DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2520, 2550, and 2578

RIN 1210–AA97

Termination of Abandoned Individual Account Plans

AGENCY: Employee Benefits Security Administration.

ACTION: Final regulations.

SUMMARY: This document contains three final regulations under the Employee Retirement Income Security Act of 1974 (ERISA or the Act) that facilitate the termination of, and distribution of benefits from, individual account pension plans that have been abandoned by their sponsoring employers. The first regulation establishes 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. The second regulation provides 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. The third regulation establishes a simplified method for filing a terminal report for abandoned individual account plans. Appendices to these rules contain model notices for use in connection therewith. These regulations will affect fiduciaries, plan service providers, and participants and beneficiaries of individual account pension plans.

DATES: All three regulations are effective May 22, 2006.

FOR FURTHER INFORMATION CONTACT: Stephanie L. Ward or Melissa R. Spurgeon, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

Thousands of individual account plans have, for a variety of reasons, been abandoned by their sponsors. Financial institutions holding the assets of these abandoned plans often do not have the authority or incentive to perform the responsibilities otherwise required of the plan administrator with respect to such plans. At the same time, participants and beneficiaries are frequently unable to access their plan benefits. As a result, the assets of many of these plans are diminished by ongoing administrative costs, rather than being paid to the plan's participants and beneficiaries.

Over the past few years, the Department of Labor's Employee Benefits Security Administration (the Department or 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. According to these participants, even though a bank or other service provider of the plan may be holding their money, neither the bank nor the participants are able to locate anyone with authority under the plan to authorize benefit distributions.

In some cases, plan abandonment occurs when the sponsoring employer ceases to exist by virtue of a bankruptcy proceeding. In other cases, abandonment occurs because the plan sponsor has been incarcerated, died, or fled the country. Whatever the causes of abandonment, participants in these so-called ''orphan plan'' or ''abandoned plan'' situations are effectively denied access to their benefits and are otherwise unable to exercise their rights guaranteed under ERISA. At the same time, benefits in such plans are at risk of being significantly diminished by ongoing administrative expenses, rather than being distributed to participants and beneficiaries.

EBSA responded to those participants' requests for assistance with a series of enforcement initiatives, including the National Enforcement Project on Orphan Plans (NEPOP), which began in 1999. NEPOP focuses primarily on identifying abandoned plans, locating their fiduciaries, if possible, and requiring those fiduciaries to manage and terminate (including making benefit distributions to participants and beneficiaries) the plans in accordance with ERISA. When no fiduciary can be found, the Department often requests a federal court to appoint an independent fiduciary to manage, terminate, and distribute the assets of the plan. EBSA had opened over 1,500 civil cases involving defined contribution orphan plans as of September 30, 2005. In the over 1,000 orphan plan cases closed with results through that date, there were approximately 50,000 participants affected and $255 million in assets involved. As of September 30, 2005, there were approximately 400 active cases involving orphan plans.

During 2002, the ERISA Advisory Council created the Working Group on Orphan Plans to study the causes and extent of the orphan plan problem. On November 8, 2002, after public hearings and testimony, the Advisory Council issued a report, entitled Report of the Working Group on Orphan Plans,[1] concluding that the problems posed by abandoned plans are very serious and substantial for plan participants, administrators, and the government. In particular, the Report states that ''[p]lan participants may suffer economic hardship as a result of their inability to obtain a distribution from an orphan plan; plan service providers may be besieged with requests for distributions, although unauthorized to act; and the government may be forced to handle the termination of hundreds or thousands of plans that have been abandoned.'' Although the Advisory Council's Report estimated that abandoned plans currently represent 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.

On March 10, 2005, the Department published in the **Federal Register** (70 FR 12046) a notice of proposed rulemaking that, upon adoption, would facilitate the termination of, and distribution of benefits from, individual account pension plans that have been abandoned by their sponsoring employers. The Department invited interested persons to submit written comments. The Department received 16 written comments representing plan sponsors, independent fiduciaries, and plan service providers including financial institutions and plan recordkeepers. These letters are available under Public Comments on the Laws & Regulations page at *http://www.dol.gov/ebsa.*

In addition to the notice of proposed rulemaking, the Department published for public comment a related class exemption addressing various

[1] A copy of the Report can be found on the About EBSA page under the heading ERISA Advisory Council at *http://www.dol.gov/ebsa.*

transactions related to the regulations. The final class exemption appears elsewhere in the notice section of today's **Federal Register**.

Set forth below is an overview of the three regulations and the public comments received in response to the proposals.

B. Abandoned Plan Regulation (29 CFR 2578.1)

In general, § 2578.1 sets forth a regulatory framework under which an individual account plan will be considered abandoned and terminated and pursuant to which a qualified termination administrator can take steps to wind up the affairs of the plan and distribute benefits to the plan's participants and beneficiaries.

1. Qualified Termination Administrator

Like the proposal, the final regulation authorizes a ''qualified termination administrator'' (QTA) to determine that an individual account plan is abandoned and to carry out related activities necessary to the termination and winding up of the plan's affairs. The conditions for being a QTA are set forth in paragraph (g) of § 2578.1. That section, as proposed, established two conditions for QTA status. First, the QTA must be 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 (Code) and, second, the QTA must be holding assets of the plan on whose behalf it will serve as the QTA.[2]

A number of the commenters on the proposed regulation suggested that the Department expand the types of persons that could serve as a QTA under the regulation. In this regard, several of the commenters recommended expanding the proposed QTA definition to include recordkeepers, third-party contract administrators, accountants, and other service providers of plans, indicating that in many, if not most, instances, recordkeepers, third-party contract administrators and other service providers will be in a better position than financial institutions to determine that a plan has been abandoned and reconcile the information necessary to a plan's termination because of their ready access to plan documents and records.

Although the Department recognizes the critical role that recordkeepers, third-party contract administrators and other service providers to plans can and will play in the process of winding up the affairs of an abandoned plan, the Department nonetheless believes that, given the authority and control over plans vested in QTAs under the regulation, QTAs must be subject to standards and oversight that will reduce the risk of losses to the plans' participants and beneficiaries. In developing its criteria for QTAs, the Department limited QTA status to trustees or issuers of an individual retirement 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. Accordingly, the Department believed that the Code and regulatory standards could be adopted for purposes of this regulation without imposing unnecessary costs and burdens on either plans or potential QTAs. The Department notes that, while commenters did propose varying procedures and criteria for defining QTA status, there was no consensus among the commenters as to what regulatory standards might be applicable to such persons. For these reasons, the Department is adopting the definition of ''qualified termination administrator'' without change from the proposal.

As noted above, the Department anticipates that recordkeepers and other providers of services to abandoned plans will play an important role in winding up the affairs of the plan and that QTAs will, to the extent necessary to discharge their responsibilities under the regulation, utilize existing service providers as a means of maximizing efficiencies in the termination process and keeping administrative costs attendant to plan termination as low as possible. Paragraph (d)(2)(iv) of the final regulation makes clear that a QTA may engage, on behalf of the plan, such service providers as are necessary for the QTA to carry out its responsibilities.

One commenter, noting the possibility that an abandoned plan might have assets invested with more than one financial institution, asked whether each such institution could be a QTA of that plan with respect to the assets held by that institution. The Department intends that there will be only one QTA for an abandoned plan and to the extent that one or more institutions is determined to hold assets of an abandoned plan subsequent to the approval of a QTA, such institutions will be expected to cooperate with the QTA in winding up the plan. To facilitate this process, the Department has added a new paragraph to the limited liability section of the regulation, paragraph (e)(3), that limits the liability of a party holding plan assets when transferring or disposing of a plan's assets at the direction of the QTA. Paragraph (e)(3) is discussed in greater detail under subsection 6 of this preamble, entitled ''Limited Liability.''

Two commenters argued in favor of conferring QTA status on court appointed bankruptcy trustees in liquidation cases where the debtor also is the plan administrator. The Department did not adopt this suggestion. Such individuals are empowered by virtue of their court appointment to take the steps necessary to terminate and wind up the affairs of a plan and, therefore, do not need the authority conferred by the regulation. The final regulation does not limit, in any way, the ability of other parties who may be acting pursuant to court appointment, court order, or otherwise acting on behalf of the sponsor of the plan, to terminate and wind up the affairs of a pension plan, without regard to whether the plan is considered abandoned under this regulation.

One commenter raised the issue of whether an affiliate of an otherwise eligible financial institution could itself be a QTA. As noted above, paragraph (g) of the final regulation provides that, in order to be a QTA, an entity must both (1) be eligible to serve as a trustee or issuer of an individual retirement plan under section 7701(a)(37) of the Code, and (2) hold assets of the abandoned plan. Accordingly, by definition, an entity that does not satisfy these two conditions could not itself be a QTA even if it is affiliated with a financial institution that does satisfy the conditions. Of course, a QTA may engage any of its affiliates to provide administrative services necessary to the termination and winding-up process, provided that all of the requirements of the regulation and prohibited transaction class exemption are satisfied.

2. Finding of Plan Abandonment

As in the proposal, the final regulation describes the circumstances under which a QTA may find an individual account plan to be abandoned. Such circumstances are when there have been no contributions to (or distributions from) a plan for a consecutive 12-month period, or where facts and circumstances known to the QTA (such as a plan sponsor's liquidation under title 11 of the United States Code, or communications from

[2] Section 7701(a)(37) defines the term individual retirement plan to mean an individual retirement account described in section 408(a) of the Code and an individual retirement annuity described in section 408(b) of the Code.

plan participants and beneficiaries regarding the plan sponsor, benefit distributions, or other plan information) suggest that the plan is or may become abandoned. Inasmuch as there were no negative comments on this provision as proposed, it was adopted without modification. See § 2578.1(b)(1)(i).

