Publications

Expanded Abandoned Plan Program Gives Certain Bankruptcy Trustees QTA Eligibility, Adopts Other Technical Changes

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On May 17, 2024, the Department of Labor ("DOL") published interim final rules (collectively, the "IFR") to amend DOL's 2006 regulations establishing the abandoned plan program, as well as the accompanying prohibited transaction exemption. The IFR expands eligibility to serve as a "qualified termination administrator" ("QTA") to include Chapter 7 bankruptcy trustees and certain parties appointed by such trustees ("Eligible Designees"). Beyond expanding QTA eligibility, the IFR also makes a number of technical changes which may impact the administration of abandoned plans.

The IFR is effective July 16, 2024. DOL has also requested industry comments by that date.

Background

DOL's abandoned plan program was established in 2006 upon its issuance of a set of regulations that provide the criteria for when a plan is considered "abandoned," eligibility rules for QTAs, procedures for terminating abandoned plans, as well as a fiduciary safe harbor for QTAs to wind up the plan and make distributions to lost or missing participants from defined contribution plans. To accompany the regulations, DOL also issued prohibited transaction exemption ("PTE") 2006-06, which among other things, permits a QTA to select itself or an affiliate for termination activities and receive compensation for such services.

The 2006 regulations strictly limited QTA eligibility to entities that:

1. were eligible to serve as a trustee or issuer of an individual retirement plan within the meaning of section 7701(a)(37) of the Internal Revenue Code, and
2. held assets of the plan on whose behalf it will serve as the QTA.

Under these conditions, bankruptcy trustees were not eligible to serve as QTAs and thus the abandoned plan program was generally not available if a plan sponsor was under liquidation under Chapter 7 of the Bankruptcy Code unless another entity eligible to serve as a QTA was available. But after administering the abandoned plan program for several years, DOL shifted its view and determined that the program "could be improved by including bankruptcy trustees as QTAs and providing streamlined termination and winding up procedures that are applicable to them." Accordingly, DOL issued a proposed rule in 2012 expanding QTA eligibility to include bankruptcy trustees. However, despite completing the notice and comment process and receiving industry feedback, DOL did not take any further action on the proposal until the issuance of the IFR more than a decade later.

Despite the significant delay, DOL notes that "the rationale for the changes discussed in the 2012 proposal continue to be relevant" but also believes that the passage of time warrants "another round of public comments [to] evaluate the further program expansions suggested by some stakeholders and other possible program improvements[.]"

Overview of Key Changes

Expansion of QTA Eligibility

The IFR permits bankruptcy trustees and Eligible Designees to serve as QTAs to abandoned plans and to avail themselves of the procedures and protections under the abandoned plan program, including the receipt of reasonable compensation for termination services. "Eligible Designees" are persons appointed by bankruptcy trustees to be responsible for the termination and winding up of abandoned plans.

Notably, the IFR broadens eligibility and permits bankruptcy trustees to select (A) a person or entity that (i) is eligible to serve as a trustee or issuer of an individual retirement plan and (ii) holds assets of the plan, or (B) an "independent bankruptcy trustee practitioner" as the Eligible Designee. An "independent bankruptcy trustee practitioner" is defined as "a person other than the bankruptcy trustee of the plan sponsor's case, who has served within the previous five years as a bankruptcy trustee in a case under chapter 7 of the Bankruptcy Code, who accepts in writing a designation by the bankruptcy trustee and who acknowledges in writing to the bankruptcy trustee that they are a fiduciary with respect to the plan."

Bankruptcy trustees are permitted to charge to the plan reasonable expenses that are "consistent with industry rates" for QTA services. In this regard, DOL expressly noted that industry rates refer to costs of "ordinary plan administration under ERISA" and that the bankruptcy trustee or Eligible Designee may not "charge attorney-level rates for plan administration activities of termination and winding up the plan."

The IFR also imposes a "rule of accountability," which prohibits the bankruptcy trustee or Eligible Designee from seeking a waiver or release from ERISA liability "in any action brought against the bankruptcy trustee or eligible designee arising out of its conduct" with respect to abandoned plan administration.

Requirements for Appointing an Eligible Designee

The IFR sets forth a process for appointing an Eligible Designee, and also mandates the appointment of an Eligible Designee in certain circumstances. The IFR further imposes certain obligations on the bankruptcy trustee governing its relationship with an Eligible Designee.

As an initial matter, the bankruptcy trustee is required to take "reasonable and diligent" efforts to determine if a plan is owed any delinquent contributions. While the decision to appoint an Eligible Designee is generally voluntary, if a plan is owed contributions in excess of a "de minimis" amount, the bankruptcy trustee is ***required*** to appoint an Eligible Designee to serve as the QTA. In this regard, a "de minimis" amount exists if there is either $2,000 or less in delinquent contributions, or if delinquent contributions exceed $2,000 but the property owned by the plan sponsor from which to collect delinquent contributions has a value "equal to or less than $2,000 net of all enforceable liens and applicable exemptions." DOL explained that the purpose of requiring the appointment of an Eligible Designee in such circumstances is to address concerns that a bankruptcy trustee may be conflicted in balancing its fiduciary duties when terminating an abandoned plan with its "obligation to close the estate expeditiously" under the Bankruptcy Code.

Helpfully, in recognizing the challenges in obtaining relevant documentation, DOL confirms that "a bankruptcy trustee will not have failed to make reasonable and diligent efforts to determine whether the plan is owed any contributions merely because the trustee reasonably concludes in good faith that it is impossible, or would involve significant cost to the plan in relation to the plan's total assets, to update or locate the necessary records to make the necessary determination."

