

ICI Comment Letter on Proposed Regulations for Orphan Plans, May 2005

May 9, 2005

U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed Regulations and Class Exemption on Abandoned Plans

Ladies and Gentlemen:

The Investment Company Institute commends the Department of Labor for its initiative to address abandoned or “orphan” defined contribution plans. We strongly support the adoption of a voluntary program in which service providers are permitted to help participants obtain their benefits in an expeditious manner. The Institute had called for regulatory action that facilitates the ability of service providers to assist participants in orphan plans.¹ The Department’s proposed regulations, which we find thoughtful and comprehensive, represent a significant step in advancing this objective.

With any voluntary program of this nature, it is fundamental that the program’s structure encourages service providers to participate in the program and assume the specified responsibilities. The proposed regulations already recognize, in many respects, the need for such incentives. We believe, however, that a number of modifications to the proposed regulations could further enhance the utility of the program and, consequently, benefit a greater number of participants and beneficiaries in orphan plans.

Specifically, we recommend that the Department:

- expand the definition of “qualified termination administrator” to include (1) service providers that hold participant records, and (2) bankruptcy trustees pursuant to the recent bankruptcy reform legislation;
- expand the liability relief provided to qualified termination administrators who undertake “reasonable and diligent” efforts to comply with program requirements;
- clarify that participants and beneficiaries identified in plan records assembled upon “diligent and reasonable” efforts should receive notice and distributions under the program;
- modify the proposed class exemption to eliminate the condition that IRAs that receive rollovers from orphan plan accounts cannot charge fees in excess of earnings in the IRA;
- clarify the impact of the customer identification program rules under the USA PATRIOT Act on IRAs established pursuant to the program; and
- continue and enhance its current efforts to assist orphan plan participants through the Department’s regional offices, particularly in complex or novel cases.

These recommendations, which address both the proposed regulations² and the proposed class exemption,³ are discussed below.

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Definition of Qualified Termination Administrator

The term “qualified termination administrator” (“QTA”) is pivotal under the proposed regulations. Only the QTA may determine whether a plan is abandoned and perform related activities to wind up an abandoned plan. The proposed regulations define QTA as a party that (1) is eligible to serve as an IRA trustee under the Internal Revenue Code, and (2) holds the assets of the abandoned plan.

We recommend that the QTA definition be expanded to include parties that hold participant-level records for the plan. A plan recordkeeping firm typically is the entity with access to participant-level information and is often the point of contact for participants. For instance, a plan recordkeeper often interfaces and communicates with participants through account statements, customer service phone representatives, and the plan’s website. Moreover, the trustee or custodian of plan assets — particularly where it is unaffiliated with the recordkeeping firm — may not have access to the participant records necessary to identify and make appropriate distributions to participants.

The definition of QTA also should be expanded in light of recently-enacted bankruptcy legislation.⁴ As the Department recognizes in the preamble, plan abandonment can occur when the sponsoring employer liquidates in formal bankruptcy proceedings. Section 446 of the “Bankruptcy Prevention and Consumer Protection Act of 2005” clarifies that where a debtor company served as a plan administrator under ERISA, a bankruptcy trustee — who represents the bankruptcy estate — must continue to perform the duties of the administrator. While a plan sponsor is in bankruptcy proceedings, the party in the best position to address plan-related issues is often a court-appointed bankruptcy trustee. We believe that a bankruptcy trustee should be eligible to participate in the Department’s program to expedite plan distributions and terminate the abandoned plan.

In addition, we ask that the Department address situations where a particular service provider may hold some, but not all, of the assets of an abandoned plan. The situation could arise, for instance, where a small plan allows participants to invest in different types of investment products offered by unrelated financial institutions. In these cases, a service provider may have the capacity only to make distributions to participants and beneficiaries for whom it has the appropriate records and holds assets. We request that the Department consider approaches to facilitate distributions by such service providers — who effectively can serve only as “limited” QTAs.

