DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application Number D–11657]

ZRIN EBSA–2012–0015

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

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Notice of Proposed Amendment to PTE 2006–06.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to PTE 2006–06, a prohibited transaction class exemption issued under the Employee Retirement Income Security Act of 1974 (ERISA). Among other things, PTE 2006–06 permits a ''qualified termination administrator'' (QTA) of an individual account plan that has been abandoned by its sponsoring employer to select itself to provide services to the plan in connection with the plan's termination, and to pay itself fees for those services.

DATES: Written comments and requests for a public hearing must be received by the Department on or before February 11, 2013.

ADDRESSES: All written comments and requests for a public hearing concerning the proposed amendment should be sent to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue NW., Washington DC 20210, Attention: PTE 2006–06 Amendment. Interested persons are also invited to submit comments and hearing requests to EBSA via email to: *moffitt.betty@dol.gov* or by fax to 202–219–0204 by the end of the scheduled comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments and hearing requests will also be available online at *www.regulations.gov* and *www.dol.gov/ebsa,* at no charge.

All comments will be made available to the public. Warning: Do not include any personally identifiable information (such as name, address, or other contact information), or confidential business information, that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Chris Motta, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8540 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed amendment to PTE 2006–06. This amendment to PTE 2006–06 is being proposed in connection with the Department's proposed amendment of regulations relating to the Termination of Abandoned Individual Account Plans at 29 CFR 2578.1 (the QTA Regulation), the Safe Harbor for Distributions from Terminated Individual Account Plans at 29 CFR 2550.404a–3 (the Safe Harbor Regulation), and the Special Terminal Report for Abandoned Plans at 29 CFR 2520.103–13 (collectively, the Abandoned Plan Regulations). The proposed amendments to the Abandoned Plan Regulations are being published simultaneously in this issue of the **Federal Register**. PTE 2006–06 provides an exemption from the restrictions of section 406(a)(1)(A) through (D), section 406(b)(1) and (b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1)(A) through (E) of the Code.

If adopted, this proposed amendment to PTE 2006–06 would affect plans, participants and beneficiaries of such plans, and certain persons engaging in the transactions covered by the class exemption.

The Department is proposing the amendment on its own motion pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[1]

Executive Order 12866

Under Executive Order 12866 (58 FR 51735), ''significant'' regulatory actions are subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of the executive order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. It has been determined that that this proposed amendment is not ''significant'' under section 3(f) of the executive order. Accordingly, OMB has not reviewed the proposed amendment.

PTE 2006–06 permits a QTA of an individual account plan that has been abandoned by its sponsoring employer to select itself or an affiliate to provide services to the plan in connection with the termination of the plan, and to pay itself or an affiliate fees for those services, provided that such fees are consistent with the conditions of the proposed exemption. The exemption also permits a QTA to: Designate itself or an affiliate as a provider of an individual retirement plan or other account; select a proprietary investment product as the initial investment for the rollover distribution of benefits for a participant or beneficiary who fails to make an election regarding the disposition of such benefits; and, pay itself or its affiliate in connection with the rollover.

The proposed amendment to PTE 2006–06 would expand the definition of QTA to include Bankruptcy Trustees (described below) and certain persons designated by such trustees to act as QTAs. The Department is proposing the amendment because it has determined that, in certain instances, it may be appropriate for a Bankruptcy Trustee to provide termination services to a plan. Currently, PTE 2006–06 and the accompanying QTA regulations do not cover plans of sponsors involved in chapter 7 bankruptcy proceedings, because such plans are not considered to be abandoned due to the fact that the Bankruptcy Trustee assumes the role of the plan administrator under the Bankruptcy Code. Moreover, Bankruptcy Trustees cannot serve as

[1] Section 102 of the Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975 of the Code to the Secretary of Labor.

QTAs under the current regulation and PTE 2006–06 because they are unable to meet the QTA definition.

Accordingly, as addressed more fully elsewhere in this preamble, the Department is proposing to expand the definition of QTA to include Bankruptcy Trustees and certain persons designated by them to act as QTAs in terminating and winding up the affairs of abandoned plans. As noted above, this proposed amendment to the class exemption is being published concurrently with proposed amendments to the Abandoned Plan Regulations. Because compliance with the QTA Regulation is required under the proposed amendment, the costs and benefits that would be associated with complying with the proposed amendment to the class exemption have been described and quantified in connection with the economic impact of the proposed amendment to the QTA Regulation.

