

## ORPHAN PLANS

### Orphan Plan – Definition

An “Orphan Plan” is a benefit plan, including defined contribution plans and voluntary employees' beneficiary associations (VEBAs), that no longer is maintained by a plan sponsor. The sponsor may no longer be in existence or may have abandoned the plan before proper plan termination and disbursement of trust assets have taken place. In some cases, plan abandonment occurs when the sponsoring employer ceases to exist by virtue of a bankruptcy proceeding or other corporate dissolution. In other cases, abandonment occurs because an individual plan sponsor no longer is fulfilling the duties of a plan sponsor. There are also cases when the plan sponsor plans for an orderly liquidation of the plan. Whatever the cause, participants in these so-called “Orphan Plan” or “Abandoned Plan” situations are at risk of being denied access to their benefits or otherwise being unable to exercise rights guaranteed under the Employee Retirement Income Security Act of 1974 (ERISA). At the same time, benefits in such plans may be significantly diminished by ongoing trustee and administrative expenses, rather than being distributed to participants and beneficiaries. Plan participants and their beneficiaries concerned about their benefits often contact third-party service providers to demand payment. Typically, these service providers do not have the authority to issue distributions or to terminate the plan. Even trustees who may exercise certain responsibilities with respect to the plan may lack such authority.

An Orphan Plan also risks disqualification under the Internal Revenue Code (IRC) resulting in the loss of the plan’s tax-favored status. If a plan is no longer sponsored by an employer, or if the plan is not being administered by an independent fiduciary who will perform responsibilities once performed by the employer as plan sponsor, the plan may cease to be a qualified plan and lose its tax-favored status. The Department of Labor (DOL) estimates that each year thousands of 401(k) plans holding hundreds of millions of dollars in assets and covering tens of thousands of workers are abandoned.

### Orphan Plan – Regulatory Background

Over the past many years, the Department of Labor's Employee Benefits Security Administration (EBSA) has seen an increase in the number of requests for assistance from participants who are unable to obtain access to the money in their individual account plans. EBSA responded to those participants' requests with a series of enforcement initiatives, including the National Enforcement Project on Orphan Plans (NEPOP), which began in 1999. NEPOP focused primarily on identifying abandoned plans, locating their fiduciaries, if possible, and requiring those fiduciaries to manage and terminate (including issuing benefit distributions to participants and beneficiaries) the plans in accordance with ERISA. When no fiduciary can be found, the Department may request a federal court to appoint an independent fiduciary to manage, terminate, and distribute the assets of the plan.

During 2002, the ERISA Advisory Council created the Working Group on Orphan Plans to study the causes and extent of orphan plans. On November 8, 2002, after public hearings and testimony, the Advisory Council issued a report, entitled Report of the Working Group on Orphan Plans, concluding that the problems posed by abandoned plans are very serious and substantial for plan participants, administrators, and the government. Although the Advisory Council's Report estimated that abandoned plans represented only about two percent of all defined contribution plans and less than one percent of total plan assets for such plans, the Report also indicated that the orphan plan problem may grow in difficult economic times.

Taking into account the problem of abandoned plans and the Department's efforts to date, the Advisory Council generally recommended measures (whether regulatory, legislative, or both) to encourage service providers to voluntarily terminate abandoned plans and distribute assets to participants and beneficiaries. Specific recommendations of the Advisory Council included new regulations for determining when a plan is abandoned, procedures for terminating abandoned plans and distributing assets, and rules defining who may terminate and wind up such plans.

In 2005, the Department of Labor issued regulations under ERISA that facilitate the termination of, and distribution of benefits from, individual account pension plans that have been abandoned by their sponsoring employers. The rules provide standards for determining when a plan is abandoned and establishes a process for winding up the affairs of the plan and distributing benefits to workers. This process would eliminate the need for costlier court approvals and allow workers to regain access to their benefits. The proposal also provided guidance on the application of tax qualification rules to plans terminated under this regulation.

The regulations (i) establish a procedure 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; (ii) provide a fiduciary safe harbor for making distributions from terminated plans on behalf of participants and beneficiaries who fail to make an election regarding a form of benefit distribution; and (iii) establish a simplified method for filing a terminal report for abandoned individual account plans. These regulations became effective May 22, 2006.

### **Orphan Plan – Administrator Duties**

The typical duties for a plan administrator of an orphan plan include tax and regulatory agency filings such as Form 5500. Other administrative duties may include audits, asset liquidation, participant communications and elections (including the responsibility to locate missing participants), benefit payments and vendor management including oversight of investment managers and third party administrators.

In situations involving the plan's ultimate dissolution, the plan sponsor should ensure either an orderly wind-down and distribution of the plan's assets or a mechanism to ensure the continuation of benefit payments. The plan administrator's duties and responsibilities are usually more complex in larger plans than in an ordinary wind-down of a plan with a small number of participants. Larger plans may require the retention of an investment manager to manage assets (both liquid and illiquid), the development of an Investment Policy Statement to be utilized in connection with the termination of the plan and the tasks associated with administering an ongoing plan. These types of orphan plans require administrators to have legal, fiduciary, administrative and financial expertise, thereby distinguishing them from routine wind-down assignments.

## **Orphan Plan – Evercore Trust Experience in Complex Situations**

The Evercore Trust Company team has served as the plan administrator complex orphan plans. Examples include:

### **Arthur D. Little Profit-Sharing Plan (2002-2007)**

Prior to its Chapter 11 bankruptcy filing in February 2002, Arthur D. Little was a privately-held international consulting firm with approximately 2,400 employees operating in 30 countries, that sponsored a profit sharing plan, with approximately 3,200 participants and approximately \$500 million of assets (including substantial investments in hedge funds and other illiquid assets). Upon the liquidation of Arthur D. Little, Evercore Trust's team, through its predecessor entity, was appointed in 2002 to wind-down and terminate the plan, and its responsibilities included:

- Serving as plan trustee, investment manager and administrator with respect to the plan for five years;
- Evaluating the timing and sales strategy for the various illiquid assets, and the distribution of over \$500 million in plan benefits;
- Appointing and supervising various service providers (recordkeepers, asset managers, etc.); and
- Terminating the plan in 2007 upon the distribution of the last plan benefits.

### **New United Motor Manufacturing, Inc. (NUMMI) VEBA (2013-Present)**

NUMMI was a joint venture between GM and Toyota that terminated in June 2009. NUMMI had two VEBA plans, with approximately 1,000 participants and beneficiaries Evercore Trust was appointed as the plan administrator and named fiduciary of the retiree medical trusts maintained for salaried and hourly employees in connection with the dissolution of NUMMI (potentially, a 50+ year assignment), responsible for:

- Negotiating the amount of the final contribution to the VEBAs;
- Selecting and replacing the trustee and other service providers for the VEBAs as appropriate;
- Drafting investment policy statements, 5500 filings and plan documentation;
- Directing third party investment manager with respect to the investment of VEBA assets (over \$75 million); and
- Amending or terminating the VEBAs.

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