Limited Liability of QTA

A QTA that meets the program’s requirements would be deemed to satisfy any responsibilities it may have under ERISA section 404(a) with respect to the activity. We strongly support the relief provided by the Department.

The extent of this relief, however, is unclear where a QTA acting in good faith fails to meet every requirement under the proposed regulations. The QTA, for example, may inadvertently fail to provide notice to a few participants describing the abandoned status of the plan.⁵ Whether the proposed regulations would provide any liability protection in this situation is uncertain.

We believe that the relief provided in the proposed regulations should remain available to a QTA where it undertakes “reasonable and diligent efforts” to comply with the program’s requirements. This standard, which the Department applies to a QTA’s duty to locate and update plan records, would ensure that QTAs act in good faith and proceed with great care to satisfy program requirements. QTAs that proceed in this manner should receive assurances about potential liability concerns. An “all-or-none” approach to liability relief, however, will serve as a significant disincentive for service providers to participate in the program.

Identification of Participants and Beneficiaries

The proposed regulations require QTAs to identify each participant or beneficiary in an abandoned plan in order to comply with a number of program requirements. For example, QTAs must provide notice to “each participant or beneficiary of the plan” about the plan’s abandoned status.

We strongly support the proper notification of all participants and beneficiaries in orphan plans. We are concerned, however, that QTAs may not have sufficient information to identify every participant and beneficiary in certain abandoned plans. Identifying proper beneficiaries, for instance, could be extremely difficult if records are incomplete or multiple beneficiary designations exist for a particular participant.

The Department therefore should provide that a QTA must satisfy program requirements only with regard to participants and beneficiaries identified in the available plan records. The proposed regulations already would require QTAs to undertake “reasonable and diligent efforts” to locate and update plan records. This standard should ensure that QTAs are taking the necessary steps to identify the participants and beneficiaries affected by the termination. To require QTAs to identify every participant and beneficiary in situations involving incomplete records would be impracticable.

Class Exemption for Rollovers to IRAs

In conjunction with the proposed regulations, the Department has issued a class exemption that, among other things, would allow a QTA to select itself or an affiliate as the IRA provider for rollovers of orphan plan accounts. To obtain this prohibited transaction relief, the fees relating to the IRA (1) cannot exceed those charged for comparable accounts, (2) can be charged only against income earned (with the exception of establishment charges), and (3) cannot be in excess of reasonable compensation under Code section 4975(d)(2).

We question the need for the limitation of fees to the earnings in an IRA. A fee limitation that restricts fees to earnings provides a distinct disincentive to financial services firms that rely on automated systems.⁶ While the required systems changes depend, in part, on how IRAs charge their fees, many IRA firms likely would have to implement considerable recordkeeping system changes to satisfy the exemption’s limitation on fees to income. The costs to IRA providers of doing so will be substantial, while the benefits to individuals perhaps will be negligible. We therefore urge fee restrictions in the exemption to be limited to the comparability and reasonable compensation standards. These limits will guard sufficiently against self-dealing by IRA providers without dissuading them from offering their services to orphan plan participants.

Customer Identification Program Compliance

The Department effectively has proposed a “default” mechanism under which participants who fail to respond to a QTA’s notice about a plan’s termination would have their accounts rolled over to IRAs. Thus, IRA providers may be faced with accounts that lack identifying information about the customer — similar to the situation faced by IRA providers under the automatic rollover rules.

The Institute requests guidance on the impact of the USA PATRIOT Act consistent with that already provided in the Department’s automatic rollover regulation.⁷ There, the Department stated that the customer identification program (CIP) rules⁸ apply to rollovers only at the time the former participant or beneficiary first contacts the institution to assert ownership or exercise control over the account — and not at the time of account establishment by the employee benefit plan. Similar clarification for IRAs established under the Department’s abandoned plan program is necessary.