With respect to the facts and circumstances clause, one commenter suggested adding language to expressly cover situations in which the plan sponsor has been dissolved without a successor under applicable State law. Although the Department agrees that the dissolution of the sponsor may cause the plan to become abandoned, the Department believes it is unnecessary to add this particular example to the regulation. The examples listed in the regulation are not exclusive. Rather, the Department anticipates that a variety of circumstances, regardless of whether they are listed as examples in the regulation, might justify a finding of immediate abandonment.[3] For example, the Department expects that effects of natural disasters, such as Hurricane Katrina, might in some cases warrant that a QTA not have to wait for 12 consecutive months of plan inactivity before taking action, even though a natural disaster is not a listed example.

As a second condition to a finding of abandonment, the proposal provided that the QTA must, following reasonable efforts to locate or communicate with the known plan sponsor, determine that the plan sponsor no longer exists, cannot be located, or is unable to maintain the plan. Because there were no negative comments on this provision, it was adopted without modification. See § 2578.1(b)(1)(ii).

With respect to the proposal's requirement of reasonable efforts to locate the missing plan sponsor, one commenter objected to the provision requiring the QTA to communicate with the sponsor's corporate agent for service of legal process. The commenter argued that this is an unnecessary and unhelpful provision and suggested eliminating it. The Department notes that the provision of the regulation referenced by the commenter is not a mandate, but rather part of a safe harbor under which the QTA will be deemed to have made a reasonable effort to locate or communicate with the plan sponsor if the corporate agent receives notification. Accordingly, if a QTA determines that contacting the agent for service of legal process is unnecessary or unhelpful, it is not required to do so. No changes were made to paragraph (b) in response to this comment.

One commenter requested that the Department confirm that the regulation would apply to a situation where a plan becomes abandoned after the plan sponsor decides to terminate the plan, but before the sponsor actually completes the termination and winding-up process. While the regulation would cover this situation, the Department notes that a sponsor's decision to terminate a plan would not relieve a QTA from following the entire process established by the regulation, including the requirements in paragraph (c) of the final regulation relating to deemed termination.

Under the proposal, a QTA was precluded from finding a plan to be abandoned if at any time before the plan is deemed terminated under the regulation the QTA receives an objection, whether oral or written, from the plan sponsor regarding the QTA's finding and the proposed termination. One commenter suggested the final regulation should mandate that such objections be put in writing and include representations regarding the sponsor's ability and willingness to administer the plan in accordance with plan documents. While the Department has not modified the final regulation in response to this comment, the Department notes that, given the facts that would give rise to a QTA's determination that the plan at issue may have been abandoned, the QTA may wish to inform the Department of the situation involving the plan and the sponsor's objection to the plan's termination.

3. Deemed Termination

The final regulation provides that following a QTA's finding that a plan is abandoned, the plan will be deemed to be terminated on the ninetieth (90th) day following the date of the letter from EBSA's Office of Enforcement acknowledging receipt of the notice of plan abandonment. The furnishing of notice to the Department, in conjunction with the 90-day delay in the deemed termination of the plan, is intended to afford the Department an opportunity to review the circumstances of the proposed plan termination and, if appropriate, object to the termination. If the Department objects to a termination within the 90-day period, the plan is not deemed terminated until such time as the Department informs the QTA that the Department's concerns have been addressed. See § 2578.1(c).

The proposal provided that the 90-day period starts when the notice is furnished to the Department. For this purpose, paragraph (c)(4) of the proposal provided that a notice would be considered furnished to the Department on receipt, unless sent by certified mail, in which case the notice would be considered furnished when mailed. Given the significance of the 90-day period to potential QTAs, plans, participants, and the Department, the Department has revised the regulation to ensure actual receipt by the agency and to eliminate any ambiguity concerning the running of the 90-day period. In this regard, the regulation now provides, in paragraph (c)(1), that, subject to the waiver exception in paragraph (c)(2), a plan shall be deemed to be terminated on the ninetieth (90th) day following the date of the letter from EBSA's Office of Enforcement acknowledging receipt of the notice of plan abandonment described in paragraph (c)(3) of the regulation. A conforming change has been made to paragraph (c)(2) and proposed paragraph (c)(4) has been eliminated from the final regulation.

As with the proposal, the Department, in its sole discretion, may waive some or all of the 90-day waiting period. Such a waiver might occur, for example, in the case of plans with few participants and few assets or if the facts relating to the abandonment are not very complicated, and if it is readily apparent to the Department that the proposed termination would be unlikely to put the participants' interests at risk. If the Department waives some or all of the 90-day period, the plan would be deemed terminated when the Department furnishes notification of the waiver to the QTA. See § 2578.1(c)(2)(ii). This provision was adopted without change.

The proposal provided that the notification to the Department must be signed and dated by the QTA and include certain information about the QTA and the abandoned plan. Except as provided below, the notification requirements of the proposal were adopted without modification. See § 2578.1(c)(3).

Under the proposal, the notification to the Department was required to include certain information about the QTA, including whether the person electing to be the QTA (or any affiliate of the person) is, or within the past 24 months has been, the subject of an investigation, examination, or enforcement action by the Department, Internal Revenue Service, or Securities and Exchange Commission concerning such entity's conduct as a fiduciary or party in interest with respect to any plan

[3] As noted in the preamble of the proposed regulation, the facts and circumstances standard is intended to permit immediate findings of abandonment where facts and circumstances clearly obviate the need for 12 consecutive months of plan inactivity. See 70 FR 12047.

covered by the Act. One commenter suggested that the term affiliate needs to be defined in the final regulation. Another commenter urged deletion of this disclosure requirement on the basis that such disclosure is difficult, costly, and possibly not relevant to the termination and winding-up process contemplated under the regulation, particularly with respect to affiliates of the QTA. This commenter noted that QTAs are likely to be among the largest and most affiliated companies in the marketplace, thereby making it very difficult, if not impossible, for a QTA to determine whether any of its affiliates are, or within the past 24 months have been, the subject of an investigation, examination, or enforcement action by the Department or other specified federal agencies.

In response to these comments, the Department is adding a definition of ''affiliate'' that is intended to provide certainty to the identification process. As set forth in paragraph (h), the term affiliate under the regulation generally means any person directly or indirectly controlling, controlled by, or under common control with, the person; or any officer, director, partner or employee of the person. See § 2578.1(h)(1). However, for purposes of the notification requirement in paragraph (c)(3)(i)(C), the regulation adopts a narrower definition, focusing on those affiliates that a QTA should have no difficulty identifying—those affiliates that are a 50 percent or more owner of a QTA or any affiliate (within the meaning of paragraph (h)(1)) that provides services to the plan. See § 2578.1(h)(2).

The content requirements for this notification also are amended to include a statement by the QTA that it has received no objection to the plan termination from the plan sponsor. This change merely clarifies the intent of the requirement that a QTA has made a reasonable effort to contact the plan sponsor. See § 2578.1(c)(3)(iii).

The final regulation, like the proposal, includes, at Appendix B, a model notice that may be used by a QTA to satisfy the notice requirement of § 2578.1(c)(3).[4] Except for some minor changes, the model notice is essentially the same as the model notice that accompanied the proposed regulation. One substantive change to the notice involves the inclusion of an item in Part I—Plan Information entitled ''Other'' (item 4). This item was added to the model notice to enable a QTA to report delinquent contributions that the QTA may have identified in the course of providing services to the plan or in connection with becoming a QTA under the regulation. As discussed in subsections 4 and 6 of this preamble entitled ''Winding up the Affairs of the Plan'' and ''Limited Liability,'' respectively, if the QTA knows about delinquent contributions, the QTA must disclose them to the Department.

In the preamble to the proposed regulation, the Department invited comment on whether notices to be submitted to the Department (*i.e.*, the notifications required by paragraphs (c)(3) and (d)(2)(ix) of § 2578.1) should be required to be submitted electronically. No commenters supported mandated electronic notification, but some commenters indicated they might choose to submit such notifications by e-mail depending on the circumstances of the particular case. Although the Department is not requiring notifications under this regulation to be submitted electronically, the Department encourages QTAs to utilize electronic media (especially e-mail) in providing information to the Department. In this regard, the Department will establish a special Abandoned Plan section on its website (*http://www.dol.gov/ebsa*) for information concerning the abandoned plan program and the electronic submission of information under the program.

4. Winding Up the Affairs of the Plan

The proposal set forth specific steps that a QTA must take to wind up an abandoned plan and, with respect to most such steps, the standards applicable to carrying out the particular activity.[5] In particular, paragraph (d)(2)(i)(A) of the proposal provided that the QTA shall undertake reasonable and diligent efforts to locate and update plan records necessary to determine benefits payable under the plan. Paragraph (d)(2)(ii) of the proposal provided that the QTA must use reasonable care in calculating the benefits payable based on the plan records assembled. Paragraph (d)(2)(iii) of the proposal provided the QTA with the authority to engage, on behalf of the plan, such service providers as are necessary for the QTA to wind up the affairs of the plan and distribute benefits to the plan's participants and beneficiaries. Paragraph (d)(2)(iv)(A) provided that reasonable expenses incurred in connection with the termination and winding up of the plan may be paid from plan assets. Paragraph (d)(2)(v) of the proposal provided that the QTA must furnish to each participant or beneficiary a notification of termination, apprising the individual of his or her account balance and requesting that such individual elect a form of distribution. Paragraph (d)(2)(vi) of the proposal addressed distributions of benefits to participants and beneficiaries.

(a) Calculating Benefits

The proposal provided that the QTA must use reasonable care in calculating benefits payable based on the plan records assembled. Two commenters raised issues concerning the calculation of benefits and the likelihood of missing or incomplete plan and other employment records in the abandoned plan context. One commenter noted that defined contribution plans often use allocation formulas based on employee compensation levels but that a QTA is unlikely to have access to employment records showing such levels. Another commenter noted that many defined contribution plans provide for a reversion of unallocated assets to the plan sponsor at termination, which generally would be unfeasible given that the plan sponsor is usually missing in the abandoned plan context.

