- ERISA issues (continued)
  - These are all fiduciary issues
  - On the DOL radar

# Uncashed Checks

- Best practices
  - Have a process
  - Periodic review and follow up
  - Understand what income/earnings may be generated and who is entitled to that money
  - What if there are losses?

# Cashout Distributions

- What does the plan say?
  - Form
  - Timing



# Cashout Distributions

- Following plan terms in operation?
  - Fiduciary issues
  - Qualification issues

# Cashout Distributions

- Best practices
  - Follow plan terms (or change plan)
  - Regular process
  - Consistent practices
    - Timing
    - IRA rollovers
    - Forfeitures/use

# Missing Participants

- Guidance
  - DOL Field Assistance Bulletin 2014-01
  - IRS Revenue Procedure 2013-12 – guidance for making corrective distributions under EPCRS

# Missing Participants

- DOL Field Assistance Bulletin 2014-01
  - Fiduciary duty to locate missing participants
  - Applies to terminated DC plans

# Missing Participants

- DOL Field Assistance Bulletin 2014-01
  - Prudent/diligent search
  - THEN may use one of the distribution options if the participant cannot be found

# Missing Participants

- DOL Field Assistance Bulletin 2014-01
  - Required search steps:
    1. Use certified mail
    2. Check related plan and employer records
    3. Check with designated beneficiaries
    4. Use free electronic search tools

# Missing Participants

- DOL Field Assistance Bulletin 2014-01
  - If Ps still not found, consider whether additional search steps are appropriate (duty of prudence and loyalty)
    1. Commercial locator service
    2. Credit reporting agencies
    3. Online databases

# Missing Participants

- DOL Field Assistance Bulletin 2014-01
  - Distribution options:
    1. IRA rollover (preferred)
    2. Federally insured interest-bearing account
    3. State unclaimed property fund



# Missing Participants

- DOL Field Assistance Bulletin 2014-01
  - Distribution Options: 100 percent withholding is not an acceptable alternative

# Missing Participants

- IRS Rev. Proc. 2013-12
  - Section 6.02(5)(d) – general correction principles
  - Applies to corrective distributions made under EPCRS

# Missing Participants

- IRS Rev. Proc. 2013-12
  - Must make reasonable effort to locate
    - Certified mail to last known address
    - Commercial locator service
    - Credit reporting agencies
    - Internet search tools

# Missing Participants

- IRS Rev. Proc. 2013-12
  - AFTER reasonable efforts have been made, correction is deemed to be complete
  - If P is located later, benefits must be provided

# Missing Participants

- Ongoing plans
  - Regular process to update records
  - Encourage sponsor to provide distribution info and update contact info at exit interview
  - Can do cashout distribution, but cannot distribute without consent if over cashout limit

# Abandoned Plans

- How are plans abandoned?
  - Company goes out of business
  - Plan sponsor and/or fiduciaries disappear (\$\$\$ missing?)

# Abandoned Plans

- How are plans abandoned? (continued)
  - Plan sponsor goes bankrupt
  - Participants and plan service providers are left “holding the bag”
    - Distributions
    - Paying fees
    - Plan compliance
    - Reporting

# Abandoned Plans

- Who can act for the plan?
  - Any fiduciaries left?
  - Appoint independent fiduciary/trustee?
  - Bankruptcy court?
  - DOL may step in



# Abandoned Plans

- 2006 DOL Regulations – DOL estimated that 1,650 plans are abandoned each year
  - 29 C.F.R. §2578.1 – Termination of Abandoned Individual Account Plans
    - When is a plan “abandoned?”
    - Who can terminate plan and distribute assets?
    - Limited liability

# Abandoned Plans

- 2006 DOL Regulations
  - 29 C.F.R §2550.404a-3 – Fiduciary safe harbor for distributions to participants and beneficiaries who fail to elect form of distribution

# Abandoned Plans

- 2006 DOL Regulations
  - 29 C.F.R. §2520.103-13 – Simplified reporting for abandoned plan

# Abandoned Plans

- Prohibited Transaction Class Exemption 2006-06 (continued)
  - PTE 2006-06 – Exemption permits QTA to select itself to wind up plan and to pay its own fees

# Abandoned Plans

- December 2012 proposed DOL regulations
  - Prior regulations do not provide termination of plan where sponsor is in Chapter 7 bankruptcy
  - Use of existing program – 331 applications in 2010

# Abandoned Plans

- December 2012 proposed DOL regulations (continued)
  - DOL estimated 50 percent increase in filings with changes – 495 plans
  - Average abandoned plan has six participants

# Abandoned Plans

- Changes to existing regulations relating to sponsors in bankruptcy
  - 29 C.F.R. §2578.1(j) – Special rules for plans of sponsors in Chapter 7 bankruptcy