Continued Department of Labor Assistance

Despite the comprehensive efforts of the Department, we anticipate that situations involving complex or novel issues inevitably will arise. We therefore urge the Department to continue to assist service providers with such cases, and where necessary, seek the appointment of independent fiduciaries to make distributions and terminate plans. In this regard, we ask that the Department (1) enhance coordination among its regional offices to ensure a uniform approach to cases that require the Department’s assistance and/or intervention, and (2) facilitate the referral of orphan plans by service providers to the Department. Assistance from the Department of Labor also would be useful in situations where a particular service provider may hold some, but not all, of the assets of the abandoned plan.

IRS Guidance

Finally, we applaud the Department’s coordination with the Internal Revenue Service in providing relief to participants in orphan plans. As recommended in our prior submissions, participants in orphan plans and service providers that seek to assist them should not be penalized for a plan’s abandoned status. The relief from the Code’s qualification requirements is significant.⁹ We are requesting that the IRS issue separate guidance, consistent with the preamble’s discussion, on which the public can formally rely. The Institute also is requesting IRS guidance on IRA establishment issues raised by the proposed regulations — specifically, how parties other than a participant can establish IRAs for orphan plan accounts.¹⁰

The Institute appreciates the extensive efforts of the Department to establish a voluntary orphan plan program. If you have any questions concerning our recommendations, please do not hesitate to contact me at (202) 326-5837 or tkim@ici.org.

Sincerely,

Thomas T. Kim

ENDNOTES

¹ See, e.g., Institute Testimony before the ERISA Advisory Council, dated July 18, 2002; Institute Letter to the Department of Labor, dated October 25, 1999.

² 70 Fed. Reg. 12046 (March 10, 2005) (Prop. Reg. §§ 2520.103-13, 2550.404a-3, and 2578.1).

³ 70 Fed. Reg. 12074 (March 10, 2005).

⁴ President Bush signed the “Bankruptcy Prevention and Consumer Protection Act of 2005” into law on April 20, 2005.

⁵ See 70 Fed. Reg. 12061 (Prop. Reg. § 2578.1(d)(2)(v)).

⁶ We urged the elimination of the same requirement in the Department’s automatic rollover regulations last year. See [Institute Letter to the U.S. Department of Labor](#) on the Automatic Rollover Regulation, dated April 1, 2004. While we commend the Department for eliminating this restriction from the regulations, the fee restriction was retained in the corresponding class exemption. See PTE 2004-16, 69 Fed. Reg. 57964 (Sept. 28, 2004). We therefore urge the Department to eliminate the fee-to-earnings restriction in class exemptions governing both automatic rollovers and orphan plan accounts.

⁷ See 69 Fed. Reg. 9900, 9903-9904 (Preamble to Proposed Regulations) (March 2, 2004); 69 Fed. Reg. 58018, 58022-58023 (Preamble to Final Regulations) (Sept. 28, 2004).

⁸ The CIP rules, among other things, require financial institutions to obtain certain identifying information about a customer prior to opening an account.

⁹ The preamble provides that the IRS will not challenge the qualified status of any plan termination under the Department’s regulations or take any adverse action against the QTA, the plan, or any participant or beneficiary of the plan as a result of the termination, provided that three conditions are followed: (1) the QTA reasonably determines whether, and to what extent, the survivor annuity requirements of Code sections 401(a)(11) and 417 apply to any benefit payable under the plan; (2) each participant and beneficiary must have a nonforfeitable right to the benefit as of the deemed termination date, subject to income, expenses, gains, and losses between that date and the distribution date; and (3) participants and beneficiaries must receive notification of their rights under Code section 402(f).

¹⁰ The Department’s proposed regulations suggest that IRAs for orphan plan participants could be established by default in a manner similar to IRAs established under the automatic rollover rules. Regulatory guidance is necessary on how these IRAs may be established where a party other than the participant is opening the account.