ASPPA
WORKING FOR AMERICA'S RETIREMENT

Comments on Abandoned Individual Account Plan Proposed Regulations and Class Exemption

May 9, 2005

Department of Labor
Employee Benefits Security Administration

29 CFR Parts 2520, 2550, et al.

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the Department of Labor's (DOL) proposed regulations regarding Abandoned Individual Account Plans (Orphan Plans) and the accompanying Proposed Prohibited Transaction Application D-11201. These proposals were published in the Federal Register on March 10, 2005, and can be found in 70 FR 12074, et seq.

ASPPA is a national organization of almost 5,500 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including attorneys, administrators, consultants, actuaries and accountants. ASPPA's membership is diverse, but united by a common dedication to the private retirement plan system.

ASPPA's membership has considerable experience dealing with Orphan Plans and recognizes the problems they can cause to plan participants who want nothing more than the retirement income to which they are legally entitled. ASPPA applauds the DOL for undertaking this important initiative.

Summary of Recommendations

The following is a summary of ASPPA's recommendations. These are described in greater detail in the Discussion of Issues section.

A. ASPPA recommends that the group of individuals or entities eligible to serve as Qualified Termination Administrators (QTAs) be expanded to include other parties, such as current or former service providers, who satisfy certain conditions. In many cases, these parties are in the best position to serve as the "quarterback" for the termination process from both a logistical and cost efficiency perspective, particularly when multiple financial institutions hold plan assets. In order to ensure adequate regulatory oversight, the ability of these parties to act as QTA could be limited to situations in which there is also a second QTA that satisfies the requirements of the proposed regulations.

B. ASPPA recommends that the fiduciary safe harbor and proposed Prohibited Transaction Exemption (PTE) with respect to the investment of amounts rolled over to IRAs or other accounts be expanded to include lifestyle, retirement date and other balanced fund options.

C. ASPPA recommends that the DOL clarify that in situations involving both a financial institution and an independent QTA (*i.e.,* a non-financial institution) that the Proposed PTE is not applicable if the independent QTA appoints a QTA that is a financial institution as an IRA or other account provider.

D. ASPPA recommends that the safe harbors provided to QTAs be expanded to court (*e.g.,* bankruptcy court) appointed persons who are charged with similar responsibilities.

E. ASPPA recommends that the proposed regulations be effective immediately once finalized and that they be expanded to include IRC §403(b) plans. In addition, ASPPA does not recommend that any changes be made to the proposals with respect to the determination of plan abandonment or reporting requirements, and that electronic filing be optional.

Discussion of Issues

In recent years, for whatever reason, the number of plans being abandoned by their sponsors seems to have been growing. Regardless of the reason—the sponsor has gone out of business, or the owner(s) have been incarcerated or simply disappeared—financial institutions, third party administrators and other service providers have been left with the assets or records of employee benefit plans and no responsible fiduciary to provide proper direction for disposition or liquidation of the participant accounts.

In some cases, plan sponsors have filed for bankruptcy and the plan issues could be resolved with the assistance of the bankruptcy court. In other cases, the Department of Labor has filed lawsuits seeking appointment of an appropriate individual to terminate a plan and distribute its assets. These approaches, however, have been piecemeal, costly, and inefficient and have not been used in many—if not most—of the abandoned plan cases.

Even if a person could be found to serve as a fiduciary for the termination of an abandoned plan, that person would often be faced with missing records or participants and would, more than likely, immediately uncover numerous operational failures, such as failure to file Form 5500 and distribute summary annual reports and summary plan descriptions. Also, many of these plan documents would have not been brought into compliance with recent changes in the law. In most of these cases, to have brought the plans into document and operational compliance prior to their termination would have served no purpose other than to consume remaining plan assets with fees relating to these mostly doctrinaire and ministerial acts that would not have related directly to plan benefits. This would have adversely affected the plan's participants and served no useful government purpose.