In an effort to provide QTAs with more certainty with respect to satisfying their obligations in making benefit determinations under the regulation, the final regulation includes a new provision addressing the allocation of expenses and unallocated assets. See § 2578.1 (d)(2)(ii)(B). In instances where a plan document is unavailable, ambiguous, or if compliance with the terms of the plan document is not feasible, the regulation provides that, for purposes of allocations in connection with calculating benefits payable under this regulation, the QTA shall be deemed to have used reasonable care when allocating expenses to the individual accounts of participants and beneficiaries if such expenses are allocated either on a pro rata basis (proportionately in the ratio that each individual account balance bears to the total of all individual account balances) or on a per capita basis (allocated

[4] The Department has provided model notices to facilitate compliance with the requirements in paragraphs (b)(5), (c)(3), (d)(2)(vi), and (d)(2)(ix) of the final regulation. These models are contained in Appendices A through D of this rulemaking. While the Department intends that use of an appropriately completed model notice would constitute compliance with the content requirements of the previously mentioned paragraphs, the Department is not requiring the use of any of the models and anticipates that a variety of other notices could satisfy the notice requirements of the regulation.

[5] In the preamble to the proposal, the Department explained that these prescribed standards are intended to both clarify and limit the responsibilities and liability of QTAs in connection with the termination and winding up of an abandoned plan. See 70 FR 12048.

equally to all accounts). See § 2578.1(d)(2)(ii)(B)(2).

In the case of unallocated assets (including forfeitures and assets in a suspense account), a QTA, under the new provision, will be deemed to have used reasonable care if such assets are allocated on a per capita basis (allocated equally to all accounts). See § 2578.1(d)(2)(ii)(B)(1). A more restrictive approach to allocations of unallocated assets was adopted due to concerns that allocating such assets on a pro rata basis (proportionately in the ratio that each individual account balance bears to the total of all individual account balances) would tend to result in discrimination in favor of highly compensated employees that is not permitted under the Code.[6]

A number of commenters requested guidance on the handling of an individual account with respect to which the amount in the account is less than the anticipated administrative cost of processing and distributing that account in accordance with the regulation. These commenters noted that payment of administrative expenses from plan assets frequently extinguishes very small accounts. It was explained that expenses unable to be paid out of a specific individual account are then charged back to the plan as a whole, thereby reducing the account balances of other plan participants or beneficiaries. In order to reduce overall administrative costs, these commenters generally recommended that any account balance worth less than its share of anticipated expenses be treated as forfeited and reallocated to the remaining accounts.

In response to these comments, the final regulation provides that a QTA shall not have failed to use reasonable care in calculating benefits payable solely because the QTA treats as forfeited an account balance that, taking into account that account's share of estimated forfeitures and other unallocated assets, is less than the estimated share of plan expenses allocable to that account. See § 2578.1(d)(ii)(A). This provision also requires the QTA to use forfeited account balances to defray plan expenses or to allocate them to other plan participant or beneficiary accounts on a per capita basis. This provision is intended to minimize accrual of unnecessary administrative expenses at the plan level in connection with individual accounts that have little, if any, likelihood of ever being distributed due to their size.

(b) Delinquent Contributions

In response to questions raised about a QTA's obligations with respect to collecting delinquent employer and employee contributions on behalf of the plan, the Department has included in the final regulation a new paragraph (d)(2)(iii). Paragraph (d)(2)(iii)(A) of the final regulation provides that a QTA must notify the Department of known delinquent contributions owed to the plan. This information must be included in either the notice of plan abandonment (§ 2578.1(c)(3)) or the final notice (§ 2578.1(d)(2)(ix)). Paragraph (d)(2)(iii)(B) of the final regulation provides that the QTA is not required to collect delinquent contributions on behalf of the plan. The final regulation includes minor conforming amendments to the content requirements of the notice of plan abandonment and the final notice to reflect the new requirement to report delinquent contributions. See §§ 2578.1(c)(3)(iv)(D) and (d)(2)(ix)(F). In addition, the model notice of plan abandonment (Appendix B) and the model final notice (Appendix D) were changed by adding a new box, entitled ''Other,'' in which the QTA may identify such delinquencies, thereby entitling the QTA to the special relief provided under the regulation. Further discussion of this issue can be found in subsection 6 of this preamble, entitled ''Limited Liability.''

(c) Reasonable Expenses

As noted above, the proposal provided that reasonable expenses incurred in connection with the termination and winding up of a plan may be paid from plan assets. In this regard, paragraph (d)(2)(iv)(B) of the proposal provided that an expense shall be considered reasonable if it is not in excess of rates charged by the QTA (or affiliate) to other customers (*i.e.*, customers that are not plans terminated under this regulation) for comparable services, if the QTA (or affiliate) provides comparable services to other customers. One commenter questioned whether this comparability standard would require QTAs to perform services for abandoned plans at the discounted rates generally afforded only to favored customers, based on existing business relationships, volume of business, or developing business opportunities. The Department recognizes that many QTAs, in the normal course of their business, may provide discounts to favored customers, based on a variety of factors. The comparability standard of the regulation is not intended to ensure that abandoned plans are necessarily provided the lowest or discount rate, but rather that in winding up the affairs of a plan, the plan (and therefore the plan's participants and beneficiaries) are not charged more than the QTA would charge similarly situated customers. If, for example, a QTA provides all or a significant portion of its customers a discount on the cost of services, the Department would expect that such discounts would be available to abandoned plans for whom the QTA provides the same or similar services. In an effort to further clarify this issue, the word ''ordinarily'' has been added to the final regulation, with the limitation now reading, in relevant part, that such expenses ''are not in excess of rates ordinarily charged by the qualified termination administrator (or affiliate) for same or similar services. * * *'' See § 2578.1(d)(2)(v)(B)(2)(ii).

(d) Notifying Participants

The proposal provided that a QTA shall, as one of its duties in winding up the affairs of a plan, furnish to each participant or beneficiary a notice concerning the termination of his or her plan. The content requirements of this notice were adopted largely as proposed. See § 2578.1(d)(2)(vi). Minor modifications were made to reflect other changes to the regulation, such as the inclusion of additional distribution options in the case of missing or non-responsive participants or beneficiaries. See § 2578.1(d)(2)(vi)(A)(5)–(8).

This notice of plan termination must include, among other things, the individual's account balance and date on which the balance was calculated. The reason for mandating this information in the notice is to inform participants of the immediacy of their distribution and help them choose an appropriate distribution option in light of the amount of their benefits. The proposal did not mandate a specific calculation date, but given the purpose and timing of the notice, the calculation date ordinarily should be on or about the date the notice is sent to the participant or beneficiary. One commenter inquired whether a QTA could omit the account balance and calculation date from notices if participants and beneficiaries could access their daily account balances via telephonic or web-based systems. This commenter indicated that its current notification system is able to produce this information only at predetermined intervals (e.g., monthly, quarterly, semiannually, or annually). Modifying existing notification systems, according to the commenter, would increase costs attendant to terminating and winding up plans under the regulation.

[6] See section 401(a)(4) of the Code.

The Department believes it is important to keep administrative costs of winding up an abandoned plan as low as possible, thereby preserving assets for distribution to participants and beneficiaries. Accordingly, a telephonic or web-based system that makes daily account balances readily accessible to participants and beneficiaries complies with the content requirements set forth in paragraph (d)(2)(vi)(A)(3)(i) of the final regulation if, in lieu of specific account information, the required notification includes the following: (1) A description of the method for accessing the system and account information, such as relevant telephone numbers, passwords, and access codes; (2) a statement indicating that participants and beneficiaries have a right to request a paper version of their specific account information; and (3) a description of the procedures for obtaining such a paper statement from the QTA.

Like the proposal, the final regulation mandates that the notice of plan termination must include a description of the plan's distribution options and the procedure for a participant or beneficiary to make an election. One commenter indicated that it currently sends to participants in tax-qualified plans, upon a distributable event, a booklet containing, among other things, a description of the distribution options available under the plan. As described by the commenter, the booklet is intended to meet the notice requirements under section 402(f) of the Code, outlining the participant or beneficiary's distribution options and explaining the tax consequences associated with each such option. The commenter asked if a QTA could exclude from the termination notice information on distribution options if such information was furnished simultaneously to participants and beneficiaries as part of the disclosure required under section 402(f) of the Code. Recognizing that furnishing duplicative information to participants and beneficiaries about their distribution options may be both confusing and costly, it is the view of the Department that the requirement of paragraph (d)(2)(vi)(A)(4) of the final regulation does not preclude the furnishing of information concerning the distribution options of participants and beneficiaries in a separate document that complies with section 402(f) of Code and is included in the same mailing as the termination notice.

(e) Distributions

In general, QTAs must distribute benefits in accordance with the form of benefit elected by the participant or beneficiary. See § 2578.1(d)(2)(vii)(A). Because spousal consent is sometimes required for a distribution, this section has been modified to add the clause ''with spousal consent, if required.''

Commenters noted that, if participants and beneficiaries fail to make a timely election concerning the form of benefit distribution, and the plan is subject to the survivor annuity requirements in sections 401(a)(11) and 417 of the Code, a QTA might not be able to comply with the distribution requirements of § 2550.404a–3 (Safe Harbor for Distributions from Terminated Individual Account Plans) as required by the proposal. In recognition of this problem, the final regulation has been amended to provide that, if a QTA determines that the survivor annuity requirements of the Code prevent a distribution in accordance with § 2550.404a–3, the QTA shall distribute benefits ''in any manner reasonably determined to achieve compliance with those requirements.'' See § 2578.1(d)(2)(vii)(B)(2). In those cases where a QTA is required to select an annuity provider, it is expected that the selection process will be carried out in accordance with the fiduciary standards under section 404 of ERISA. See § 2578.1(e)(1)(iii).

Further discussion relating to annuity purchases pursuant to paragraph (d)(2)(vii)(B)(2) is contained in subsection 6 of this preamble, entitled ''Limited Liability,'' and subsection 7, entitled ''Internal Revenue Service.'' Also, it should be noted that an additional change was made to 29 CFR 2550.404a–3 for distributions on behalf of missing or non-responsive participants in situations where the present value of the benefits does not exceed $1,000. See 29 CFR 2550.404a–3(d)(1)(iii) and the preamble discussion related to that final regulation for an explanation of this change.

