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Submitted by e-mail to e-ORI@dol.gov

February 11, 2013

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

Attention: Abandoned Plans

Re: Amendments to the Abandoned Plan Regulations
Docket ID: EBSA-2012-0036
RIN 1210-AB47

Ladies and Gentlemen:

These comments on the proposed rule on Amendments to the Abandoned Plan Regulations, issued by the Department of Labor,[1] are submitted on behalf of the American

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[1] The Proposed Rule was published in the Federal Register on December 12, 2012 (77 Fed. Reg. 74063) and is available at http://www.gpo.gov/fdsys/pkg/FR-2012-12-12/pdf/2012-29500.pdf. On the same day, the Department published the Notice of Proposed Amendment to Prohibited Transaction Exemption 2006-06 (PTE 2006-06) for Services Provided in Connection with the Termination of Abandoned Individual Account Plans (77 Fed. Reg. 74056). The AFL-CIO supports the proposed amendment of PTE 2006-06 although separate comments in response to the Notice will not be submitted.

Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and its 56 affiliated unions. The AFL-CIO, together with its community affiliate Working America, represents more than 12.2 million workers across the country in all sectors of our economy, including those working in manufacturing, construction, transportation, health care, education, hospitality, entertainment and state and local governments. Our affiliated unions negotiate retirement benefits for millions of workers and retirees in the private sector. These benefits are provided through single employer and multiemployer plans and through both defined benefit and defined contribution plans, all of which are subject to the requirements of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

In the Proposed Rule, the Department expands the scope of the Abandoned Plan Program[2] to include plans whose sponsors are liquidating under Chapter 7 of the U.S. Bankruptcy Code and to permit a Chapter 7 trustee to serve as the qualified termination administrator. As discussed in the preamble to the Proposed Rule, the proposed expansion reflects a reconsideration of the decision made when the Abandoned Plan Program was initially established in 2006. The Department's explanation for reaching a different result today primarily relates to the need to provide guidance to Chapter 7 trustees in light of a change in the Bankruptcy Code.[3] 77 Fed. Reg. at 74064. These trustees are now responsible for performing the obligations of the debtor in connection with any employee benefit plan that the debtor maintained.

We agree with the Department that a Chapter 7 trustee responsible for administering the debtor's employee benefit plans is a fiduciary under ERISA. We also consider it appropriate for the Department to provide guidance to these trustees and a process for them to follow to terminate individual account plans and fulfill their statutory obligations under both the Bankruptcy Code and ERISA. By doing so, the Department also protects the interests of participants by assuring an orderly, expeditious and cost-effective procedure that allows access to, and the preservation of, participants' retirement savings. We support the expansion of the Abandoned Plan Program to include liquidations under Chapter 7 of the Bankruptcy Code and the ability of Chapter 7 trustees to serve as qualified termination administrators for individual account plans.

In a number of areas, the Proposed Rule draws distinctions between Chapter 7 trustees that serve as qualified termination administrators and banks and other asset custodians acting in

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[2] The Abandoned Plan Program, as the preamble to the Proposed Rule notes, includes the three relevant regulations and the class exemption. 77 Fed. Reg. at 74063.

[3] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. 109-8, 119 Stat. 23, added a new Section 704(a)(11) to the Bankruptcy Code (11 U.S.C. §704(a)(11)) requiring a Chapter 7 trustee to "continue to perform the obligations required of the administrator" if "the debtor (or any entity designated by the debtor) served as the administrator ... of an employee benefit plan ...."

that capacity. In our view, those distinctions are appropriate and should be maintained in the final rule. Two of the more significant differences are with respect to the standard for determining the reasonableness of expenses under proposed section 2578.1(j)(3)(vi) and the rule of accountability in proposed section 2578.1(j)(4).

In proposed section 2578.1(j)(3)(vi)(A), the fees and expenses of the Chapter 7 trustee "shall be consistent with industry rates for such or similar services ordinarily charged by qualified termination administrators." 77 Fed. Reg. at 74085. This standard properly looks to the charges of qualified termination administrators, rather than the typical rates charged by Chapter 7 trustees for administering bankruptcy estates. We think the proposed rule is sufficiently clear that the reasonableness of the Chapter 7 trustee's fees and expenses should be based on the cost of comparable services provided by other entities that can serve as qualified termination administrators. We support this provision as proposed and urge its inclusion in the final rule. To preserve the value of participants' retirement savings, the fees and expenses of a Chapter 7 trustee should be no more than what would otherwise be paid to any other entity serving as the qualified termination administrator. Moreover, the duties and responsibilities of a qualified termination administrator are different than those performed by a Chapter 7 trustee in the ordinary course of administering a bankruptcy estate, and there is no reason to charge what are likely to be higher fees for the performance of the duties required under the Abandoned Plan Program.

The rule of accountability in proposed section 2578.1(j)(4) prohibits a Chapter 7 trustee or designee from seeking a release from liability under ERISA or asserting a defense of derived judicial immunity. We support this provision and the rationale for it offered by the Department in the preamble to the proposed rule. *See* 77 Fed. Reg. at 74068. Under the terms of the Abandoned Plan Program, any fiduciary exposure is already limited for qualified termination administrators, including Chapter 7 trustees, who follow the provisions of the Program. There is simply no need for more.