Knowledgeable practitioners can work with both the DOL and the Internal Revenue Service on a case-by-case basis to simplify the process, but there is no established or published procedure for doing so.

We are gratified that the DOL has recognized these problems and has undertaken a major initiative to address them. It is clear from the DOL proposals that the Department takes these problems seriously and has devoted considerable time and attention to resolving them. The DOL proposal addresses the major issues facing plan service providers in dealing with these problems and does so within a framework that is protective of the rights of both participants and the public.

However, based on wide ranging practical experience of our members, ASPPA has recommendations that would make the pending proposal more workable and applicable to a wider range of situations without foregoing the protections the DOL desires. These recommendations, as is the case with the DOL proposal, are designed to achieve the following mutual goals: (1) protecting and preserving plan assets and assuring compliance with the fiduciary provisions of ERISA; (2) distributing plan assets to the participants or successor custodian as quickly and efficiently as possible after the plan has been determined to be abandoned; (3) keeping the costs of plan termination and distribution of assets as low as possible; and (4) providing meaningful protection for those who step forward to assume responsibility for terminating the plan and distributing its assets. All of these objectives are important and interdependent and our proposals are designed to achieve them all.

A. Expansion of Qualified Termination Administrator

The proposal places unnecessary restrictions on those entities and individuals authorized to serve as QTAs. These restrictions may actually serve as an impediment to the use of the proposed regulations. In many cases, there are several financial institutions holding plan assets. It is not uncommon for a §401(k) plan to offer its participants mutual funds from several different fund families. In these cases, all plan contributions are sent to the plan administrator or record keeper who then forwards the money to each mutual fund or other investment product selected by the participants. In this case, the third party administrator or record keeper would be in a better position to serve as a QTA than any one of the several financial institutions holding plan investments. In other situations, another service provider, such as an accountant, might be in a better position to undertake the duties of a QTA.

ASPPA recommends that the DOL broaden the definition of a QTA to include any current or former service provider to the plan who meets certain specified criteria designed to protect the plan. One of the protections could be that this QTA would be a joint QTA with an entity that meets the requirements of a QTA as set forth in the proposed regulation (*i.e.,* a financial institution). In addition, the non-financial institution QTA would need to satisfy each of the criteria set forth below. Satisfaction of these requirements would provide adequate protection to the plan and the participants while allowing sufficient flexibility to assure that the most appropriate party in any given situation can serve as the QTA.

1. The proposed QTA must possess or maintain fiduciary liability insurance (the cost of which, excluding the non-recourse rider, may be borne by the plan). In the alternative, the QTA could obtain a bond, letter of credit or other surety in an amount sufficient to protect the plan against any loss. Proof of compliance with this requirement would be provided to the DOL as a part of the application process.

2. The proposed QTA must be qualified to serve as a plan fiduciary pursuant to Title I of ERISA and not have been found by the DOL or any court of competent jurisdiction to have breached its fiduciary responsibilities to any employee benefit plan during the preceding five years.

3. Unless the proposed QTA is eligible to serve as a trustee or issuer of an individual retirement plan within the meaning of Internal Revenue Code §7701(a)(37), it could not select itself as either the interim or final repository of any participant's account.

B. Expansion of Investment Alternatives for Amounts Automatically Rolled Over to an IRA

Pursuant to proposed regulation §2550.404a-32, one of the conditions of the fiduciary safe-harbor with respect to the investment of funds that are automatically rolled over to an IRA (due to the failure of a participant to make an affirmative distribution election) is that the investment "shall seek to maintain, over the term of the investment, the dollar value that is equal to the amount invested in the product by the individual retirement plan or other account...." A similar restriction is found in the proposed Prohibited Transaction Exemption (PTE) (*i.e.,* investments are limited to "Eligible Investment Products").

It would be rare for an investment advisor to approve long-term investment objectives based solely on the preservation of capital. Virtually all financial institutions offer lifestyle, retirement date and other balanced fund options that are designed for long-term investors who choose not to actively manage their accounts. Provided the fees are reasonable and the investment decisions prudent, such investments will always, in the long run, provide a greater benefit to plan participants.