In the context of plan distributions, several commenters requested guidance concerning a QTA's duties with respect to assets for which there is no readily ascertainable fair market value (e.g., limited partnership/joint venture interests, employer securities, participant loans, defaulted mortgages and bonds, and employer real property). Recognizing that there is no one course of action that would be appropriate to all types of assets that QTAs might confront in the course of winding up the affairs of abandoned plans, QTAs, as with plan fiduciaries generally, will be required to evaluate the options and costs and make a determination as to what course of action is in the best interest of participants and beneficiaries. The actions of a QTA in liquidating hard to value plan assets are not covered by the safe harbor in paragraph (e) of the final regulation. The Department notes that significant holdings of hard to value or illiquid assets by a plan may indicate that the plan is not suitable for termination under this regulation. Rather, it might be more appropriate for the plan termination to occur under the Department's National Enforcement Project on Orphan Plans (NEPOP).[7] Information about NEPOP may be obtained through the Abandoned Plan section of EBSA's website (*http://www.dol.gov/ebsa*).

Because the Department is interested in receiving information about hard to value and illiquid assets held by abandoned plans, the Department has added a new provision to the Special Terminal Report for Abandoned Plans to enable the Department to collect data on this topic. See § 2520.103–13(b)(5). Under this provision, a QTA is required to identify and report the fair market value and method of valuation of any assets with respect to which there is no readily ascertainable fair market value.

(f) Final Notice

The last step in the winding-up process is for the QTA to notify EBSA's Office of Enforcement that all benefits have been distributed in accordance with the regulation. Paragraph (d)(2)(viii) of the proposal set forth the content requirements of this notification. These requirements have been adopted largely as proposed. See § 2578.1(d)(2)(ix). Unlike the proposal, however, the final regulation does not require the final notice to include a statement that a special terminal report meeting the requirements of § 2520.103–13 is attached to the final notice. This change was made to preserve maximum flexibility with respect to the filing requirements of the special terminal report. As explained below in the preamble to § 2520.103–13, initially all terminal reports will be filed as attachments to final notices. Ultimately, though, such attachments will be unnecessary as the Department anticipates an electronic system for filing terminal reports.

5. Plan Amendments

Paragraph (d)(3) of the proposal provided that the terms of the plan shall, for purposes of title I of ERISA, be deemed amended to the extent necessary to allow the QTA to wind up the plan in accordance with this

[7] See infra Background section of this document.

regulation. The purpose of this provision is to enable QTAs to avoid the potentially significant costs attendant to amending the plan to permit what is otherwise permissible under this regulation. For example, a QTA may, without regard to plan terms, engage or replace service providers and pay expenses attendant to winding up and terminating the plan from plan assets. Because there were no negative comments on this provision, it was adopted without modification. See § 2578.1(d)(3). One commenter raised several questions regarding the need to amend an abandoned plan for purposes of maintaining that plan's qualified status under the Code. This issue is addressed in subsection 7 of this preamble, entitled ''Internal Revenue Service,'' relating to the IRS' treatment of plans terminated under this regulation.

6. Limited Liability

Paragraph (e) of the final regulation, like the proposal, provides that, if a QTA carries out its responsibilities with regard to winding up the affairs of the plan in accordance with paragraph (d)(2) of the regulation, the QTA will be deemed to satisfy any responsibilities it may have under section 404(a) of ERISA with respect to such activity, except for selecting and monitoring service providers. In addition, if the QTA selects and monitors service providers consistent with the prudence requirements in part 4 of ERISA, the QTA will not be held liable for the acts or omissions of the service providers with respect to which the QTA does not have knowledge. See § 2578.1(e)(1).

With regard to the liability of a QTA, commenters argued that: (1) The winding-up provisions under the regulation should not be considered fiduciary acts; (2) the QTA should be protected from lawsuits by plan sponsors and participants and beneficiaries; and (3) the Department should adopt a substantial compliance approach to assessing compliance with the regulation. The Department believes that it has constructed a regulatory framework that serves to minimize to the greatest extent possible the liability and exposure of QTAs who carry out their responsibilities in accordance with the provisions of the regulation. In this regard, the Department does not believe it can take the position that acts involving the exercise of discretion are not fiduciary acts. Nonetheless, the Department has, in many instances, attempted to define the type of activity that would be viewed as satisfying the fiduciary requirements under ERISA in the context of abandoned plans. See § 2578.1(e)(1) (referring to the activities in paragraph (d)(2) of the regulation). Further, the Department believes that compliance with the requirements of the regulation will provide a meaningful defense for the actions of a QTA in the event the QTA is sued by the plan sponsor or a plan participant or beneficiary.

Two commenters questioned the obligations of a QTA with respect to the retention of service providers that had been engaged to provide services to the plan by the plan sponsor (or another plan fiduciary) prior to the plan's abandonment. It is the view of the Department that a QTA does not have a duty to second guess the prudence of an earlier determination by the plan sponsor (or fiduciary) to engage a service provider for, or on behalf of, the plan. However, the QTA does have an obligation to monitor those who provide services to the plan, consistent with the requirements of section 404(a), without regard to whether the service provider was selected by the plan sponsor (or other fiduciary of the plan) or by the QTA. Like the proposal, the final regulation provides, however, that, to the extent that a QTA discharges its duties to select and monitor service providers in a manner consistent with section 404(a), the QTA will not be liable for the acts or omissions of the service provider with respect to which the QTA does not have actual knowledge. See § 2578.1(e)(1)(ii).

As with the selection and monitoring of service providers, it is the view of the Department that the selection of annuity providers is of such significance to plan participants and beneficiaries that the selection process should be governed by the fiduciary standards of section 404(a) of ERISA. For this reason, the limited liability provisions of § 2578.1(e)(1)(i) do not extend to a QTA's selection of an annuity provider in those instances where a QTA determines that the survivor annuity requirements of the Code prevent a distribution in accordance with § 2550.404a–3. See § 2578.1(e)(1)(iii).

Several commenters inquired whether a QTA would have a fiduciary duty under ERISA to identify and correct fiduciary breaches that were committed before the person became a QTA (i.e., before the date of the plan's deemed termination). Most of these inquiries concerned delinquencies in forwarding participant contributions to the plan. The commenters noted that correcting such violations could add significantly to the cost of terminating an abandoned plan.

In an effort to clarify the responsibilities of a QTA with regard to such circumstances, the Department has added two new provisions to the final regulation. The first provision makes it clear that a QTA is not required to conduct an inquiry or review to determine whether or what breaches of fiduciary responsibility may have occurred with respect to a plan prior to becoming the QTA for such plan. See § 2578.1(e)(2).[8] The second provision makes it clear that a QTA is not obligated to collect delinquent contributions on behalf of the plan. See § 2578.1(d)(2)(iii). As discussed earlier, however, a QTA is required to report known delinquent contributions to the Department.[9] In addition, if an entity, in the course of becoming a QTA or winding-up a plan, happens to discover other breaches of fiduciary responsibility that occurred with respect to the plan before that entity became the QTA, the Department encourages the QTA to identify such breaches as part of the notification process under the final regulation, either in the notification of plan abandonment (§ 2578.1(c)(3)) or the final notice (§ 2578.1(d)(2)(ix)). If the QTA uses the model notice in Appendix B or D, such identifications may be included in the section designated for other information.

Another issue raised by commenters relates to circumstances when the assets of an abandoned plan are held by more than one institution. In such circumstances, the Department intends that there will be only one QTA and that other parties holding plan assets cooperate with the QTA in winding up the affairs of the plan and distributing assets to the plan's participants and beneficiaries in accordance with this regulation. The Department recognizes that persons holding such assets may have concerns about their potential liability under ERISA in following a QTA's direction. The Department, therefore, has added a new paragraph (§ 2578.1(e)(3)) to make clear that a person holding assets of an abandoned plan will not be considered to violate section 404(a) of ERISA to the extent that person cooperates with and follows the direction of the QTA, as the QTA carries out its responsibilities under the regulation. The regulation conditions relief on the person holding plan assets confirming that the person representing to be the QTA of an abandoned plan is the QTA recognized by the Department

[8] In this regard, section 409(b) of ERISA is clear that no fiduciary is liable for a breach of fiduciary duty committed before he or she became a fiduciary or after he or she ceased to be a fiduciary.

[9] The requirement to report delinquent contributions is discussed in more detail above in subsection 4 of this preamble, entitled ''Winding up the Affairs of the Plan.''

of Labor. Confirmation of a person's QTA status with respect to a given plan can be obtained by contacting the Employee Benefits Security Administration's Abandoned Plan Coordinator or by checking the Abandoned Plan section of EBSA's Web site (*http://www.dol.gov/ebsa*). The Department anticipates that it will dedicate a section of its Web site to matters pertaining to abandoned plans, including a list of plans deemed terminated under the regulation and an identification of the entity electing to be the QTA for each such plan.

7. Internal Revenue Service

In developing the proposed regulation, the Department conferred with representatives of the IRS regarding the qualification requirements under the Code as applied to plans that are terminated pursuant to the regulation. As indicated in the preamble of the proposed regulation, the Department has been advised by the IRS that it will not challenge the qualified status of any plan terminated under the regulation or take any adverse action against, or seek to assess or impose any penalty on, the QTA, the plan, or any participant or beneficiary of the plan as a result of such termination, including the distribution of the plan's assets, provided that the QTA satisfies three conditions. First, the QTA, based on plan records located and updated in accordance with paragraph (d)(2)(i) of the proposed regulation, reasonably determines whether, and to what extent, the survivor annuity requirements of sections 401(a)(11) and 417 of the Code apply to any benefit payable under the plan and takes reasonable steps to comply with those requirements (if applicable). Second, each participant and beneficiary has a nonforfeitable right to his or her accrued benefits as of the date of deemed termination under paragraph (c)(1) of the proposed regulation, subject to income, expenses, gains, and losses between that date and the date of distribution. Third, participants and beneficiaries must receive notification of their rights under section 402(f) of the Code. This notification should be included in, or attached to, the notice described in paragraph (d)(2)(v) of the proposed regulation. Notwithstanding the foregoing, as indicated in the preamble to the proposed regulation, the IRS reserves the right to pursue appropriate remedies under the Code against any party who is responsible for the plan, such as the plan sponsor, plan administrator, or owner of the business, even in its capacity as a participant or beneficiary under the plan.