The Department believes that the proposed amendments to the Abandoned Plan Regulations and PTE 2006–06 will incentivize many bankruptcy trustees to carryout plan terminations consistent with ERISA, which the Department expects ultimately would benefit participants and beneficiaries of such plans by ensuring abandoned plans are terminated in an orderly and cost-effective manner.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data will be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

The proposed amendment to PTE 2006–06 would only be used by QTAs that also take advantage of the proposed amendment to the QTA Regulation, which is published elsewhere in this issue of the **Federal Register**. The Department has combined the hour and cost burdens associated with the proposed amendment to the class exemption with the hour and cost burden associated with the amended proposed regulation, under one Information Collection Request (ICR) that will be filed with OMB. By combining the two ICRs, the Department believes that the regulated community will gain a better understanding of the overall burden impact of terminating abandoned plans pursuant to the proposed amendments. The specific burden for the proposed amendment to the class exemption includes a recordkeeping requirement for a Bankruptcy Trustee that terminates an abandoned plan and chooses to roll over the account balances of missing or nonresponsive participants into individual retirement plans offered by it or an affiliate. The hour and cost burden for the ICR are described more fully in the preamble to the proposed amendment to the regulation under the Paperwork Reduction Act section.

I. Background

On April 21, 2006, the Department issued the Abandoned Plan Regulations.[2] These Regulations facilitate the orderly, efficient termination of abandoned individual account plans by a QTA (described below) in order to give participants and beneficiaries of those plans access to the amounts held in their individual accounts, which are frequently unavailable to them because of the abandonment.[3] Specifically, the Termination of Abandoned Individual Account Plans regulation establishes standards for financial institutions holding the assets of an abandoned individual account plan to terminate the plan and distribute benefits to the plan's participants and beneficiaries, with limited liability. The Safe Harbor for Distributions from Terminated Individual Account Plans regulation provides a fiduciary safe harbor for making distributions from terminated individual account plans on behalf of participants and beneficiaries who fail to make an election regarding the form of benefit distribution after the furnishing of notice. The Special Terminal Report for Abandoned Plans regulation establishes a simplified method for filing a terminal report for abandoned individual account plans.

On that same date, the Department granted PTE 2006–06.[4] This class exemption facilitates the goal of the Abandoned Plan Regulations by permitting a QTA, under the conditions of the exemption, to, among other things, select itself or an affiliate to provide services to the plan, to pay itself or an affiliate fees for those services, and to pay itself fees for services provided prior to the plan's deemed termination, in connection with terminating the abandoned plan.

On October 7, 2008, the Department issued final rules amending the QTA Regulation and the Safe Harbor Regulation.[5] These amendments were made in response to changes to the Internal Revenue Code of 1986 (the Code) enacted as part of the Pension Protection Act of 2006. On that same date, and for the same purpose, PTE 2006–06 was also amended.[6] In this regard, as amended, the class exemption requires that benefits for a missing, designated nonspouse beneficiary be directly rolled over into an inherited individual retirement plan that fully complies with Code requirements.

As noted above, proposed amendments to the Abandoned Plan Regulations are being published simultaneously in this issue of the **Federal Register**. If adopted, these amendments, among other things, would permit a Bankruptcy Trustee to qualify as a QTA under the Abandoned Plan Regulations or to appoint an ''eligible designee'' to act as a QTA under the Abandoned Plan Regulations. Thereafter, the Bankruptcy Trustee or the ''eligible designee'' may provide certain services, pursuant to the requirements set forth in the Abandoned Plan Regulations, in connection with the termination of one or more individual account plans sponsored by the entity that is the subject of the proceeding.

II. Description of the Class Exemption

PTE 2006–06 is comprised of five sections. Section I describes the transactions covered by the exemption. These transactions are divided into two categories. The first category of transactions (hereinafter, Covered Termination Transactions) involve the use by a QTA (described below) of its authority in connection with the termination of an abandoned individual account plan pursuant to the QTA Regulation,[7] to: Select itself or an affiliate to provide services to the plan; receive fees for the services performed as a QTA; and pay itself fees for services provided to the plan prior to the

[2] See the Termination of Abandoned Individual Account Plans at 29 CFR 2578.1 (77 FR 20820 at 20838); the Safe Harbor for Distributions from Terminated Individual Account Plans at 29 CFR 2550.404a-3 (77 FR 20820 at 20850); and Special Terminal Report for Abandoned Plans at 29 CFR 2520.103–13 (77 FR 20820 at 20853).

[3] 77 FR 20820 at *id.*

[4] 71 FR 20856 (Apr. 21, 2006) as amended *infra.*

[5] See 73 FR 58459 at 58462 and 58465.