ASPPA recommends that, with respect to investments permitted in rolled-over IRA amounts, the DOL broaden both the fiduciary safe-harbor and the term "Eligible Investment Product" as defined in the proposed PTE to include lifestyle, retirement date and other balanced fund options.

C. Clarification of Application of the Proposed PTE

The proposed PTE would provide a class exemption from the prohibited transaction rules where a QTA selects itself as the provider of an IRA (or other account provider in the context of a rollover on behalf of a non-spousal beneficiary) and/or issuer of an investment held by such plan. One of the conditions of the PTE is that fees be limited to the earnings on the account. If the DOL adopts ASPPA's recommendation that there be non-financial institutions serving as QTAs in conjunction with QTAs that are financial institutions, then it should be clarified that the limitations of the PTE only apply with respect to self-appointments made by QTAs that are financial institutions.

ASPPA recommends that the DOL clarify that in situations where there are both a financial institution and an independent QTA (*i.e.,* a non-financial institution), the proposed PTE is not applicable if the independent QTA appoints the QTA that is a financial institution as an IRA or other account provider.

D. Expansion of QTA Safe Harbors to Court Appointed Persons

In bankruptcy situations, the bankruptcy courts or trustees appointed in bankruptcy have assumed the role of former plan sponsors to terminate Orphan Plans. It is likely that this trend will continue, and possibly even be more common in light of the recently enacted bankruptcy legislation. The proposed regulations would provide safe-harbors for QTAs but would not apply to persons charged with the same tasks in a bankruptcy or other legal situation.

ASPPA recommends that the same safe harbor protections offered to QTAs be made available to court appointed persons charged with the same tasks.

E. Effective Date, Expansion to 403(b) Plans, Finding of Plan Abandonment and Reporting

In the preamble to the proposed regulations, the DOL specifically asked for input regarding numerous other items.

ASPPA recommends the following:

1. The proposed relief should be immediately effective upon adoption.

2. Electronic filing should be optional, not mandatory.

3. There is no reason to augment the procedural steps needed prior to a QTA assuming responsibility for terminating a plan. Any such augmentation would add to both the expense and time involved in terminating an orphan plan and distributing its assets. While it is always possible that a fiduciary may arise at some later date, there is no incentive for anyone to seek to become a QTA when a reasonable possibility exists that the fiduciary can be found. In fact, any potential QTA would do anything reasonably possible to find the plan sponsor or named fiduciary before volunteering to undertake those duties.

4. No additional modifications should be made to the reporting requirements set forth in the proposal.

5. The proposed relief should be expanded to include IRC §403(b) plans.

In conclusion, ASPPA again applauds the DOL for undertaking this important initiative and doing so in a comprehensive manner. Although a public hearing on this proposal is probably not necessary, should one be held, ASPPA would be happy to participate in it and amplify the recommendations made herein.

These comments were prepared by the DOL Subcommittee of ASPPA's Government Affairs Committee, and primarily authored by the Chair, Sherwin S. Kaplan, Esq., APM. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

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The policy would, of course, have to be issued by a company licensed to do business in the subject jurisdiction; the issuing company would not be related to the QTA and the cost of the insurance must be both reasonable and no more than fiduciaries of other, similarly situated plans would pay.

In fact, funds maintained in such accounts for extended periods of time have historically not even kept pace with inflation. Thus, putting a participant's entire account balance in a money market account for an extended period of time would have the ironic effect, based on past history, of absolutely guarantying a loss.

Any deficiencies in these areas would, of course, be fiduciary violations under ERISA. Money market or stable value investments could be used for a three-month period in order to give the participant the opportunity to make his or her own investment decisions. Failure to do so would put fiduciary responsibility for such investments on the QTA. Providing exemptive relief for more active management (which would achieve both diversification and asset allocation objectives) would be in the best interest of all concerned.