The Department received several comments regarding the position of the IRS, as stated above, particularly with respect to the three conditions. Many of the commenters stated a need for clarification of the conditions with respect to specific issues likely to arise in connection with distributions on behalf of missing or non-responsive participants or beneficiaries. Other commenters requested that the Department continue to consult with the IRS throughout the rulemaking process in order to provide the best possible final regulation under the circumstances. These commenters suggested that the overall success of a final regulation would depend, in part, on a clear statement from the IRS regarding the qualification requirements under the Code as applied to plans that would be terminated pursuant to the final regulation. All relevant comment letters were transmitted to the IRS for its consideration along with the three final regulations being published in this notice. The IRS has advised that its view, as expressed above, has not changed. Set forth below is a discussion of the specific issues raised by the commenters and, where appropriate, the IRS response.

(a) Survivor Annuity Requirements

With respect to the first IRS condition, one commenter requested clarification on how a QTA would be able to effect a distribution on behalf of a missing or non-responsive participant in those circumstances when the benefit payable is subject to the Code's survivor annuity requirements.[10] After consulting with the IRS, the Department modified the proposal by adding a provision that enables a QTA to purchase a qualified joint and survivor annuity or a qualified preretirement survivor annuity on behalf of the missing participant or beneficiary rather than rolling over the account balance into an individual retirement plan. The final regulation, in relevant part, provides that if a QTA determines that the survivor annuity requirements in sections 401(a)(11) and 417 of the Code prevent a direct rollover in accordance with § 2550.404a–3, the QTA shall distribute benefits in any manner reasonably determined to achieve compliance with the survivor annuity requirements of the Code. See § 2578.1(d)(2)(vii)(B)(2). The IRS has indicated that it may request comments in its Employee Plans Compliance Resolution Program (EPCRS) concerning whether additional correction methods in the context of an abandoned plan are needed in light of the ability to satisfy those requirements by purchase of a commercial annuity contract.

(b) Vesting

With respect to the second IRS condition, one commenter asked for guidance from the IRS regarding compliance with the partial termination requirements of section 411(d)(3) of the Code. The IRS has advised as follows. The partial termination provisions apply in this context only if there is a forfeiture account (not a Code 415 suspense account) with plan assets as of the date of deemed termination under paragraph (c)(1) of the final regulation. In such a circumstance, the Code generally requires an evaluation, based on plan records located and updated in accordance with paragraph (d)(2)(i) of the final regulation, of whether a partial termination occurred at any point during the plan year preceding the year in which the plan is terminated. If the QTA determines there was a partial termination, the benefits of affected participants, if any, would have to be fully vested in accordance with section 411 of the Code. However, no such evaluation, vesting, and distribution would be necessary if the QTA reasonably determines that the cost of carrying out those acts would exceed the value of the benefits that would otherwise vest under the partial termination provisions.

(c) Code Section 402(f) Notice

With respect to the third IRS condition (regarding the written explanation requirement imposed by Code section 402(f)), the view of the IRS is that the section 402(f) notice should be included in, or attached to, the participant notification of termination described in paragraph (d)(2)(v) of the proposed regulation. Paragraph (d)(2)(vi)(B) of the proposed regulation required that a participant be given at least 30 days from the furnishing of the notification described in paragraph (d)(2)(v) of the proposal to elect a form of distribution, after which the QTA is required to distribute the participant's benefits in accordance with the regulation. One commenter suggested that the timing requirements for when a plan administrator must furnish the Code section 402(f) notice might not always be consistent with the "at least 30 days" requirement in paragraph (d)(2)(vi)(B) of the proposed regulation. After consulting with the IRS, the Department has decided to adopt paragraph (d)(2)(vi)(B) of the proposed

[10] See sections 401(a)(11) and 417 of the Code.

regulation without modification.[11] The IRS advised that, in its view, the third condition relating to notification of rights under section 402(f) of the Code is not satisfied unless the QTA furnishes the Code section 402(f) notice, or an eligible summary thereof, within a 60-day window that is no less than 30 days and no more than 90 days before the date of a distribution. See 26 CFR 1.402(f)-1, A–2. In the view of the Department, when a QTA provides a combined notification within the period for providing the notice under Code section 402(f), the QTA will not be transgressing the 30-day requirement in paragraph (d)(2)(vii)(B) of the final regulation.

(d) Restrictions on Certain Mandatory Distributions

One commenter asked for clarification regarding compliance with the Code's consent requirements in cases where the present value of a missing or non-responsive participant's vested accrued benefit exceeds $5,000.[12] In this regard, the proposal provided that a QTA must roll over the account balance of any missing or non-responsive participant into an individual retirement plan in accordance with proposed § 2550.404a–3 without regard to whether the vested account balance exceeds $5,000. The Department has been advised that the position of the IRS is that, if a plan is terminated (as provided in § 2578.1) and the three conditions described above are satisfied, a QTA may distribute a missing or non-responsive participant or beneficiary's vested accrued benefit without that participant's consent and without regard to the present value of such benefits. Thus, for example, in the case of a profit sharing plan that is not subject to the survivor annuity requirements of sections 401(a)(11) and 417 of the Code, a QTA may make such a distribution to a missing or non-responsive participant or beneficiary even if the plan offers an annuity option.

(e) Plan Amendments/Restatements

One commenter requested clarification on the position of the IRS as to whether, in addition to satisfying the three conditions discussed above, a QTA would be expected or required under the Code to amend an abandoned plan at or before termination for qualification purposes. The commenter specifically mentioned the general practice of amending or restating a tax-qualified plan to reflect legislative or other updates to the Code, such as adopting plan amendments for the Economic Growth and Tax Relief Reconciliation Act of 2001. The Department has been advised that the position of the IRS is that, if a plan is terminated (as provided in § 2578.1) and the three conditions described above are satisfied, a QTA would not be required or expected to amend the plan to reflect future guidance under the Code.

C. Safe Harbor for Distributions From Terminated Individual Account Plans (29 CFR 2550.404a–3)

1. Scope

On March 10, 2005, the Department published in the **Federal Register** (70 FR 12046) a proposed regulation that would add to part 2550 of the Code of Federal Regulations a new section 2550.404a–3. The proposal was intended to provide a fiduciary safe harbor for use in connection with making distributions from terminated individual account plans on behalf of participants and beneficiaries who fail to make an election regarding a form of benefit distribution. The need for a fiduciary safe harbor in this context was discussed in the preamble to that regulation. The public response to the proposal was generally favorable. Therefore, the safe harbor was adopted in final form largely without modification.[13]

2. Conditions

Like the proposal, the final regulation provides that if the conditions of the safe harbor are met, a fiduciary (including a QTA in the case of an abandoned plan) is deemed to have satisfied the requirements of section 404(a) of the Act with respect to the distribution of benefits, selection of an individual retirement plan provider or other account provider, and the investment of funds in connection with the distribution. See § 2550.404a–3(c). In this regard, the proposal set forth three conditions. These conditions related to the qualifications of individual retirement plan providers, permissible investment products, limits on fees and expenses, a written agreement requirement, participant enforcement rights, and prohibited transactions. Except as otherwise indicated below, the final regulation retains each of these conditions without modification.

(a) Rollover Distribution to an Individual Retirement Plan

The proposal conditioned relief on, among other things, the rollover of distributions to an individual retirement plan, as defined in section 7701(a)(37) of the Code.[14] This condition applied without regard to the present value of the benefit distribution. Several commenters objected to this condition where benefit distributions would be $1,000 or less. The commenters asserted that few, if any, financial institutions offer, or will offer, an individual retirement plan for initial investments of $1,000 or less. Thus, it was argued, the potential inability of a QTA to identify an individual retirement plan provider willing to receive a rollover distribution of $1,000 or less may prevent a QTA from completing the termination and winding-up process set forth in 29 CFR 2578.1. Similarly, the inability of a QTA to identify an individual retirement plan provider willing to receive such small accounts may dissuade some financial institutions from serving as QTAs, particularly where the institution views its QTA status as forcing it to accept the rollover distribution at a financial loss.

In response to these comments, the final regulation includes an alternative to direct rollovers to individual retirement plans. Under this alternative, a QTA may make distributions to certain bank accounts or State unclaimed property funds. This alternative is available only in the case of a distribution by a QTA with respect to which the amount to be distributed is $1,000 or less and that amount is less than the minimum amount required to be invested in an individual retirement plan product offered by the QTA to the

[11] Due to reordering of provisions in paragraph (d)(2) of the proposal, the language formerly in paragraph (d)(2)(vi)(B) of the proposal appears in paragraph (d)(2)(vii)(B) of the final regulation. See § 2578.1(d)(2)(vii)(B).

[12] See Code section 411(a)(11).

[13] The final safe harbor regulation codifies those parts of Field Assistance Bulletin 2004–02 (September 30, 2004) relating to the distribution of assets to an individual retirement plan from terminating individual account plans in those instances where a participant or beneficiary fails to make a distribution election. FAB 2004–02 did not address abandoned plans.

[14] In the case of a distribution on behalf of a non-spousal distributee (e.g., child of participant), the proposal required that the distribution must be rolled over into an account, other than an individual retirement plan, maintained by an entity that is eligible to serve as a trustee or issuer of an individual retirement plan. This provision was added to the proposal at the request of the IRS to reflect the fact that a distribution to a non-spousal beneficiary is not an ''eligible rollover distribution'' under the Code and therefore cannot be transferred into an individual retirement plan within the meaning of section 7701(a)(37) of the Code. See 26 CFR 1.402(c)–2, Q&A–12. This provision has been adopted in the final regulation without modification. See § 2550.404a–3(d)(1)(ii). The IRS has advised the Department that a distribution under this provision, as well as distributions pursuant to § 2550.404a–3(d)(1)(iii)(A) and (B), will be subject to income taxation, mandatory income tax withholding and a possible additional tax for premature distributions.

public at the time of the distribution. See 2550.404a–3(d)(1)(iii).