[6] See 73 FR 58629 (October 7, 2008).

[7] Section I(a) of PTE 2006–06 incorrectly cites the QTA Regulation as Reg. Sec. 2550.404a–3. Section I(a) of this proposed amendment properly cites the QTA Regulation as Reg. Sec. 2578.1.

deemed termination of the plan. The second category of transactions (hereinafter, Covered Distribution Transactions) involves the use by a QTA of its authority in connection with the termination of an abandoned individual account plan pursuant to the QTA Regulation to: (1) Designate itself or an affiliate as: (i) Provider of an individual retirement plan; (ii) provider, in the case of a distribution on behalf of a designated beneficiary (as defined by section 401(a)(9)(E) of the Code) who is not the surviving spouse of the deceased participant, of an inherited individual retirement plan (within the meaning of section 402(c)(11) of the Code) established to receive the distribution on behalf of the nonspouse beneficiary under the circumstances described in section (d)(1)(ii) of the Safe Harbor Regulation; or (iii) provider of an interest-bearing, federally insured bank or savings association account maintained in the name of the participant or beneficiary, in the case of a distribution described in section (d)(1)(iii) of the Safe Harbor Regulation, for the distribution of the account balance of the participant or beneficiary of the abandoned individual account plan who does not provide direction as to the disposition of such assets; (2) make the initial investment of the account balance of the participant or beneficiary in the QTA's or its affiliate's proprietary investment product; (3) receive fees in connection with the establishment or maintenance of the individual retirement plan or other account; and (4) pay itself or an affiliate investment fees as a result of the investment of the individual retirement plan or other account assets in the QTA's or its affiliate's proprietary investment product.

Section II contains conditions applicable to the Covered Termination Transactions. These conditions include the requirement that the fees and expenses paid to the QTA, and its affiliate, for services associated with the termination of a plan and the distribution of its benefits (hereinafter, Termination Services) [8] be consistent with industry rates for such or similar services, based on the experience of the QTA.[9] Section II provides further that the fees and expenses paid to the QTA, and its affiliate, may not exceed the rates ordinarily charged by the QTA (or affiliate) for the same or similar services provided to customers that are not plans terminated pursuant to the QTA regulation, if the QTA (or affiliate) provides the same or similar services to such other customers. Among the remaining conditions set forth in section II is the requirement that, with respect to a Termination Transaction, the requirements of the QTA Regulation are met.

Section III of PTE 2006–06 contains conditions applicable to the Covered Distribution Transactions. These conditions include the requirement that, with respect to a Covered Distribution Transaction, the conditions of the QTA Regulation are met. Section III additionally requires that, in connection with the notice to participants and beneficiaries requirement described in the QTA Regulation, a statement is provided explaining that: (1) If the participant or beneficiary fails to make an election within the 30-day period referenced in the QTA Regulation, the QTA will directly distribute the account balance to an individual retirement plan or other account offered by the QTA or its affiliate; and (2) the proceeds of the distribution may be invested in the QTA's (or affiliate's) own proprietary investment product, which is designed to preserve principal and provide a reasonable rate of return and liquidity. This section of the class exemption requires further that the terms of the individual retirement plan or other account, including the fees and expenses for establishing and maintaining the individual retirement plan or other account, may be no less favorable than those available to comparable individual retirement plans or other accounts established for reasons other than the receipt of a distribution described in the QTA Regulation. Among the remaining conditions set forth in section III is the requirement that the rate of return or the investment performance of the individual retirement plan or other account may be no less favorable than the rate of return or investment performance of an identical investment(s) that could have been made at the same time by comparable individual retirement plans or other accounts established for reasons other than the receipt of a distribution described in the QTA Regulation.

Section IV contains the recordkeeping requirements for the QTA, and section V defines certain terms that appear in the class exemption. In this last regard, section V(a) currently provides that a termination administrator is ''qualified'' for purposes of the Abandoned Plan Regulations and the class exemption if: (1) The QTA is eligible to serve as a trustee or issuer of an individual retirement plan or other account, within the meaning of section 7701(a)(37) of the Code,[10] and (2) the QTA holds plan assets of the plan considered abandoned. Accordingly, relief under the existing class exemption extends only to entities with experience providing services to plans that are subject to ERISA.