# Abandoned Plans

- Changes to existing regulations relating to sponsors in bankruptcy (continued)
  - 29 C.F.R. §2550.404a-3(d)(1)(iv) – Confirms that fiduciary safe harbor applies where bankruptcy trustee is unable to locate participant or beneficiary



# Abandoned Plans

- Changes to existing regulations relating to sponsors in bankruptcy (continued)
  - 29 C.F.R. §2520.103-13 – Revises subsection (b)(1) to include information for plan of bankrupt sponsor

# Abandoned Plans

- Other changes to existing regulations
  - Eliminate requirements to state whether QTA has been subject to investigation, examination or enforcement action – 29 C.F.R. §2578.1(c)(3)(i)(C)
  - Revise definition of “affiliate” – 29 C.F.R. §2578.1(h)

# Abandoned Plans

- Other changes to existing regulations (continued)
  - Revise 29 C.F.R. §2550.404a-3(d)(v) – Transfer to bank account or state unclaimed property fund where participant/beneficiary believed to be dead
  - Revise 29 C.F.R. §2520.103-13(c)(2) – Clarifies where to find instructions for filing Special Terminal Report for Abandoned Plans (STRAP):  
<http://www.dol.gov/ebsa/publications/APterminalreport.html>

# Bankruptcy

- General
  - Company is insolvent (unable to pay debts)
  - Chapter 7 – Liquidation
  - Chapter 11 – Reorganization
  - Plan assets are NOT part of bankruptcy estate

# Bankruptcy

- Chapter 7 – Liquidation
  - Bankruptcy trustee collects assets and pays creditors
  - Plan will not continue
  - Bankruptcy trustee – duties
    - Required to continue performing duties of plan administrator [Bankruptcy Code §704(a)(11)]
    - DOL takes the position that trustee is a fiduciary

# Bankruptcy

- Chapter 7 – Liquidation (continued)
  - Plan may have claims against sponsor/bankruptcy estate
    - Unpaid contributions
    - Deferrals withheld from employees' pay
  - Creditors may try to grab plan assets

# Bankruptcy

- Chapter 11 – Reorganization
  - Company continues in business
  - Negotiate workout plan with creditors
  - Plan may continue
  - Contributions and deferrals may be ongoing
  - May be converted to liquidation

# Bankruptcy

- Who's on first?
  - Who are plan fiduciaries?
    - Trustee
    - Plan administrator
    - Investment manager



# Bankruptcy

- Who's on first? (continued)
  - Can you find them?
  - Will they help wind up plan?

# Bankruptcy

- Who's on first? (continued)
  - Who else can act for the plan?
    - Amend/terminate
    - Authorize distributions
    - Authorize payment of administrative, legal, or other expenses/fees

# Bankruptcy

- Who's on first? (continued)
  - Fees and expenses
    - What fees can be paid from plan assets?
    - Can/will bankruptcy estate pay?

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Standards for terminating and winding up an individual account plan where:
  - QTA determines there is no plan administrator; or
  - Bankruptcy court has entered order for relief in Chapter 7 case

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- QTA = Qualified Termination Administrator
  - Eligible to serve as IRA trustee – bank or insurance company
  - Holds assets of an abandoned plan
  - **[PROPOSED]** Chapter 7 bankruptcy trustee or an “eligible designee”

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Finding of abandonment
  - QTA may find abandonment if either:
    - No contributions or distributions for at least 12 months; or
    - Other facts and circumstances indicate plan is or may be abandoned

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Finding of abandonment
  - Following reasonable efforts to locate or communicate, QTA determines that plan sponsor:
    - No longer exists
    - Cannot be located; or
    - Is unable to maintain plan

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Finding of abandonment
  - Reasonable efforts
    - Send notice to last known address and agent for service of process (if corporation), by delivery method requiring acknowledgment of receipt
    - Contact known service providers



# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Finding of abandonment
  - No finding of abandonment if plan sponsor objects to findings or to plan termination before plan is deemed terminated

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Finding of abandonment
  - **[PROPOSED]** Chapter 7 bankruptcy – Plan is considered abandoned upon entry of order for relief. No abandonment if case is converted to Chapter 11.