For example, a financial institution offers to the public an IRA with a minimum initial investment requirement of $200. The financial institution also is the QTA of an abandoned plan, with respect to which there are two missing or non-responsive participants. The present value of the benefits for one of the participants is $900 and the present value of the other participant's benefits is $175. After determining that the Code's survivor annuity rules do not apply to either distribution, the QTA must distribute the benefits totaling $900 directly to an individual retirement plan within the meaning of section 7701(a)(37) of the Code. The benefit distribution of $175 must, at the election of the QTA, be distributed to an interest-bearing federally insured bank or savings association account in the name of the participant, to the unclaimed property fund of the State in which the participant's last known address is located, or, if available, to an individual retirement plan offered by an institution other than the QTA.[15] Any of these options will satisfy the requirements of the regulation and entitle the QTA to safe harbor relief.

(b) Investment Products

Paragraph (d)(2)(i) and (ii) address the types of investments that are permitted under the safe harbor in the case of distributions to individual retirement plans (pursuant to paragraph (d)(1)(i) or (d)(1)(iii)(C)) or to other accounts in the case of distributions on behalf of non-spousal beneficiaries (pursuant to paragraph (d)(1)(ii)).[16] While one commenter suggested expanding the types of investments that would be permitted under the regulation, the Department has decided not to adopt the commenter's suggestions at this time. Therefore, like the proposal, the final regulation provides that there must be a written agreement entered into by the plan fiduciary (including QTA) and an individual retirement plan (or other account) provider. This agreement must provide, with respect to investment of individual retirement plan (or other account) funds, that (i) the rolled-over funds shall be invested in an investment product designed to preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with liquidity; (ii) for purposes of (i), the investment product selected for the rolled-over funds 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); and (iii) the investment product selected for the rolled-over funds shall be offered by a State or federally regulated financial institution, which shall be: 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. The Department notes that although the final regulation does not reflect the suggestions of the commenter, the Department has not ruled out the possibility of eventually expanding the types of investments that would be permitted under the regulation. The Department, in a different context, is currently considering possible amendments to the section 404(c) regulation that would serve to encourage more retirement-appropriate investments for participants who fail to provide direction or opt for a managed fund with respect to which participant direction is not required. In the course of considering amendments to the section 404(c) regulation, the Department will continue to evaluate the suggestions made by the commenter on this regulation.

3. Miscellaneous

As noted above, this regulation provides a fiduciary safe harbor for distributions from terminated individual account plans (whether abandoned or not) on behalf of missing or non-responsive participants and beneficiaries, without regard to the value of such distributions. In the context of distributions from non-abandoned plans, one commenter requested guidance on the application of the consent requirements in section 411(a)(11) of the Code to a distribution of vested accrued benefits in excess of $5,000 where the plan offers an annuity option (purchased from a commercial provider), or where the sponsoring employer, or any entity within the same controlled group as the employer, maintains another defined contribution plan (other than an employee stock ownership plan as defined in section 4975(e)(7) of the Code) into which the benefits could be transferred.[17] The Department transmitted this comment to the IRS as part of the development of this safe harbor regulation. The IRS has advised as follows for situations involving distributions from non-abandoned plans.[18] Defined contribution plans that are not subject to the joint and survivor requirements and that offer immediate payment in a single sum distribution may be amended at or before plan termination to eliminate all annuity options without violating the Code's anti-cutback rules.[19] Where such an amendment occurs and the plan terminates, then the plan fiduciary may distribute a participant's vested accrued benefits in accordance with this safe harbor regulation without the participant's consent and without regard to the present value of such benefits.

The proposed fiduciary safe harbor was limited to distributions from plans described in section 401(a) of the Code to reflect the tax deferred nature of the rollover in the safe harbor.[20] In the preamble of the proposal, the Department solicited comments on

[15] A QTA is not required to solicit bids in connection with electing to distribute benefits to an individual retirement plan offered by another financial institution.

[16] The conditions on permissible investment products do not apply in the case of a distribution to an interest-bearing bank or savings association account (pursuant to paragraph (d)(1)(iii)(A)) or to a State unclaimed property fund (pursuant to paragraph (d)(1)(iii)(B)).

[17] See Treas. Reg. 26 CFR 1.411(a)–11(e)(1) for rules when a defined contribution plan terminates and the plan does not offer an annuity option.

[18] Subsection 7 of the preamble to 29 CFR 2578.1, entitled ''Internal Revenue Service,'' discusses the application of the consent requirements in section 411(a)(11) of the Code to a distribution of vested accrued benefits in excess of $5,000 by a QTA from an abandoned plan.

[19] See Treas. Reg. § 1.411(d)–4, Q&A–2(e) for further information, including when a defined contribution plan is permitted to be amended to eliminate annuity options under the plan. However, the following defined contribution plans are only permitted to be amended to eliminate annuity options to the extent that they retain sufficient annuity options to comply with the survivor annuity requirements: (1) A defined contribution plan that is subject to the funding requirements under section 412 of the Code; (2) a defined contribution plan that is a direct or indirect transferee of a plan subject to the joint and survivor annuity requirements; and (3) a defined contribution plan that fails to provide for full payment of the nonforfeitable accrued benefit (*i.e.*, account balance) to the surviving spouse upon the participant's death. For defined contribution plans that are not permitted to be amended to eliminate all annuity options, the IRS has indicated that it may request comments under the EPCRS on whether additional correction methods are needed under EPCRS in order for such plans that are abandoned to take advantage of the fiduciary safe harbor regulation.

[20] Specifically, in the case of distributions from a plan that is not an abandoned plan, such plan would have to be in compliance with the requirements of section 401(a) of the Code at the time of each such distribution. In the case of distributions from an abandoned plan, the safe harbor would be available if the plan was intended to be tax-qualified in accordance with the requirements of section 401(a) of the Code, even if such plan was not operationally qualified at the time of a distribution from the plan. See 70 FR 12051.

whether the safe harbor regulation should be extended to distributions from plans described in section 403 of the Code.[21] One commenter recommended that the proposal be changed to include such plans. After consulting with the IRS on this issue, the Department has agreed with this recommendation.[22] Accordingly, paragraph (a)(2) of the proposal was modified by adding the clause ''section 401(a), 403(a), or 403(b)'' to make it clear that fiduciaries of such plans may use the safe harbor. See § 2550.404a–3(a)(2).

One commenter expressed concern over the application of the customer identification and verification (CIP) procedures of the USA PATRIOT Act (the Patriot Act) in connection with a rollover by a QTA on behalf of a missing participant. Generally, the perceived difficulties concern situations where a QTA is required to make a direct rollover to an individual retirement plan, but the participant cannot be located or is otherwise not communicating with the plan concerning the distribution of plan benefits. If the CIP provisions of the Patriot Act were construed to require active participant involvement at the time an individual retirement plan is established on his or her behalf, QTAs would be unable to comply with the distribution requirements under § 2578.1 (d)(2)(vii)(B) and, consequently, would be unable utilize the rollover safe harbor in § 2550.404a–3.

In response to this comment, the Department notes that it has been advised by Treasury staff, along with staff of other Federal functional regulators,[23] that they interpret the CIP requirements of section 326 of the Patriot Act, including implementing regulations and other guidance thereunder, to require that banks and other financial institutions implement their CIP compliance program with respect to an account, including an individual retirement plan, established by a QTA in the name of a former participant (or beneficiary) of an abandoned plan terminated under § 2578.1, only at the time the former participant or beneficiary first contacts such institution to assert ownership or exercise control over the account. CIP compliance will not be required at the time a QTA establishes an account and transfers the funds to a bank or other financial institution for purposes of a distribution of benefits in compliance with § 2550. 404a–3.[24]

Like the proposed safe harbor, the final regulation includes a model notice of plan termination in the appendix to facilitate compliance with the requirement to notify participants and beneficiaries of their distribution options and to request that each such participant or beneficiary elect a form of distribution. While the Department intends that use of an appropriately completed model notice would be considered compliance with paragraph (e) of the final regulation, the Department does not intend to require its use and anticipates a variety of other notices could satisfy the requirements of the regulation.

D. Terminal Report for Abandoned Plans (29 CFR 2520.103–13)

On March 10, 2005, the Department published in the **Federal Register** (70 FR 12046) a proposed regulation that would add to part 2520 of the Code of Federal Regulations a new section 2520.103–13. The purpose of this new section is to provide annual reporting relief relating to abandoned plan filings by QTAs. The comments regarding the proposal were generally favorable. Accordingly, except as otherwise described below, the proposal was adopted without modifications.

Like the proposal, the final regulation addresses the content, timing, and method of filing rules for the reporting requirement imposed on qualified termination administrators pursuant to 29 CFR 2578.1(d)(2)(viii). With respect to content requirements, in addition to basic identifying information of the plan and QTA, the report is required to specify the plan's total assets as of a particular date, termination expenses paid by the plan, and the total amount of distributions, along with other relevant information. Regarding timing, the report must be filed within 2 months after the month in which all of the plan's affairs have been completed (except for the requirements in § 2578.1(d)(2)(viii) and (ix)).

With respect to method of filing rules, the report must be filed on the latest available Form 5500 in accordance with the Form's special instructions for abandoned plans terminated pursuant to § 2578.1. The instructions to the Form 5500 do not currently address plans terminated pursuant to § 2578.1. Until such time as the Department revises the instructions to the Form 5500 to reflect the requirements of § 2520.103–13, the terminal report should be completed in accordance with temporary instructions which will be posted on the Abandoned Plan section of EBSA's website and the EFAST website.