III. Description of the Proposed Amendment to the Class Exemption

When an entity that sponsors an individual account plan is liquidated under chapter 7 of title 11 of the United States Code, a person appointed as a bankruptcy trustee (a Bankruptcy Trustee) will, among other things, perform the obligations that otherwise would have been required of the bankrupt entity. Once appointed, the Bankruptcy Trustee is responsible for administering the plan, which may include taking the steps necessary to terminate the plan and wind up the affairs of the plan. A Bankruptcy Trustee who undertakes these plan responsibilities is a fiduciary with respect to the plan,[11] and therefore subject to section 404 of ERISA.[12] As noted in the preamble to PTE 2006–06, as proposed, a violation of section 406(a) and/or (b) of the Act may occur if the QTA determines to pay itself or an affiliate for services rendered to the plan from the assets of an abandoned

[8] The Department notes that the ''distribution'' services referenced in section II of PTE 2006–06 are distinguishable from the Distribution Transactions described in section I(b) of the class exemption. In this regard, the Distribution Transactions involve the investment of Plan assets in the QTA's proprietary investment vehicles. Section II ''distribution'' services relate to the transfer of Plan assets to Plan participants and/or investment vehicles that are unrelated to the QTA.

[9] See section II(b)(1) of PTE 2006–06.

[10] Section 7701(a)(37) of the Internal Revenue Code describes an ''individual retirement plan'' as an individual retirement account described in section 408(a) of the Code, and an individual retirement account described in section 408(b) of the Code. Section 408(a) of the Code describes the term ''individual retirement account'' as meaning a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, if certain requirements are met. Section 408(b) of the Code describes the term ''individual retirement annuity'' as meaning an annuity contract, or an endowment contract, which meets certain requirements.

[11] In this regard, section 3(21)(A)(i) of ERISA provides that a person is a ''fiduciary'' with respect to a plan to the extent he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets. In addition, section 3(21)(A)(iii) of ERISA provides that a person is a ''fiduciary'' with respect to a plan to the extent he has any discretionary authority or discretionary responsibility in the administration of such plan.

[12] Section 404 of ERISA requires, among other things, that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and with the care, skill prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiarity with such matters would use in the conduct of an enterprise of a like character and with like aims.

plan.[13] Also, additional violations may occur if the QTA designates itself or an affiliate as the provider of an individual retirement plan or other account established for the benefit of participants and beneficiaries who do not make an election as to the form of distribution.

As described below, a Bankruptcy Trustee may determine that it is capable of prudently and expeditiously winding down the operations of an individual account plan. However, the relief currently provided by PTE 2006–06 generally does not extend to the provision of Termination Services by a Bankruptcy Trustee to a plan. In this regard, it is the understanding of the Department that Bankruptcy Trustees seldom hold custody of plan assets of the bankrupt plan sponsor. Thus, Bankruptcy Trustees are generally unable to meet the definition of QTA, as set forth in section V(a) of the existing class exemption.

In addition, the provision of Termination Services by a Bankruptcy Trustee to a Plan is often outside the scope of relief intended by the Department for the existing class exemption.[14] In this regard, the class exemption currently limits relief to entities that are eligible to serve as trustees or issuers of individual retirement plans and thus have experience providing services to individual account plans subject to ERISA.[15] As noted above, the existing class exemption requires, among other things, that the fees and expenses paid to a QTA, and its affiliate, for Termination Services are consistent with industry rates, based on the experience of the QTA. This condition may have little or no relevance to Bankruptcy Trustees that have minimal or no experience providing services to ERISA-covered individual account plans.

Nevertheless, the Department recognizes that when the sponsor of an individual account plan is in liquidation pursuant to a Chapter 7 bankruptcy proceeding, participants in the plan benefit to the extent the plan's operations are wound down properly and in an expeditious manner. The Department is proposing this amendment based on its belief that extending relief under the class exemption to Bankruptcy Trustees will enable these Trustees to carry out plan terminations consistent with ERISA and the Department's expectations.

Accordingly, the Department is proposing to expand the definition of QTA to include Bankruptcy Trustees and certain persons designated by such trustees to act as QTAs. Specifically, this new category of QTA is: (1) A person appointed as a bankruptcy trustee pursuant to a liquidation proceeding under chapter 7 of title 11 of the United States Code, or (2) an ''eligible designee'' of such bankruptcy trustee (as described below). Given that a Bankruptcy Trustee may have little or no experience providing services to employee benefit plans, the Department is proposing to modify section II(b)(1) of the class exemption. The modification, which applies only to Bankruptcy Trustee/QTAs and not ''eligible designees'' or other QTAs, eliminates the ''experience of the QTA'' component of the condition. In this regard, section II(b)(1) of this proposed amendment limits the total amount of compensation that may be paid to a Bankruptcy Trustee/QTA (or any affiliate) for Termination Services to an amount that is consistent with industry rates for such or similar services.[16]