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Finding of abandonment
  - Notice to sponsor
    - QTA name and address
    - Plan name, account number, and identifying information
    - Statement that plan may be terminated and benefits distributed if plan sponsor fails to contact QTA within 30 days
    - Statement that notice will be provided to DOL if plan is terminated
    - DOL statement – fiduciary responsibility/liability
    - Plan sponsor may contact DOL for more information

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Deemed termination – 90 days after DOL acknowledges receipt of notice
  - QTA must provide notice of abandonment to DOL
    - QTA information
    - QTA elects to terminate and wind up
    - Plan information
    - Findings and basis
    - Name, last known address, and telephone number of plan sponsor
    - Estimated number of participants and beneficiaries
    - Plan asset information
    - Perjury statement

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Deemed termination – 90 days after acknowledgement
  - **[PROPOSED]** Chapter 7 bankruptcy – Additional information
    - Name, address, and telephone number of bankruptcy trustee (and any eligible designee)
    - Copy of order for relief

# Termination of Abandoned Plans [29 C.F.R. §2578.1]

- Deemed termination – 90 days after acknowledgement
  - Before 90 days, DOL may:
    - Object
    - Waive the 90-day period

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - Update plan records
  - Calculate benefits

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - Report known delinquent contributions to DOL
    - Generally, QTA has no duty to collect delinquent contributions
    - **[PROPOSED]** Chapter 7 bankruptcy – Must take reasonable, good-faith steps to collect, taking into account the amount involved, likelihood of recovery, and cost to pursue



# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - **[PROPOSED]** Chapter 7 bankruptcy – Must report any activity that QTA believes may be evidence of other fiduciary breaches involving plan assets by a prior fiduciary
    - Missing \$\$\$
    - Bad investments

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - Engage service providers
  - Pay reasonable expenses
    - Necessary to wind up and distribute
    - Consistent with industry rates based on experience of QTA
    - Not in excess of rates ordinarily charged by QTA
    - No prohibited transaction
    - **[PROPOSED]** Chapter 7 bankruptcy – Expenses must be consistent with industry rates charged by QTAs for similar services (not based on expenses generally charged by bankruptcy trustees)

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - Notice to participants and beneficiaries
    - Written in a manner calculated to be understood by the average participant

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - Notice to participants and beneficiaries must contain the following information:
    - Plan name
    - Statement that plan has been abandoned
    - **[PROPOSED]** Chapter 7 bankruptcy – Statement that sponsor is in liquidation and plan has been terminated by bankruptcy trustee
    - Account balance (actual distribution may be more or less)
    - Distribution options and request election

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - Notice to participants and beneficiaries must containing the following information (continued):
    - If no response in 30 days, distribution will be made to IRA, inherited IRA, bank account, state unclaimed property fund, or annuity provider
    - Investments designed to preserve principal
    - Statement of fees
    - Contact info for IRA provider and QTA

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - Notice to participants and beneficiaries
    - Returned mail – must take steps to locate

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - Distribute benefits
    - In accordance with elections
    - If no election within 30 days, distribute in accordance with §2550.404a-3, or in a manner reasonably determined to comply with survivor annuity requirements

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - Distribute benefits
    - QTA may transfer assets to itself only if exempt under prohibited transaction rules (**[PROPOSED]** Chapter 7 bankruptcy – not applicable if QTA is bankruptcy trustee)



# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - File STRAP

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - File final notice with DOL
    - **[PROPOSED]** Chapter 7 bankruptcy – Include name, address, and telephone number of bankruptcy trustee (or eligible designee)

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Winding up the plan
  - Plan is deemed to be amended to permit wind-up

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Limited liability
  - Where discretion is exercised, QTA deemed to satisfy fiduciary duties where acting in accordance with regulations
  - Must prudently select and monitor service providers and assure that fees are reasonable
  - Must prudently select annuity providers

# Termination of Abandoned Plans

## [29 C.F.R. §2578.1]

- Limited liability (continued)
  - No duty to investigate whether prior fiduciary breaches occurred
  - **[PROPOSED]** Chapter 7 bankruptcy – Bankruptcy trustee or eligible designee may not seek release from liability or assert defense of judicial immunity

# Safe Harbor for Distributions

- Applies to distributions if:
  - Notice is provided to participants and beneficiaries
  - Participant or beneficiary failed to elect form of distribution within 30 days

# Safe Harbor for Distributions

- Fiduciary is deemed to have satisfied duties under ERISA §404(a) with respect to:
  - Distribution of benefits
  - Selection of transferee for IRA, bank account or annuity; and
  - Investment of funds in connection with the distribution

# Safe Harbor for Distributions

- Conditions
  - Distribution is made for IRA or inherited IRA
  - If less than \$1,000 (or minimum amount required for investment):
    - Interest-bearing federally insured account
    - State unclaimed property fund; or
    - IRA offered by other financial institution



# Safe Harbor for Distributions

- Conditions
  - **[PROPOSED]** Chapter 7 bankruptcy – If less than \$1,000 and bankruptcy trustee is unable to find IRA provider, then distribute to interest-bearing federally insured account or state unclaimed property fund
  - QTA may disregard \$1,000 threshold if it finds in good faith that participant/beneficiary is deceased

