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MIDDLE DISTRICT OF NORTH CAROLINA
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Re: Benefit Plan Wind Ups

To chapter 7 trustees:

When a debtor was the administrator of an ERISA benefit plan such as a 401(k) plan, you are required to "continue to perform the obligations required of the administrator." 11 U.S.C. § 704(a)(11). An "administrator" means:

> (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
>
> (ii) if an administrator is not so designated, the plan sponsor; or
>
> (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

29 U.S.C. § 1002(16)(A). Usually—but not always—the employer is the administrator and plan sponsor[1] under these types of plans. Thus, when a business debtor was an employer with an ERISA benefit plan for its employees, you will typically find yourself with the duty to wind-up the benefit plan. This memo provides some guidance on this process.

First, earlier this year, the Department of Labor ("DOL") amended the regulations governing its "Abandoned Plan Program" so that chapter 7 trustees may take advantage of its streamlined procedures to terminate and wind-up these plans. More information can be found here and here. Participation in the program is optional, not required. However, the wind-up process is streamlined and includes liability limitations. You will likely wish to take advantage of this program.

The abandoned plan program regulations can be found at 29 C.F.R. § 2578.1, which you should review carefully. This letter is not an attempt to summarize

[1] 29 U.SC. § 1002(16)(B) defines "plan sponsor" to include, *inter alia,* "the employer in the case of an employee benefit plan established or maintained by a single employer."

every aspect of the regulations. However, here are the big picture steps for winding up a plan under the program:

- A plan is deemed abandoned when a chapter 7 order for relief is entered in the plan sponsor's bankruptcy case. 29 C.F.R. § 2578.1(j)(2).
- Either the bankruptcy trustee, or an "eligible designee," may be the "qualified termination administrator" ("QTA") for purposes of winding up the plan. *See* 29 C.F.R. § 2578.1(j)(3) and (4).
- The QTA must send the DOL a notice of their intent to serve as QTA, which includes contact information for the bankruptcy trustee and the designee (if applicable), and information about the plan, the bankruptcy case, any suspected fiduciary breaches under the plan, the plan's assets, and the plan's service providers. *See* 29 C.F.R. § 2578.1(j)(6).
- The QTA would then follow the steps for winding up the plan as described under 29 C.F.R. § 2578.1(d) as modified for the chapter 7 bankruptcy context by § 2578.1(j)(7).
- The trustee and designee (if any) would be entitled to the benefits of limited liability as provided by 29 C.F.R. § 2578.1(e).

Model forms for the required notices can be found here, under "Model Notices and Instructions."

You (or the designee, if any) may be entitled to compensation for your services as QTA in winding up the plan, to be paid from plan assets as reasonable expenses of the wind up. Any such compensation is subject to applicable ERISA law and the terms of the benefit plan documents. This compensation must be "consistent with industry rates for such or similar services ordinarily charged by qualified termination administrators." 29 C.F.R. § 2578.1(j)(7)(iv). Our office's position is that § 326 statutory commission does not apply to distribution of benefit plan assets since these are distributions of non-estate funds to non-creditors. *See* 11 U.S.C. § 541(b)(7) (excluding ERISA plan assets from bankruptcy estates); 11 U.S.C. § 326 (providing for a commission based upon disbursements "in the case" made to "parties in interest").

We believe benefit plan wind up expenses should generally be borne by the benefit plan, not the bankruptcy estate, since such expenses do not benefit or relate to the bankruptcy estate. We oppose the use of estate funds to pay compensation for such services. That said, if you believe unique circumstances warrant compensation from estate funds, it would require application and approval from the bankruptcy court. No payment for wind up expenses associated with an ERISA plan should be made from bankruptcy estate funds absent court approval. However, compensation paid from ERISA benefit plan assets likely falls outside the bankruptcy court's jurisdiction and is therefore does not require application or approval from the court. *See, e.g., In re Robert Plan Corp.*, 777 F.3d 594 (2nd Cir. 2015) (reversing bankruptcy court and finding that it lacked jurisdiction to approve compensation paid to a chapter 7 bankruptcy trustee from an ERISA benefit plan's assets); *In re AB & C Group, Inc.,* 411 B.R. 284 (Bankr. N.D. W. Va. 2009) (holding that it lacked jurisdiction to enter an order approving procedures governing the wind up of a 401(k) plan and payment of compensation associated with the plan's termination); *but see In re Franchi Equipment Co., Inc.,* 452 B.R. 352 (Bankr. D. Mass. 2011) (acknowledging conflicting authority but finding that it had jurisdiction).[2] Compensation paid from benefit plan assets is instead subject to DOL oversight, applicable ERISA law, and the terms of the applicable benefit plan documents. *See, e.g., In re Robert Plan Corp.,* 2018 WL 1267870, at *9 (Bankr. E.D.N.Y. Mar. 1, 2018) ("To the extent a Chapter 7 trustee is compensated by ERISA plan funds, the Chapter 7 trustee can take such funds free from the scrutiny of the Bankruptcy Court, but the Chapter 7 trustee would be subject to any applicable ERISA laws governing his or her compensation or conduct, enforceable outside of the Bankruptcy Court.")

If you have a case involving an ERISA benefit plan, feel free to contact our office for additional guidance.

John Paul H. Cournoyer
U.S. Bankruptcy Administrator
Middle District of North Carolina

[2] This is unsettled law in our district, and this letter reflects the BA's view only.