The Department solicited comments on a number of issues, including whether the Abandoned Plan Program should be further expanded to include other types of business liquidations[4] and whether the obligation to collect delinquent contributions described in proposed section 2578.1(j)(3)(i) poses any potential conflict with any duties of a Chapter 7 trustee under the Bankruptcy Code.[5]

The AFL-CIO suggests that the Department considering extending the Abandoned Plan Program to include plans maintained by employers that undergo liquidation under Chapter 11 of

[4] *See* 77 Fed. Reg. at 74064-74065, n. 7.

[5] *See* 77 Fed. Reg. at 74066.

the Bankruptcy Code ("liquidating 11") or state receiverships. In both liquidating 11 cases and state receiverships, the end result is virtually the same as what occurs in Chapter 7 liquidations—the plan sponsor ceases to exist. Most of these cases involve the sale of assets and workers may or may not be employed by any purchasers. Extending the Program to these other types of liquidations would offer a recognized, streamlined process and method for winding up an individual account plan and distributing participants' benefits to them.

Issues to address if the Program were extended to liquidating 11 cases include rules for establishing the date of abandonment which could not be the bankruptcy filing date as it is for Chapter 7 cases and determining what entities could serve as the qualified termination administrator. One approach for setting the date of abandonment is to modify the existing definition in section 2578.1(b) to include a liquidating 11 as a "fact and circumstance" suggesting the plan is or may be abandoned by the plan sponsor. Another possible alternative is to use the date when the Bankruptcy Court determines that the Chapter 11 debtor will be liquidating, rather than reorganizing. With respect to the qualified termination administrator, the existing permitted entities (other than the proposed Chapter 7 trustee) could fill that position and one could be designated by the Chapter 11 debtor, subject to approval by the Bankruptcy Court.

Extending the Program to include state receivership proceedings would recognize the similarity between these proceedings and liquidations under Chapter 7 of the Bankruptcy Code. Indeed, this equivalence is drawn elsewhere in ERISA as one of the criteria for a distress termination of a single-employer defined benefit plan under Section 4041(c)(2)(B)(i) is "... a petition seeking liquidation in a case under Title 11 or under any similar Federal law or law of a State or political subdivision of a State ...." The court proceedings for state receiverships generally follow what occurs in Chapter 7 liquidations with court-appointed receivers performing duties comparable to those of Chapter 7 bankruptcy trustees. The receiver could, like the bankruptcy trustee, serve as the qualified termination administrator or appoint an eligible designee and the plan could, like the chapter 7 plan, be treated as abandoned when an appropriate state court order appointing the receiver is entered.

Proposed section 2578.1(j)(3)(i) requires the Chapter 7 trustee to

> take reasonable and good faith steps to collect known delinquent contributions on behalf of the plan, taking into account the value of the plan assets involved, the likelihood of a successful recovery, and the expenses expected to be incurred in connection with collection.[6]

The AFL-CIO does not see any conflict between this obligation under the Proposed Rule and the role of the Chapter 7 trustee under the Bankruptcy Code. Any contributions due to the plan attributable to workers' deferred wages are not the property of the debtor's estate under the

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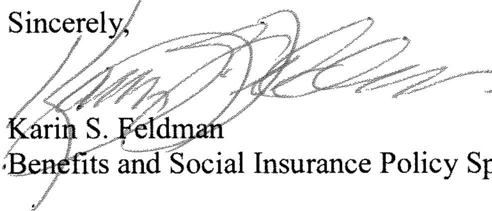
[6] 77 Fed. Reg. at 74085.

Bankruptcy Code. *See* Section 541(b)(7), 11 U.S.C. §541(b)(7). The trustee is responsible for making sure that assets not generally available for creditors are accounted for and excluded from the estate. Because salary deferral contributions in the debtor's possession should be excluded, no additional or conflicting responsibility falls on the Chapter 7 trustee under the Proposed Rule with respect to them. Any contributions owed by the plan sponsor to the plan would be a liability of the debtor, and the Chapter 7 trustee is responsible for determining those obligations. Because employer contributions are claims entitled to priority under Section 507(a)(4) or 507(a)(5) of the Bankruptcy Code,[7] it is particularly important for the Chapter 7 trustee to determine whether any delinquent employer contributions are owed to the plan. However, under the Bankruptcy Code, any outstanding contributions due to the plan above the priority amounts are not likely to be paid in full or paid ahead of administrative expenses which have the highest priority under the Code. We suggest that the appropriate reading of the Chapter 7 trustee's obligation under proposed section 2578.1(j)(3)(i) to collect delinquent contributions is to require the trustee to pay these amounts consistent with the payment priorities in Section 507(a)(4) and 507(a)(5) of the Bankruptcy Code and to file a claim for any excess amounts.

We appreciate the opportunity to submit these comments, and we urge the Department to adopt a final rule substantially in the form of the Proposed Rule. The key features of the Proposed Rule, including its directives regarding the standard for determining the reasonable of the fees and expenses a Chapter 7 trustee may receive and the rule of accountability, should be part of the final rule and should not be weakened. They offer participants appropriate protections against unwarranted charges against their retirement savings as well as assurance that their savings will be distributed to them in a timely fashion.

If you have any questions about these comments or need any additional information, please do not hesitate to contact me.

Sincerely,



Karin S. Feldman
Benefits and Social Insurance Policy Specialist

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7 11 U.S.C. §507(a)(4) or 11 U.S.C. §507(a)5).