



February 8, 2013

**VIA ELECTRONIC DELIVERY**

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

**Re: Proposed Amendments to the Abandoned Plan Regulations (RIN 1210-AB47)**

Dear Sir or Madam:

The Federal Deposit Insurance Corporation (“FDIC”) appreciates this opportunity to comment on the U.S. Department of Labor’s (“DOL”) proposed amendments to the regulations “Amendments to the Abandoned Plan Regulations,” 77 Fed. Reg. 74,063 (Dec. 12, 2012). We write to request that the regulations be further amended to extend their application to individual account plans<sup>1</sup> sponsored by an insured depository institution<sup>2</sup> for which the FDIC has been appointed receiver. We also recommend modifications to the proposed amendments to the regulations.

**Overview**

The FDIC is a government corporation that operates as an independent agency of the federal government. The FDIC was established in 1933 in response to the thousands of bank failures that occurred in the 1920s and early 1930s. The FDIC is tasked with preserving and promoting public confidence in the U.S. financial system by insuring deposits in depository institutions; by identifying, monitoring, and addressing risks to the deposit insurance fund; and by limiting the effect on the economy and to the financial system when an insured depository institution fails.

**The appointment of the FDIC as Receiver of an Insured Depository Institution**

Insured depository institutions are generally closed by their chartering authority – the state regulator or the Office of the Comptroller of the Currency (“OCC”). The OCC must appoint the FDIC as receiver for an insured Federal depository institution and the FDIC must accept such appointment.<sup>3</sup> Whenever the authority having supervision of any insured State depository institution appoints the FDIC as receiver, the FDIC may accept such appointment, but it is not

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<sup>1</sup> In this letter, “individual account plan” means an individual account plan as defined in §3(34) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

<sup>2</sup> 12 U.S.C. § 1813(c)(2).

<sup>3</sup> 12 U.S.C. § 1821(c)(2)(A)(ii).

required to do so.<sup>4</sup> State regulatory authorities virtually always request the appointment of the FDIC when a receiver is appointed and the FDIC accepts such appointment.

### **The FDIC-Receiver acts as Plan Sponsor and Plan Administrator of a Failed Institution Plan**

When the FDIC is appointed as receiver of a failed institution,<sup>5</sup> the FDIC-Receiver<sup>6</sup> succeeds to all rights, titles, powers, and privileges of the insured depository institution by operation of law.<sup>7</sup> The FDIC-Receiver acts as plan sponsor and plan administrator of a failed institution plan<sup>8</sup> if the failed institution performed those roles at the time the FDIC was appointed receiver. In those cases, the FDIC-Receiver, in winding up the affairs of the failed institution, works to terminate the failed institution plan.

### **The Termination Process**

The FDIC-Receiver endeavors to protect the tax qualified status of a failed institution plan, manage the orderly and efficient termination of the plan, and distribute benefits to participants in a timely manner. However, the termination process is expensive, complicated, and time consuming. As part of the termination process, the plan is reviewed for tax compliance, and any qualification failures are corrected. A plan audit is conducted (when required), and all annual reporting requirements are brought up to date. In many cases, the plan also applies for and receives a determination letter for reliance that the plan is qualified at the time of termination. These compliance efforts increase plan expenses and create a delay in distributing account balances.

### **The FDIC-Receiver and the Chapter 7 Bankruptcy Trustee function in similar roles as Plan Administrators of Abandoned Plans**

When the Chapter 7 bankruptcy trustee is appointed by the relevant authority to liquidate the assets of the plan sponsor's estate, the U.S. Bankruptcy Code requires the trustee to also perform the obligations of a plan administrator if the debtor also served in such capacity at the time the case was filed.<sup>9</sup> The obligations of the plan administrator will generally include terminating the plan since there is no surviving entity to administer the plan. The plan is effectively abandoned as a consequence of the plan sponsor's liquidation.

A similar situation occurs when a plan sponsor that is an insured depository institution enters receivership. The FDIC-Receiver acts as plan sponsor and plan administrator of a failed institution plan if the failed institution performed those roles at the time the FDIC was appointed receiver. As part of its activities in winding up the affairs of the failed institution, the FDIC-

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<sup>4</sup> 12 U.S.C. § 1821(c)(3)(A).

<sup>5</sup> In this letter, "failed institution" means a Federal or State depository institution whose deposits are insured by the FDIC and for which the FDIC has been appointed receiver.

<sup>6</sup> In this letter, "FDIC-Receiver" means the FDIC in its capacity as receiver for a failed institution.

<sup>7</sup> 12 U.S.C. § 1821(d)(2)(A).

