SUTHERLAND

LEGAL ALERT

December 12, 2012

DOL Proposes Expansion and Refinement of ERISA Abandoned Plan Program

On December 12, 2012, the Department of Labor (DOL) published in the Federal Register proposed revisions to its abandoned plan regulations and prohibited transaction class exemption, expanding the scope and refining the terms of that program. The proposal is also summarized in a supporting fact sheet.

As originally constructed in 2006, this program was designed to facilitate the cost-effective dissolution of certain retirement plans abandoned by their sponsors, as defined in the regulation, by:

- Providing procedures by which a "qualified termination administrator" or QTA – generally, a financial institution eligible to serve as an IRA trustee or issuer that is holding assets on behalf of the abandoned plan – may terminate the plan and distribute its assets to participants and beneficiaries;
- Limiting the ERISA liability of the QTA acting pursuant to those procedures;
- Making available an ERISA fiduciary safe harbor for the QTA to make distributions to participants and beneficiaries who fail to elect a form of distribution;
- Providing a simplified method for filing a final Form 5500 for abandoned defined contribution plans; and
- Permitting, through a prohibited transaction class exemption, the QTA or an affiliate to carry out these procedures for a fee, at industry standard rates, paid from the assets of the plan.

The program as originally adopted was purposefully unavailable to most bankruptcy trustees in Chapter 7 liquidations, whom DOL nonetheless deems to be fiduciaries when administering the debtor's ERISA plans. DOL has now reconsidered that decision and proposes to make the abandoned plan program available to a Chapter 7 trustee or its "eligible designee", with specific rules, including:

- Treating the plan as abandoned at the commencement of bankruptcy proceedings, i.e., upon the bankruptcy court's entry of an order for relief pursuant to the Bankruptcy Code, without any further findings;
- Limiting the bankruptcy trustee's fees that may be paid from plan assets to reasonable compensation not in excess of the industry standard for services by QTAs that are not bankruptcy trustees; and
- Eliminating for a bankruptcy trustee (but not an eligible designee) the "experience of the QTA" requirement for the class exemption, inasmuch as bankruptcy trustees often have no experience providing services to benefit plans.

© 2012 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

DOL also proposes to make useful refinements to the technical terms of the program generally, including:

- Eliminating the "investigation statement" from the notice of plan abandonment filed by the QTA with DOL, i.e., whether the QTA or an affiliate has been the subject of a DOL, Internal Revenue Service (IRS) or Securities and Exchange Commission (SEC) examination in the past 24 months for its conduct as an ERISA fiduciary or party in interest with respect to any ERISA plan; and

- Conditionally permitting the QTA to transfer the account balances of decedents to an interest-bearing bank account or a state's unclaimed property fund instead of an IRA without regard to the size of the account, which is allowed under the current regulation only if the account balance is $1,000 or less.

The proposal also notes that, as before, the IRS will not challenge the tax qualification of a plan terminated under the abandoned plan program or take adverse action against QTAs including bankruptcy trustees, if three conditions are met. Generally, the IRS will not expect an EPCRS filing as a condition for abandoned plan relief.

Comments on the proposal are due on February 11, 2013.

■ ■ ■

If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Margaret C. Barker	404.853.8054	margaret.barker@sutherland.com
Adam B. Cohen	202.383.0167	adam.cohen@sutherland.com
Carol T. McClarnon	202.383.0946	carol.mcclarnon@sutherland.com
Jamey A. Medlin	404.853.8198	jamey.medlin@sutherland.com
Alice Murtos	404.853.8410	alice.murtos@sutherland.com
Joanna G. Myers	202.383.0237	joanna.myers@sutherland.com
Vanessa A. Scott	202.383.0215	vanessa.scott@sutherland.com
W. Mark Smith	202.383.0221	mark.smith@sutherland.com
William J. Walderman	202.383.0243	william.walderman@sutherland.com
Carol A. Weiser	202.383.0728	carol.weiser@sutherland.com

© 2012 Sutherland Asbill & Brennan LLP. All Rights Reserved.
This article is for informational purposes and is not intended to constitute legal advice.