The IFR also imposes other conditions regarding the bankruptcy trustee's relationship with the Eligible Designee, including the following:

- The bankruptcy trustee is required to provide its findings regarding the amount of delinquent contributions to the Eligible Designee.
- The bankruptcy trustee is required to establish procedures to allow the Eligible Designee to have "reasonable access" to the bankruptcy trustee's records that may be needed to terminate and wind up the plan (e.g., payroll records, participant information, trust statements).
- The bankruptcy trustee has a fiduciary duty to prudently select and monitor the Eligible Designee "throughout the termination and winding up process until all plan assets are distributed." Notably, DOL confirmed that a bankruptcy trustee's obligations do not end upon the appointment of an Eligible Designee.
- The bankruptcy trustee is required to notify DOL if it discovers evidence of a breach by a prior plan fiduciary in the course of monitoring and communicating with the Eligible Designee in the termination process. This notice requirement applies even after termination of the plan.

Technical Changes to Abandoned Plan Program

In addition to the changes relating to expanding QTA status to include Chapter 7 bankruptcy trustees, DOL made several technical changes to the abandoned plan regulations and requested comments on several issues, including the following:

- Notices to DOL. The abandoned plan regulations currently require QTAs to file a final Form 5500 for the plan with a schedule unique to the abandoned plan program. The IFR will replace the Form 5500 filing requirement with a separate standalone form called the "Special Terminal Report for Abandoned Plans." This form will be required to include, among other things, the total number of distributions and the number of distributions to missing participants included in that total. DOL also stated that it will build a voluntary electronic filing system to allow all notices required to be provided to DOL to be delivered online.
- Deceased Participants. The abandoned plan regulations generally require that accounts of participants the QTA knows to be deceased to be rolled over an IRA if the account's size is greater than $1,000. The IFR will now permit a QTA to distribute the account of a participant the QTA knows to be deceased to a state unclaimed property fund (no matter the size) if (i) the QTA has reasonably and in good faith searched for and cannot locate a beneficiary designation for the account, (ii) the QTA has reasonably and in good faith searched for, but could not locate, the participant's estate, and cannot distribute the account to an IRA in the name of the participant's estate, and (iii) the QTA has no actual knowledge of claims by any person for ownership over all or part of the participant's account.
- Service Providers Permitted to Act as QTAs. One controversial aspect of the abandoned plan regulations is that the only type of plan service provider that may act as a QTA is an entity eligible to act as a trustee or issuer of an IRA that holds at least some assets of the plan (i.e., a plan custodian). Recordkeepers and third-party administrators are therefore excluded. Yet the responsibilities imposed on a QTA are more similar to the services provided by recordkeepers and third-party administrators than the services provided by custodians.

  DOL declined to extend QTA eligibility to recordkeepers and third-party administrators on the basis that they are not regulated in the same manner as banks or trust companies. However, DOL expressly welcomed additional comments on this matter, especially as to whether recordkeepers and third-party administrators may be subject to sufficient regulation by the Securities and Exchange Commission.
- Distributions Options. The abandoned plan regulations currently allow participant account balances that are $1,000 or less, if the QTA does not offer an IRA product that accepts rollovers of such amounts, to be distributed to an interest bearing bank account, to the unclaimed property fund of the state associated with the participant's last-known address, or to an IRA offered by another financial institution if the participant does not direct another method of distribution.

  DOL declined to extend this treatment to participant accounts with a value of $5,000 or less. Accounts with a size larger than $1,000 can be distributed to an IRA or, pursuant to DOL Field Assistance Bulletin 2021-01, the Pension Benefit Guaranty Corporation's ("PBGC") Missing Participants Program for Defined Contribution Plans if the participant does not direct an alternative distribution method. DOL requested comments on use of the PBGC program, including whether it should be applied as the sole distribution option for terminating plans eligible to use the program and whether streamlined procedures could be applied when it is used. DOL also requested comment on whether distributions from 403(b) plans should be permitted to be made in the form of an annuity contract.

- Forfeiture of De Minimis Account Balances and Allocation of Expenses. The abandoned plan regulations currently permit a QTA to treat a participant account as forfeited if the account's allocable share of plan expenses exceeds the balance of the account. DOL stated that a QTA would not be permitted to assume that it would be necessary to incur costs to locate the participant, allocate expected search costs to the participant account, and use such search costs as a basis for forfeiting the participant account without an indication that the plan's records of the participant's address are incorrect. However, DOL clarified that if mail sent to the participant is returned as undeliverable, then the QTA would be permitted to allocate reasonable search costs entirely to the participant's account, and if the expenses exceed the size of the participant's account, the account could be forfeited. The regulations permit expenses to be allocated pro rata (proportionately) or per capita (equally) among participant accounts. DOL requested comment on whether further guidance should be provided on the types of expenses that should be allocated to participants pro rata or per capita.
- Delivery of Participant Distribution Notices. DOL requested on comment on how notices of a participant's right to select a method of distribution are delivered when the QTA is aware the participant is missing, noting that one commenter stated that it sends notices through certified mail in this situation. Additionally, DOL solicited comment on whether guidance on QTA's ability to rely on DOL's safe harbors for electronic distribution of notices would be helpful.

Requests for Comments

As noted above, the IFR is effective on July 16, 2024, and DOL has also requested comments by that date. Members of the regulated community that work with abandoned plans, including entities that currently serve as QTAs or are interested in serving in that capacity, are encouraged to submit comments regarding the recent changes to the abandoned plan program, as well as potential changes that they would like DOL to consider for future rulemaking.

Please contact your regular Groom attorney if you have any questions or are interested in submitting a comment letter.