The Department notes that compliance with section II(b)(1) of this proposed amendment imposes an obligation on a Bankruptcy Trustee/QTA, prior to performing any Termination Service on behalf of a Plan, to investigate and determine that the fees and expenses proposed to be paid to such Bankruptcy Trustee/QTA are consistent with the amount the Plan would have to pay to an experienced service provider for the same or similar Termination Services. The Department believes that information currently available on the Department's Web site, as described in further detail below, will assist Bankruptcy Trustee/QTAs set fees for Termination Services in the manner required by section II(b)(1) of the proposed exemption. The Department recognizes that a Bankruptcy Trustee, once appointed to administer the termination of a Plan, may seek to appoint the Plan's custodian to provide Termination Services and/or Distribution Services to such Plan.[17] The Department believes that the provision of Termination Services and/or Distribution Services by a plan custodian who has been retained in this manner to act as QTA would be consistent with the intended scope of the existing class exemption. Accordingly, the Department is proposing to expand the definition of QTA to include an ''eligible designee'' of a Bankruptcy Trustee. The proposed amendment defines an ''eligible designee'' to mean any entity appointed by a Bankruptcy Trustee/QTA, who: is eligible to serve as a trustee or issuer of an individual retirement plan; and holds assets of the plan(s) sponsored by the entity that is the subject of the chapter 7 liquidation proceeding. Given that ''eligible designees'' are plan custodians with experience providing services to employee benefit plans subject to ERISA, the Department believes that ''eligible designees'' should be treated in the same manner as QTAs that are not Bankruptcy Trustee/QTAs. In this regard, the proposed amendment permits ''eligible designees'' to engage in all transactions covered by the exemption (i.e., Covered Termination Transactions and/or Covered Distribution Transactions) subject to the same conditions applicable to QTAs other than

[13] In this regard, section 406(a)(1) of the Act prohibits, in part, a fiduciary of a plan from causing the plan to engage in a transaction that constitutes a direct or an indirect sale, exchange or leasing of any property between the plan and a party in interest; lending of money or other extension of credit between the plan and a party in interest; furnishing of goods, services, or facilities between the plan and a party in interest; and a transfer to, or use by or for the benefit of, a party in interest of any assets of the plan. Section 406(b)(1) and (b)(2) of the Act prohibits a fiduciary with respect to a plan from dealing with the assets of the plan in his own interest or for his own account; and from acting in his individual or in any other capacity in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

[14] It is also the understanding of the Department that Bankruptcy Trustees do not maintain proprietary investment vehicles, and thus do not, in the general course of their business activities, offer services associated with the Distribution Transactions. Accordingly, this proposed amendment does not extend relief for a Bankruptcy Trustee/QTA that designates itself or an affiliate to offer such services.

[15] In the preamble to the QTA Regulation, the Department further noted that in developing its criteria for QTAs, the Department limited QTA status to trustees or issuers of an individual account plan within the meaning of section 7701(a)(37) of the Code, because the standards applicable to such trustees and issuers are well understood by the regulated community and the Department is unaware of any problems attributable to weaknesses in the existing Code and regulatory standards for such persons. See 77 FR 20820 at 20821.

[16] This proposed amendment does not affect the obligations under the class exemption of a QTA that is not a Bankruptcy Trustee.

[17] The Department notes that the Act's general standards of fiduciary conduct would apply to this arrangement. In this regard, section 404 of the Act requires, among other things, that Bankruptcy Trustee/QTA discharge his or her duties in a prudent manner. Accordingly, a Bankruptcy Trustee/QTA who appoints an ''eligible designee'' would thereafter be responsible for monitoring the services provided by the ''eligible designee.'' The Department cautions that such monitoring, and the fee associated therewith, must be consistent with, and reflective of, the Plan's interest in having its operations wound down in an expeditious and cost effective manner. In this regard, the rates charged to the Plan by the Bankruptcy Trustee/QTA for monitoring the ''eligible designee'' must reflect the rates charged by a plan fiduciary for similar services, rather than the generally higher fees charged by bankruptcy trustees for legal services provided to the bankruptcy estate.

Bankruptcy Trustee/QTAs. Accordingly, the fees and expenses paid to an ''eligible designee''/QTA pursuant to section II(b)(1) of PTE 2006–06 must be, among other things, based on the experience of such QTA.