The proposed regulation provided that the filing of a terminal report with the Department would be accomplished when a report meeting the requirements of proposed § 2520.103–13 is furnished to the Department as an attachment to the notice described in § 2578.1(d)(2)(ix) (*i.e.*, the final notice). This provision was eliminated from the final regulation in order to preserve maximum flexibility with respect to the filing requirements of the special terminal report. Initially, all terminal reports will be filed as attachments to final notices. Upon implementation of an electronic filing system for the Form 5500 Annual Return/Report, the Department anticipates that terminal reports filed by QTAs also will be filed electronically, rather than as an attachment to the final notice.

Paragraph (e) of § 2520.103–13 addresses concerns regarding the responsibilities of QTAs under part 1 of title I of ERISA. This paragraph clarifies that a QTA is not subject to the generally applicable reporting requirements in part 1 of title I of ERISA, and that the filing of a report in accordance with this section does not relieve the plan's administrator (within the meaning of section 3(16) of ERISA) of any obligation it has under ERISA. Similarly, any failure by the QTA to meet the requirements of 29 CFR 2520.103–13 does not for that reason make the QTA subject to the requirements of part 1 of title I of ERISA, although it would prevent compliance with § 2578.1.

One commenter recommended an extension of the deadline for filing the report. The commenter was concerned that 60 days would be an insufficient period of time to complete and file the report. As noted above, the proposal required the report to be filed within two months after the month in which all of the plan's affairs have been

[21] The Department notes that the proposed abandoned plan regulation was not limited to plans described in section 401(a) of the Code. As with the proposal, the final abandoned plan regulation is available to any individual account plan as defined in section 3(34) of the Act. This includes plans described in section 401(a), 403(a), or 403(b) of the Code. See § 2578.1(a).

[22] Plan fiduciaries would have to determine whether use of the safe harbor is inconsistent with rules or regulations of the IRS. In this regard, the Department notes that the IRS has published proposed regulations addressing the circumstances under which a Code section 403(b) plan may be terminated. See 69 FR 67075, 82.

[23] The term ''other Federal functional regulators'' refers to other agencies responsible for administration and regulations under the Patriot Act.

[24] This position is consistent with guidance published by the staff of the Treasury, FinCEN, and the other federal functional regulators regarding accounts established under section 657(c) of the Economic Growth and Tax Relief Reconciliation Act of 2001. See, *e.g.*, OCC Bulletin 2005–16 (April 28, 2005).

completed. In many cases, depending on when the plan's affairs have been completed, the time for filing actually will be in excess of 60 days. After careful consideration of this issue, it is the Department's view that the proposed time period is adequate given the simplified reporting requirements of the report. See § 2520.103–13(d).

A new provision was added to the report to enable the Department to collect data on the extent to which abandoned plans hold assets for which there is not a readily ascertainable fair market value, (*e.g.*, limited partnership/joint venture interests, employer securities, participant loans, defaulted mortgages and bonds, and other employer real property). See § 2520.103–13(b)(5). Under this provision, a QTA is required to identify and report the fair market value and method of valuation of any assets with respect to which there is no readily ascertainable fair market value. As noted above, in the discussion regarding a QTA's duties with respect to these assets in connection with winding up an abandoned plan, the Department also will use the information reported to ensure that QTAs are acting reasonably and in good faith with respect to such assets.

E. Regulatory Impact Analysis

Summary

This regulatory initiative comprises three separate regulations. The first, entitled Termination of Abandoned Individual Account Plans (29 CFR 2578.1), establishes a procedure that financial institutions holding assets of abandoned individual account pension plans may follow to terminate the plan and distribute benefits to the plan's participants and beneficiaries, with limited liability. The first regulation includes, as appendices, model forms that can be used to provide the notices required under the regulatory termination procedures. The second regulation, entitled Safe Harbor for Distributions from Terminated Individual Account Plans (29 CFR 2550.404a–3), provides 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. The third regulation, entitled Special Terminal Report for Abandoned Plans, establishes a simplified method for filing a terminal report for abandoned individual account plans. The Department is also publishing, simultaneously with this regulatory initiative, a final class exemption for services provided in connection with the termination of abandoned individual account plans. As described further in the preamble to the exemption, published elsewhere in this issue of the **Federal Register**, the Department has taken into account the availability of conditional relief under the exemption, which the Department believes is essential to achievement of the purposes underlying these regulations, in assessing the economic costs and benefits of the regulations.

These regulations address the problems caused when the employer sponsor of an individual account pension plan abandons the plan, relinquishing the responsibility to either administer the plan or to appoint an administrator. The assets of such plans often languish in financial institutions that hold the funds under a limited delegation of authority without the power to distribute them. The establishment of the standards and procedures set forth in these regulations will reduce the difficulties that participants and beneficiaries often face in seeking to gain access to the account balances attributable to them under an abandoned plan. By establishing an efficient method of winding up the plan's affairs and distributing account balances, the regulations will also eliminate unnecessary expenses that are charged to the plan assets being passively held by the financial institution and increase the likelihood that participants and beneficiaries will receive the benefits due them under abandoned plans. The following section summarizes the Department's economic analysis of these regulations. Additional sections describe the basis of the analysis and the Department's conclusions in more detail.

Although abandoned plans will pay certain additional costs as a result of these regulations, their qualitative and quantitative benefits are expected to be substantial. Most significantly, they will produce the qualitative benefit of facilitating voluntary, timely, efficient termination of abandoned plans. These regulations will encourage appropriate financial institutions to serve as QTAs to wind up the affairs of abandoned plans. The regulations' requirements for timing and content of notices to the Department and to participants and beneficiaries; specification of QTA obligations with respect to the condition of plan records, the selection and monitoring of service providers, and the payment of fees and expenses; and standards for plan amendments all protect the benefits of affected participants and beneficiaries in the termination of abandoned plans.

The orderly termination of abandoned plans will also produce quantitative benefits by maximizing the account balances ultimately payable to participants and beneficiaries. First, prompt, efficient termination of an abandoned plan will eliminate future administrative expenses charged to the plan that would otherwise diminish the plan's assets. Second, through the specific standards and procedures, the regulations will reduce the overall cost of terminating an abandoned plan.

The regulations will result in abandoned plans' incurring costs to wind up their affairs. However, the magnitude of such costs is meaningful only when compared to the savings that will result from reliance on the regulations' procedures and termination of the plans. The Department's analysis, detailed below, shows that, although a plan's termination costs in some cases may exceed the anticipated administrative cost savings in the actual year of termination, the administrative cost savings produced by the termination will exceed the termination costs by the year next following termination. To the extent that a plan, if not terminated, would have continued to be abandoned for more than one year, therefore, the aggregate savings resulting from termination will substantially exceed the termination costs, resulting in a substantial preservation of plan assets and larger benefits for participants and beneficiaries.

Because the specific circumstances of abandoned plans are thought to vary considerably, the Department's quantitative estimates of savings from efficiency gains are subject to some uncertainty. Regardless of the variations in termination costs across the spectrum of abandoned plans, however, if the regulations are successful in reducing termination costs in the aggregate by 10 percent, the Department estimates that they would reduce the aggregate (one-time) cost of terminating the currently existing abandoned plans by at least $800,000. If the regulations further increase efficiency in the termination process and therefore reduce termination costs by 20 percent overall, about $1.7 million in aggregate termination costs will be saved. Under this assumption, the benefits of terminating existing abandoned plans under these regulations will exceed the administrative costs these plans would otherwise incur by about $900,000, even in the year of termination. For the estimated currently existing abandoned plans, this net benefit is expected to increase to $6.6 million, if it is presumed that abandonment would continue for a year beyond the year of termination, and to $27 million, if abandonment continued instead for an additional four years beyond the year of termination.

Similar effects will be seen for the somewhat smaller number of plans that become abandoned and are terminated in future years. In future years, termination of an additional 1,650 plans that become abandoned annually is expected to result in a net benefit ranging from about $400,000 to $2.7 million at the year beyond the year of termination or to $14.5 million at the fourth year beyond the year of termination. A more detailed discussion of the data, assumptions, and methodology underlying this analysis will be found below.

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a ''significant regulatory action'' is 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. OMB has determined that this action is significant under section 3(f)(4) because it raises novel legal or policy issues arising from the President's priorities. Accordingly, the Department has undertaken an analysis of the costs and benefits of the regulations. OMB has reviewed this regulatory action.

Costs

Termination of Abandoned Individual Account Plans (29 CFR 2578.1)

This regulation establishes the process for terminating abandoned plans. It will have the effect of causing abandoned plans to incur certain costs in connection with termination and distribution of their assets. These costs include, among others, the costs associated with determining whether the plan is abandoned; notifying participants, beneficiaries, and the Federal government of the abandonment; distributing benefits to participants and beneficiaries; and reporting the termination of the plan to the Federal government.

Estimation of the total cost attributable to this regulation depends on the number of abandoned plans to which it will apply. To estimate the number of abandoned plans, the Department examined information on Form 5500 filings that describes the contribution and distribution activity of individual account pension plans. This data, although not conclusive as to whether a plan has been abandoned, was considered the only reliable source of information available for approximating the total number of abandoned plans.

Using 1999 plan year data, the Department first ascertained the number of plans that had filed a Form 5500 indicating both no contributions received by the plan and no distributions made to participants or beneficiaries. The Department then examined Form 5500 filings for these same plans for each subsequent year from 2000 to 2002 to determine whether, at any time during those years, the plans had received contributions or made distributions. The Department considered a plan to be abandoned, for purposes of this analysis, if neither activity was reported for the plan throughout this entire period. The Department emphasizes that it adopted this methodology merely to produce a reasonable estimate of existing abandoned plans for the purpose of conducting this economic analysis; the Department's use of this methodology is not intended to reflect a view on the regulatory requirements for finding abandonment; nor does it indicate any view regarding whether a particular plan included in this survey was or is in fact abandoned.