<sup>8</sup> In this letter, "failed institution plan" means an individual account plan sponsored by a failed institution for which the FDIC has been appointed receiver.

<sup>9</sup> 11 U.S.C. § 704(a)(11).

Receiver terminates the plan because the institution has failed and there will be no surviving entity. The failed institution plan is effectively abandoned as a consequence of the failed institution being placed in receivership.

### **The Abandoned Plan Program should be extended to cover Failed Institution Plans**

We understand that the proposed extension of the regulations was premised on the theory that Chapter 7 plans are effectively abandoned by the sponsor as a result of liquidation and therefore should be covered under the Abandoned Plan Program (the “Program”). The same rationale can be used to extend the Program to cover failed institution plans that have been similarly abandoned. In both a liquidation and receivership, the plans at issue are effectively abandoned by the plan sponsor when the business entity ceases operations.

The DOL recognizes the difficulty that Chapter 7 bankruptcy trustees encounter in navigating ERISA’s fiduciary responsibilities and in terminating the plans at issue. The FDIC-Receiver suffers the same difficulty and must engage outside counsel with ERISA expertise to assist with the termination of a failed institution plan. The proposed amendments to the Program provide the bankruptcy trustee with a simplified process to terminate Chapter 7 plans and distribute account balances in a manner that is consistent with its fiduciary duties. The FDIC-Receiver is in substantially the same situation as a bankruptcy trustee and would also benefit from a simplified termination process. More importantly, plan participants would benefit from the removal of compliance obstacles that cause delays in distributing their benefits. For these reasons, the Program should be expanded to include failed institution plans.

### **Benefits of Extending the Abandoned Plan Program to cover Failed Institution Plans**

The proposed changes to the Program would assist the FDIC-Receiver in terminating the plans of failed institutions and providing participants with eligible rollover distributions. The FDIC-Receiver could use the Program’s streamlined termination process without having to satisfy the annual reporting requirements, correct plan document or operational failures, or conduct plan audits. As a result, the FDIC-Receiver would be able to terminate failed institution plans without amending plans or filing VCP or determination letter applications for plans with which it has no historical context and limited background. All of this reduction in compliance work would reduce plan expenses and accelerate plan distributions.

### **Summary of Recommendations**

While the roles of the Chapter 7 trustee and the FDIC-Receiver are to a large extent the same, there are some specific differences that warrant modifications to the Program to allow for the inclusion of failed institution plans. The following is a summary of recommended modifications we respectfully request:

- A. The Program requires a Qualified Termination Administrator (“QTA”) to be able to serve as a trustee or issuer of an individual retirement plan and to hold assets of the plan. The FDIC-Receiver cannot comply with either requirement and should be deemed a QTA upon its appointment as receiver without satisfying these current requirements.

- B. The proposed changes to the Program will allow Chapter 7 plans to be considered abandoned upon the entry of an order for relief. No other findings must be made. This timing rule should also be applied to failed institution plans. Failed institution plans should be deemed abandoned upon appointment of the FDIC as receiver.
- C. The “Notification of Plan Abandonment and Intent to Serve as Qualified Termination Administrator” Appendix C to § 2578.1; “Notice of Plan Termination” Appendix D to § 2578.1; and “Final Notice” Appendix E to § 2578.1, should be revised accordingly for use by the FDIC-Receiver.
- D. The extension of the Program to failed institution plans should also include those failed institution plans that are currently in the termination process.
- E. The Program should not require the FDIC-Receiver to review ERISA §408(b)(2) notices and prepare and distribute ERISA §404(a)(5) notices detailing fees and costs for a plan that is being terminated.
- F. The Internal Revenue Service (“IRS”) has advised the DOL that it would not challenge the tax status of any Chapter 7 plan terminated under the Program, nor take any adverse action against the Chapter 7 trustee serving as a QTA, as a result of such termination. We request confirmation that the IRS will take the same position in regards to the termination of failed institution plans under the Program and the FDIC-Receiver serving as a QTA.

### Summary

The proposed amendments to the Program are limited to plans whose sponsors have entered liquidation under Chapter 7 of the U.S. Bankruptcy Code. The FDIC-Receiver’s role parallels that of the bankruptcy trustee in terminating plans that are effectively abandoned by reason of liquidation and receivership respectively. The extension of the Program to cover failed institution plans would significantly assist the FDIC-Receiver in protecting the tax status of failed institution plans and in providing participants with distributions sooner.

We look forward to working with the DOL to make modifications to the Program that will ensure failed institution plans are properly terminated in an efficient manner. If the DOL has any questions regarding the comments we have made, we would welcome the opportunity to respond.

Respectfully submitted,



Bret D. Edwards  
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