The Department reemphasizes to all entities seeking to take advantage of PTE 2006–06 that relief under that class exemption is conditioned upon, among other things, fulfilling the requirements set forth in the QTA Regulation. Accordingly, following a QTA's determination that an individual account plan has been abandoned,[18] the QTA must furnish the Department with a notice that includes, among other things, an identification of any services considered necessary to wind up the plan in accordance with this section, the name of the service provider(s) that is expected to provide such services, and an itemized estimate of expenses attendant thereto expected to be paid out of plan assets by the qualified termination administrator.[19] The Department cautions that, while all such notices are reviewed by the Department, any such notice furnished by a Bankruptcy Trustee/QTA will be subject to additional scrutiny by the Department to ensure that plans pay no more than reasonable compensation for Termination Services.[20] At the beginning of the termination process, the Department conducts a review of the estimated expenses for reasonableness. In this regard, the Department will: Compare the QTA's estimated expenses to those of other QTAs; and consider also the facts and circumstances of the Plan in question. The Department notes that Plans are deemed terminated only after the Department establishes that the fees are reasonable.

In addition, the Department notes that compliance with the QTA Regulation requires that each QTA file a ''Special Terminal Report for Abandoned Plans (STRAP)'' with the Department, and such Report must set forth, among other things, the total termination expenses paid by the plan and a separate schedule identifying each service provider and amount received, itemized by expense.[21] Completed STRAPs are available on the Department's Web site: *http://askebsa.dol.gov/AbandonedPlanSearch/UI/QTASearchResults.aspx.* The Department expects that the information contained in these completed STRAPs, including the itemized fees set forth therein, will assist Bankruptcy Trustee/QTAs set fees for Termination Services in the manner required by section II(b)(1) of the proposed exemption. For further assistance regarding QTA participation in the abandoned plan program, Bankruptcy Trustee/QTAs may contact the EBSA office for the region where the abandoned plan is located.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act.

(2) If granted, this proposed amendment does not extend to transactions prohibited under section 406(b)(3) of the Act or section 4975(c)(1)(F) of the Code;

(3) Before an amendment may be granted under section 408(a) of ERISA and 4975(c)(2) of the Code, the Department must find that the amendment is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(4) If granted, the amendment is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(5) If granted, the amendment is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Proposed Amendment

Under section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990), the Department proposes to amend PTE 2006–06, effective as of the date the adopted amendment is published in the **Federal Register**. The entire exemption, as proposed to be amended, is set forth below:

I. Covered Transactions

(a) The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1) and 406(b)(2) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to a QTA (as defined in paragraph (a)(1) or (a)(2) of section V) using its authority in connection with the termination of an abandoned individual account plan pursuant to the Department's regulation at 2578.1, relating to the Termination of Abandoned Individual Account Plans (the QTA Regulation) to:

(1) Select itself or an affiliate to provide services to the plan;

(2) Receive fees for the services performed as a QTA; and

(3) Pay itself fees for services provided to the plan prior to the deemed termination of the plan, provided that the conditions set forth in sections II and IV of this exemption are satisfied.

(b) The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1) and 406(b)(2) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to a QTA (as defined in paragraph (a)(1) or (a)(2)(ii) of section V) using its authority in connection with the termination of an abandoned individual account plan pursuant to the QTA Regulation to:

(1) Designate itself or an affiliate as: (i) Provider of an individual retirement plan; (ii) provider, in the case of a distribution on behalf of a designated beneficiary (as defined by section 401(a)(9)(E) of the Code) who is not the surviving spouse of the deceased participant, of an inherited individual retirement plan (within the meaning of section 402(c)(11) of the Code) established to receive the distribution on behalf of the nonspouse beneficiary under the circumstances described in

[18] The Proposed Amendment to the QTA Regulation provides that if an individual account plan's sponsor is in liquidation under chapter 7 of title 11 of the United States Code, the plan may be considered abandoned upon the entry of an order for relief, and the bankruptcy trustee, or an eligible designee, shall be the qualified termination administrator. See Paragraph (j)(1) of the Proposed Amendment to the QTA Regulation.

[19] See paragraph (c)(3)(iii) of the QTA Regulation.

[20] Paragraph (d)(2)(v) of the QTA Regulation provides, among other things, that expenses of plan administration shall be considered reasonable to the extent such expenses are consistent with industry rates for such or similar services.

