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Legal Department
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Submitted Electronically

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
Attn: Abandoned Plans

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

Ladies and Gentlemen:

These comments are submitted on behalf of the group of financial service companies for which FMR LLC is the parent corporation (collectively, "Fidelity"). Fidelity companies provide investment management, recordkeeping, communications and directed trustee and custodial services to thousands of retirement plans covering millions of participants. Fidelity is acutely aware of the difficulties in administering abandoned plans and commends the Department for its proposed expansion of the abandoned plan regulations to better facilitate the termination of plans whose sponsors are in liquidation under Chapter 7 of the U.S. Bankruptcy Code.

We believe, however, that certain modifications to the proposed amendments and additional modifications to the original guidance will lead to a greater utilization of the Department's Abandoned Plan Program and benefit a greater number of participants and beneficiaries. Specifically, Fidelity's comments, set forth below, relate to the following issues as to which clarification or additional guidance would be desirable: (1) Deceased /Missing Participants and Beneficiaries; (2) Bankruptcy Trustee's Designation of a Qualified Termination Administrator ("QTA"); (3) Joint and Survivor Annuities; and (4) QTA's Fiduciary Liability.

(1) Deceased /Missing Participants and Beneficiaries

The proposed amendments permit QTAs to transfer the account balances of decedents to an appropriate bank account or a state's unclaimed property fund, regardless of account size, if the QTA "reasonably and in good faith finds that the participant and if applicable, the named beneficiary, are deceased." We agree with the statement in the Supplementary Information accompanying the proposed regulations that certain obstacles often prevent distribution of a deceased participant's benefits and thus discourage qualified entities from serving as QTAs. However, we believe the amended regulation needs to go further to address the concerns of potential QTAs.

The Department has solicited comment specifically on whether these deceased participant provisions would sufficiently safeguard the rights of participants and beneficiaries, for example where the QTA has knowledge that a descendant of the deceased has a claim. In our experience, a deceased participant's or beneficiary's heirs may claim a right to the decedent's plan account, although it is often unclear whether the claim is valid under the terms of the plan. Similarly, some participants will designate their estate as beneficiary or a plan's terms will provide that a participant's estate is his or her beneficiary in the absence of another designation. It is not clear whether the proposed amendment's deceased participant provisions are intended to apply irrespective of the rights of a valid claimant or the affirmative or default designation of a decedent's estate as beneficiary under the plan. It is also unclear whether the claims of estates, heirs or other persons would be pre-empted by the proposed regulation if such were the intent. In the absence of such pre-emption, the proposed amendment should be revised to explicitly provide that the deceased participant provisions do not apply if a participant's beneficiary[1] is his or her estate or if the QTA has received a claim with respect to the account from any person.

In addition, many potential QTAs will not themselves have access to a record of deceased participants' beneficiary designations as that information may only be maintained by the plan sponsor/administrator. Guidance is requested on whether the QTA may treat the deceased participant as having not designated a beneficiary in such situations.

While the deceased participant provisions with the above clarifications would be a welcome improvement, we believe that deceased participants and beneficiaries represent only a small portion of a larger category of participants and beneficiaries that are problematic for potential QTAs: missing participants and beneficiaries, i.e., participants and beneficiaries for whom the QTA has no valid contact information. We strongly encourage the Department to provide QTAs with more guidance and a failsafe method of dealing with the accounts of all missing participants. In this regard, please confirm in the regulations that following the search methods set forth in Department of Labor Field Assistance Bulletin 2004-02 ("FAB 2004-02") will satisfy the QTA's fiduciary responsibilities.

Further, QTAs need more guidance regarding transfers of assets to states' unclaimed property funds. We request that the following concept from FAB 2004-02 be appropriately incorporated into the final Sec. 2550.404-3 and Sec. 2578.1 regulations to ensure consistency and clarity:

[1] The proposed amendment uses the term "named beneficiary" in connection with the deceased participant provisions but does not define that term. It would be helpful if the proposed amendment were clarified to indicate that a "named beneficiary" is any beneficiary as defined under the terms of the applicable plan document, including for example any primary, secondary or contingent beneficiaries affirmatively designated by a participant or any beneficiary designated by the plan document in the absence of an affirmative designation by the participant.