# Safe Harbor for Distributions

- Conditions
  - QTA must have written agreement:
    - Investment designed to preserve principal and provide reasonable rate of return
    - Offered by bank, insurance company, or registered investment company
    - Fees not to exceed charged by provider for comparable plans or accounts
    - Participant or beneficiary has right to enforce

# Safe Harbor for Distributions

- Conditions
  - Selection of provider and investment of funds is not prohibited transaction

# Safe Harbor for Distributions

- Conditions
  - Notice to participant/beneficiary:
    - Plan name
    - Account balance; amount distributed may be more or less
    - Plan distribution options and request to make election
    - If fail to make election within 30 days, plan will distribute to IRA and balance will be invested in product designed to preserve principal
    - Fees
    - Contact info for IRA provider and plan administrator (or QTA)
    - Send to last known address; reasonable effort to locate if returned as undeliverable

# Terminal Reporting for Abandoned Plans

- File on Form 5500
- Within two months after end of month in which wind-up is completed
- Instructions:

<http://www.dol.gov/ebsa/publications/APterminalreport.html>

# Terminal Reporting for Abandoned Plans

- Content
  - **[PROPOSED]** Chapter 7 bankruptcy – Identifying information for bankruptcy trustee and any eligible designee, and the plan being terminated
  - Total assets as of date of deemed termination, before expenses and distributions
  - Itemized schedule of expenses paid by the plan to each service provider
  - Total distributions and statement indicating whether any distributions were transferred because participant failed to make an election
  - Description, value and method of validation for any assets with no readily ascertainable fair market value

# Prohibited Transaction Class Exemption 2006-06

- Exemption – ERISA §§ 406(a)(1)(A)-(D) and 406(b)(1) and (2) do not apply where QTA uses its authority to:
  - Services and fees
    - Select itself or an affiliate to provide services
    - Receive fees for services performed as QTA
    - Pay itself prior to deemed termination of plan

# Prohibited Transaction Class

## Exemption 2006-06

- Exemption – ERISA §§ 406(a)(1)(A)-(D) and 406(b)(1) and (2) do not apply where QTA uses its authority to:
  - Accounts and investments
    - Designate itself as provider for IRA, inherited IRA, or federally insured account to receive distribution where participant or beneficiary does not provide direction
    - Invest account balance in proprietary investment product
    - Receive fees for establishment and maintenance of account
    - Pay itself investment fees



# Prohibited Transaction Class Exemption 2006-06

- Conditions for services and fees
  - Must follow QTA regulations

# Prohibited Transaction Class Exemption 2006-06

- Conditions for services and fees
  - Fees and expenses paid to QTA and affiliates must be:
    - Consistent with industry rates for similar services, based on experience
    - Not in excess of rates charged to others

# Prohibited Transaction Class Exemption 2006-06

- Conditions for services and fees
  - **[PROPOSED]** Chapter 7 bankruptcy – Where QTA is bankruptcy trustee:
    - Services are necessary to wind up plan
    - Fees and expenses are consistent with industry rates for QTAs who are not bankruptcy trustees

# Prohibited Transaction Class Exemption 2006-06

- Conditions for distributions
  - Must follow QTA regulations

# Prohibited Transaction Class Exemption 2006-06

- Conditions for distributions
  - Notice to participants and beneficiaries:
    - If fail to elect within 30 days, account balance will be distributed to IRA or other account
    - May be invested in proprietary investment product designed to preserve principal
    - IRA or other account for exclusive benefit of account holder, spouse, or beneficiaries

# Prohibited Transaction Class Exemption 2006-06

- Conditions for distributions
  - Notice to participants and beneficiaries (continued):
    - Terms are no less favorable than terms for comparable IRA or other account
    - Rate of return is no less favorable than rate of return for comparable IRA or other account
    - No sales commissions

# Prohibited Transaction Class Exemption 2006-06

- Conditions for distributions
  - Notice to participants and beneficiaries (continued):
    - May transfer without penalty to different investment or IRA/account at another institution
    - Fees and expenses not to exceed fees/expenses charged to comparable accounts

# Prohibited Transaction Class Exemption 2006-06

- Conditions for distributions
  - Notice to participants and beneficiaries (continued):
    - Fees and expenses may be charged only against income earned
    - Fees and expenses are not in excess of “reasonable compensation”



# Prohibited Transaction Class Exemption 2006-06

- Recordkeeping
  - Six years from date abandonment notice provided to DOL
  - Records sufficient to determine whether QTA complied with Exemption conditions

# Questions?

# THANKS!

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