[21] See DOL Reg. Sec. 2520.103–13(b)(3).

section (d)(1)(ii) of the Safe Harbor Regulation for Terminated Plans (29 CFR section 2550.404a–3) (the Safe Harbor Regulation); or (iii) provider of an interest bearing, federally insured bank or savings association account maintained in the name of the participant or beneficiary, in the case of a distribution described in section (d)(1)(iii) of the Safe Harbor Regulation, for the distribution of the account balance of the participant or beneficiary of the abandoned individual account plan who does not provide direction as to the disposition of such assets;

(2) Make the initial investment of the account balance of the participant or beneficiary in the QTA's or its affiliate's proprietary investment product;

(3) Receive fees in connection with the establishment or maintenance of the individual retirement plan or other account; and

(4) Pay itself or an affiliate investment fees as a result of the investment of the individual retirement plan or other account assets in the QTA's or its affiliate's proprietary investment product, provided that the conditions set forth in sections III and IV of this exemption are satisfied.

II. Conditions for Provision of Termination Services and Receipt of Fees in Connection Therewith

(a) The requirements of the QTA Regulation are met. The QTA provides, in a timely manner, any other reasonably available information requested by the Department regarding the proposed termination.

(b) Fees and expenses paid to the QTA, and its affiliate, in connection with the termination of the plan and the distribution of benefits:

(1) Are consistent with industry rates for such or similar services, based on the experience of the QTA, and

(2) Are not in excess of rates ordinarily charged by the QTA (or affiliate) for the same or similar services provided to customers that are not plans terminated pursuant to the QTA regulation, if the QTA (or affiliate) provides the same or similar services to such other customers. Notwithstanding the foregoing, solely with respect to a QTA described in section V(a)(2)(i) of this proposed class exemption, the requirement set forth in (b)(1) of this paragraph shall be deemed met to the extent that the fees and expenses paid to such QTA are: (i) For services necessary to wind-up the affairs of the plan and distribute benefits to the plan's participants and beneficiaries; and (ii) consistent with industry rates for such or similar services ordinarily charged by QTAs described in section V(a)(1)(i);

(c) In the case of a transaction described in section I(a)(3):

(1) Such services: (i) Were performed in good faith pursuant to the terms of a written agreement executed prior to the service provider becoming a QTA; or (ii) were performed pursuant to the QTA Regulation; and

(2) The QTA, in the initial notification of plan abandonment described in section (c)(3) of the QTA Regulation: (i) Represents under penalty of perjury that such services were actually performed; and (ii) in the case of section II(c)(1)(i) above, provides the Department with a copy of the executed contract between the QTA and a plan fiduciary or the plan sponsor that authorized such services.

III. Conditions for Distributions

(a) The conditions of the QTA Regulation are met.

(b) In connection with the notice to participants and beneficiaries described in the QTA Regulation, a statement is provided explaining that:

(1) If the participant or beneficiary fails to make an election within the 30-day period referenced in the QTA Regulation, the QTA will directly distribute the account balance to an individual retirement plan or other account offered by the QTA or its affiliate;

(2) The proceeds of the distribution may be invested in the QTA's (or affiliate's) own proprietary investment product, which is designed to preserve principal and provide a reasonable rate of return and liquidity.

(c) The individual retirement plan or other account is established and maintained for the exclusive benefit of the individual retirement plan account holder or other account holder, his or her spouse, or their beneficiaries.

(d) The terms of the individual retirement plan or other account, including the fees and expenses for establishing and maintaining the individual retirement plan or other account, are no less favorable than those available to comparable individual retirement plans or other accounts established for reasons other than the receipt of a distribution described in the QTA Regulation.

(e) Except in the case of a QTA providing a bank or savings account pursuant to section I(b)(1)(iii) of the exemption, the distribution proceeds are invested in an Eligible Investment Product(s), as defined in section V(c) of this class exemption.

(f) The rate of return or the investment performance of the individual retirement plan or other account is no less favorable than the rate of return or investment performance of an identical investment(s) that could have been made at the same time by comparable individual retirement plans or other accounts established for reasons other than the receipt of a distribution described in the QTA Regulation.

(g) The individual retirement plan or other account does not pay a sales commission in connection with the acquisition of an Eligible Investment Product.

(h) The individual retirement plan account holder or other account holder must be able, within a reasonable period of time after his or her request and without penalty to the principal amount of the investment, to transfer his or her account balance to a different investment offered by the QTA or its affiliate, or to a different financial institution not related to the QTA or its affiliate.