> "…we believe that a plan fiduciary's transfer of a missing participant's account balance from a terminated defined contribution plan to a state's unclaimed property fund would constitute a plan distribution, which ends both the property owner's status as a plan participant and the property's status as plan assets under ERISA." (footnote omitted)
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> D.O.L. Field Assistance Bulletin 2004-02 (2004) (text accompanying note 19).

Finally, we continue to support the optional transfer of missing participants' accounts to the PBGC pursuant to the Pension Protection Act of 2006 and implore the Department to advocate for the issuance of regulations by PBGC to implement such program.

(2) Bankruptcy Trustee's Designation of a QTA

The proposed amendment allows a bankruptcy trustee the option of designating someone else to serve as the QTA. This seems useful insofar as it would enable a bankruptcy trustee to choose a designee that may have more experience in plan matters to act as QTA on its behalf. It would be helpful and minimize confusion, however, if the final regulations clarify that a designee must accept such designation in writing before it becomes effective. For example, a bankruptcy trustee should not be permitted to unilaterally designate the plan's current recordkeeper or trustee (assuming such service provider would otherwise qualify as a QTA) to serve as QTA for the plan. The service provider should be required to agree to such designation before it becomes effective.

(3) Joint and Survivor Annuities

The abandoned plan regulations continue to require the QTA to determine whether the survivor annuity requirements in sections 401(a)(11) and 417 of the Internal Revenue Code apply and distribute benefits in any manner reasonably determined to achieve compliance with those requirements. Due to the difficulties in distributing benefits in terminating plans that are subject to the survivor annuity requirements, it would be helpful to clarify that the QTA's responsibilities in this regard apply only to defined benefit plans and to defined contribution plans which include balances attributable to a money purchase pension plan or, alternatively, to specifically provide that the QTA may amend the plan to remove the survivor annuity option from other plans as permitted by the regulations under Internal Revenue Code Section 411(d)(6). The "deemed amendment" rule in Reg. Section 2578.1(d)(3) is not sufficient for this purpose as it would technically be possible for the QTA to "wind up the plan" without such an amendment.

In addition, it is very difficult for small employers to find annuity providers upon plan termination because the total amount involved is so small. The difficulties may be even greater for a QTA in the abandoned plan context. A potential QTA would be more likely to terminate a plan that is subject to the survivor annuity requirements if the regulations specifically provided for an alternative distribution form where an annuity provider could not be found after a diligent search.

(4) QTA's Fiduciary Liability

The abandoned plan regulations continue to provide fiduciary relief for QTAs that undertake specified activities in winding up the affairs of the plan and comply with the requirements of the regulation for each such activity. While this is somewhat helpful with respect to the specific activities detailed in the regulations, it provides no assurance for other activities normally performed by a plan administrator that may need to be assumed by the QTA (or its delegate) to effectively terminate the plan. For example, while the plan termination is underway, the QTA may receive a domestic relations order. If the QTA makes a determination that the order satisfies the QDRO requirements, has it performed a fiduciary function for which the relief is unavailable? Without broader relief that covers such situations, potential QTAs will be less likely to participate in the program.

Also, if the QTA fails to meet every requirement of the program, is the fiduciary relief unavailable for all activities undertaken pursuant to the program? The fiduciary standards should be deemed satisfied with respect to any activity for which the QTA complies with the program's requirements, even if the QTA has failed to satisfy all the program's requirements with respect to other activities it has undertaken.

Thank you for your consideration of these comments. If you have any questions or need further information, please contact the undersigned.

Sincerely,

Gary L. Yerke

Gary L. Yerke
Vice President and Associate
General Counsel