(i)(1) Fees and expenses attendant to the individual retirement plan or other account, including the investment of the assets of such plan or account, (e.g., establishment charges, maintenance fees, investment expenses, termination costs, and surrender charges) shall not exceed the fees and expenses charged by the QTA for comparable individual retirement plans or other accounts established for reasons other than the receipt of a distribution made pursuant to the QTA Regulation;

(2) Fees and expenses attendant to the individual retirement plan or other account, with the exception of establishment charges, may be charged only against the income earned by the individual retirement plan or other account; and

(3) Fees and expenses attendant to the individual retirement plan or other account are not in excess of reasonable compensation within the meaning of section 4975(d) (2) of the Code.

IV. Recordkeeping

(a) The QTA maintains or causes to be maintained, for a period of six (6) years from the date the QTA provides notice to the Department of its determination of plan abandonment and its election to serve as the QTA described in the QTA Regulation, the records necessary to enable the persons described in paragraph (b) of this section to determine whether the applicable conditions of this exemption have been met. Such records must be readily available to assure accessibility by the persons identified in paragraph (b) of this section.

(b) Notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (a) of this section are unconditionally

available at their customary location for examination during normal business hours by—

(1) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service; and

(2) Any account holder of an individual retirement plan or other account established pursuant to this exemption, or any duly authorized representative of such account holder.

(c) A prohibited transaction will not be considered to have occurred if due to circumstances beyond the control of the QTA, the records necessary to enable the persons described in paragraph (b) to determine whether the conditions of the exemption have been met are lost or destroyed, and no party in interest other than the QTA shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by sections 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (b).

(3) None of the persons described in paragraph (b)(2) of this section shall be authorized to examine the trade secrets of the QTA or its affiliates or commercial or financial information that is privileged or confidential.

V. Definitions

(a) A termination administrator is ''qualified'' for purposes of the QTA Regulation and this proposed amendment if the requirements set forth in either subparagraph (1) or (2) below are met:

(1)(i) The QTA is eligible to serve as a trustee or issuer of an individual retirement plan or other account, within the meaning of section 7701(a)(37) of the Code, and (ii) The QTA holds plan assets of the plan that is considered abandoned; or

(2)(i) The QTA is a bankruptcy trustee in a liquidation proceeding under chapter 7 of title 11 of the United States Code with responsibility under 11 U.S.C 704(a)(11) to administer one or more individual account plans sponsored by the entity that is the subject of the proceeding, or (ii) The QTA is an ''eligible designee,'' as defined in section V(h) below, of such bankruptcy trustee.

(b) The term ''individual retirement plan'' means an individual retirement plan described in section 7701(a)(37) of the Code. For purposes of section III of this exemption, the term ''individual retirement plan'' shall also include an inherited individual retirement plan (within the meaning of section 402(c)(11) of the Code) established to receive a distribution on behalf of a nonspouse beneficiary. Notwithstanding the foregoing, the term individual retirement plan shall not include an individual retirement plan which is an employee benefit plan covered by Title I of ERISA.

(c) The term ''Eligible Investment Product'' means an investment product designed to preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with liquidity. For this purpose, the product must be offered by a Regulated Financial Institution as defined in paragraph (d) of this section and shall seek to maintain, over the term of the investment, the dollar value that is equal to the amount invested in the product by the individual retirement plan or other account. Such term includes money market funds maintained by registered investment companies, and interest-bearing savings accounts and certificates of deposit of a bank or similar financial institution. In addition, the term includes ''stable value products'' issued by a financial institution that are fully benefit-responsive to the individual retirement plan account holder or other account holder, i.e., that provide a liquidity guarantee by a financially responsible third party of principal and previously accrued interest for liquidations or transfers initiated by the individual retirement plan account holder or other account holder exercising his or her right to withdraw or transfer funds under the terms of an arrangement that does not include substantial restrictions to the account holder access to the individual retirement plan or other account's assets.

(d) The term ''Regulated Financial Institution'' means an entity that: (i) Is subject to state or federal regulation, and (ii) is a bank or savings association, the deposits of which are insured by the Federal Deposit Insurance Corporation; a credit union, the member accounts of which are insured within the meaning of section 101(7) of the Federal Credit Union Act; an insurance company, the products of which are protected by state guaranty associations; or an investment company registered under the Investment Company Act of 1940.

(e) An ''affiliate'' of a person includes:

(1) Any person directly or indirectly controlling, controlled by, or under common control with, the person; or

(2) Any officer, director, partner or employee of the person.

(f) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(g) The term ''individual account plan'' means an individual account plan as that term is defined in section 3(34) of the Act.

(h) The term ''eligible designee'' means any person or entity designated by a QTA described in section V(a)(2)(i) that is 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 that holds assets of a plan described in section V(a)(2)(i).

Signed at Washington, DC, September, 2012.

Lyssa E. Hall,

Director, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

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