This approach yielded an estimate of approximately 4,000 plans currently existing in a state of abandonment. Because witnesses before the Working Group had indicated that most abandoned plans are small plans with 20 or fewer participants, the Department estimated that the estimated 4,000 abandoned plans would cover 78,500 participants. Other analysis of Form 5500 data suggested that, in the future, an estimated additional 1,650 plans, with an aggregate 33,000 participants, and an estimated $868 million in assets, may become newly abandoned annually.

The Department notes that this use of Form 5500 data to estimate the number of abandoned plans results in a fair degree of uncertainty. For example, these estimates do not include an estimate of abandoned plans that did not file a Form 5500 in 1999 or a later year. Further, each plan counted within the 4,000-plan estimate represents a plan for which an annual report was actually filed, indicating that some administrative activities were conducted on behalf of the plan and suggesting that circumstances other than abandonment may explain the apparent lack of financial activity.[25] Testimony by service providers before the Working Group and information gathered under NEPOP indicate, however, that a plan may be abandoned despite evidence of some continued administrative activity. Although the Department acknowledges the uncertainty of its assumptions, the methodology described above provides the best available basis for reaching an estimate of the number of abandoned plans for purposes of assessing the relative costs and benefits of this regulation.

The Department has estimated the net impact of the regulation by comparing the ongoing administrative costs of maintaining an abandoned plan with the cost of terminating such a plan. Assuming that termination costs will be significantly affected by the degree to which plan administration was maintained following abandonment, the Department expected an inverse relationship between continuing administration and termination costs of abandoned plans, such that a well-maintained plan would be less costly to terminate and a less-well-maintained plan would be relatively more costly to terminate.

Based on available information regarding plans in general, the ongoing administrative costs for abandoned plans are estimated to range from approximately $900 to $3,000 per plan annually, or $3.5 million to $11.8 million annually for 4,000 currently abandoned plans. Testimony before the Working Group indicated that terminating an abandoned plan can add ten percent to the ordinary expenses related to plan administration. As such, termination costs are expected to range from $1,000 to $3,300 per plan, or $3.9 million to $13 million for all currently abandoned plans.[26] Weighting the

[25] For example, in any particular year, a profit sharing plan may not receive any contributions, without there being any imputation of abandonment.

[26] One commenter on the proposed regulations suggested that the Department's estimate of the costs of terminating abandoned plans was too low,

number of abandoned plans equally between those that have been more and less well-maintained produces an aggregate annual administrative cost for 4,000 abandoned plans of approximately $7.7 million; the one-time cost to terminate these same plans would be $8.4 million. Similarly, the annual administrative costs for the 1,650 additional plans estimated to become abandoned annually in the future is estimated at $3.2 million, while the one-time cost of terminating those plans would be $3.5 million annually.

Regardless of whether costs of terminating abandoned plans would exceed ongoing administrative costs in the year the plans are terminated, the future savings of eliminating continuing administrative expenses that result from termination will quickly exceed those termination expenses. The Department expects, however, that the one-time termination costs under this regulation may actually be less than one year's ongoing administrative expenses for such plans because its specific standards and procedures will increase the efficiency of terminating abandoned plans. The aggregate savings that would arise from this greater efficiency is subject to uncertainty. However, each 10 percent reduction in the cost of termination is assumed to produce savings in excess of $800,000. Assuming that this regulation reduces the costs of terminating abandoned plans by at least 20 percent, $1.7 million in termination costs will be saved, and total one-time termination costs would amount to $6.7 million. Savings of about $700,000 would arise from greater efficiency in terminating plans that become abandoned in each future year, reducing ongoing estimated annual termination costs from $3.5 million to $2.8 million.

In response to public comments on the proposals, as explained above, the Department has modified the two model notices (the Notice to the Department and the Final Notice) to provide QTAs with the opportunity to inform the Department of known delinquent contributions. Because this modification imposes only a very small additional cost relative to the overall range of cost estimates for the regulation, the Department has not increased its cost estimates for these two model notices.

particularly for plans that had been poorly administered for some time after abandonment. This commenter suggested that termination of a neglected plan could take up to ten hours per participant. The Department recognizes the difficulty of anticipating actual termination costs for specific plans and has therefore developed an estimate based on a range of such costs, which the Department continues to consider adequate and appropriate for purposes of estimation.

The Notice to the Department and the Final Notice are discussed more fully below in the section of the preamble on the Paperwork Reduction Act.

Safe Harbor for Distributions From Terminated Individual Account Plans (29 CFR 2550.404a–3)

The safe harbor provided in section 2550.404a–3 requires a notice to be furnished to participants and beneficiaries informing them of the plan's termination and the options available for distribution of their account balances. The Department's estimate of the number of notices that will be sent and the cost for these notices is based on the number of missing or non-responsive individuals whose account balances are likely to be directly transferred by a fiduciary.

Based on data about terminating plans that are not abandoned plans from the year 2000 Form 5500 Annual Report, the Department estimates that, annually, there are 2.3 million participants and beneficiaries in terminating plans. Although it is not known how many of these participants and beneficiaries will fail to make an election concerning distribution of their benefits, other information about participants and beneficiaries in defined benefit plans has led the Department to assume that approximately one percent, or 23,500, individuals will fail to do so annually. As such, it is estimated that plan administrators will be required to furnish 23,500 notices to participants in order to take advantage of the safe harbor under section 404(a). The cost for these notices, at two minutes per notice and $.38 each for mailing, is $62,170.

Special Terminal Report for Abandoned Plans (29 CFR 2520.103–13)

The Department has modified the proposed regulation for simplified reporting for abandoned plans to add a provision to collect data on abandoned plan assets for which there is not a readily ascertainable fair market value. Despite this minor modification, the Department has not attributable any costs to the changes in reporting for abandoned plans provided by this regulation. This simplified reporting is treated, for purposes of this analysis, as a benefit to abandoned plans, as explained below.

Benefits

Termination of Abandoned Individual Account Plans (29 CFR 2578.1)

The final regulation has both qualitative and quantitative benefits. The standards and procedures it provides will encourage timely, efficient termination of abandoned plans and appropriate, careful distribution of account balances, thereby increasing the benefit security of participants and beneficiaries. The regulation's requirements for timing and content of notices to the Department and to the participants and beneficiaries; specification of QTA obligations with respect to the condition of plan records, selection and monitoring of service providers, and payment of fees and expenses; and standards for plan amendments protect the benefits of participants and beneficiaries during the termination of abandoned plans.

The orderly termination of abandoned plans will also produce quantitative benefits by maximizing account balances ultimately payable to participants and beneficiaries. First, prompt, efficient termination of an abandoned plan will eliminate future administrative expenses that would otherwise diminish the plan's assets. Second, application of the regulation's specific standards and procedures will reduce costs of termination. Both of these effects will reduce the extent to which benefits held in individual accounts under abandoned plans are drawn upon to pay for expenses.

The most significant qualitative benefit of the regulation will arise from encouraging QTAs to terminate abandoned plans. Absent the standards and procedures of this regulation, including its provisions limiting a QTA's liability in certain circumstances, the institutions holding assets of abandoned plans would likely lack the necessary authority and/or incentive to properly terminate the plans and distribute benefits. Termination of abandoned plans further will produce the benefit of making previously inaccessible plan accounts available to the participants and beneficiaries of abandoned plans. The regulation's specifications for how the QTA should wind up the affairs of an abandoned plan will also protect benefits in the course of that process.

Benefits ultimately payable to participants and beneficiaries will be maximized in two important ways. First, termination will eliminate future administrative expenses that would diminish plan assets (and therefore participant account balances). Second, the regulation's specific standards and procedures will reduce the costs associated with plan termination. Each of these effects will moderate the extent to which benefits will be reduced due to either continued administration or termination.

The magnitude of the costs incurred by a plan to wind up its affairs under this regulation is meaningful only when compared to the savings of future administrative expenses that will also result from termination. A comparison of termination costs with administrative savings is complicated by the fact that the termination costs will be incurred only once, while the savings in eliminated administrative costs will accrue throughout the years during which the plan would have continued to exist in its abandoned state. In order to assess the balance of costs and benefits, the Department has estimated the present value of future ongoing administrative expenses using a three percent discount rate over a period from one year to five years after termination. The actual duration of abandonment cannot be determined with certainty; however, a period from one to five years is thought to offer a reasonable illustration of potential administrative cost savings that could arise in future years from the termination of abandoned plans.

The comparison of estimated termination costs of $8.4 million with the present value of future administrative costs discounted over the range of durations noted above shows that, while termination costs are estimated to exceed the estimated $7.7 million savings of administrative expenses in the year of termination, the present value of administrative expenses that would otherwise be paid in the year following termination exceeds the estimated termination cost by $6.6 million, resulting in a substantial preservation of account balances and therefore retirement benefits. The present value of administrative expenses that would otherwise be paid over the five years following termination exceeds the termination cost by $27 million. Similarly, the cost of termination of the 1,650 additional plans assumed to become newly abandoned each year would be slightly greater than eliminated administrative costs for the year of termination, but termination would have the effect of eliminating over $2.8 million in administrative expenses by the end of the next year following termination, and $11.6 million if those plans had remained abandoned for five years. These net benefits would also represent account balances preserved for retirement benefits.

As noted earlier, the estimates of reduction in termination costs that might arise from efficiency gains due to this regulation's specific standards and procedures are subject to some uncertainty. However, each 10 percent reduction in the cost of terminating abandoned plans under these new standards is assumed to produce savings in excess of $800,000. Assuming that the specific provisions of the regulation will increase efficiency and reduce costs by at least 20 percent, an additional $1.7 million in termination costs will be saved, further preserving retirement benefits for participants and beneficiaries of currently abandoned plans. With that assumption, the benefits of these terminations would be estimated to exceed their costs by about $900,000 in the year of plan termination. Efficiency gains for the 1,650 plans that become abandoned from year to year would be expected to amount to $710,000 annually, such that the benefits of terminating these abandoned plans would exceed their termination costs by about $400,000 each year.

Safe Harbor for Distributions From Terminated Individual Account Plans (29 CFR 2550.404a–3)

By providing a safe harbor for plan fiduciaries that directly transfer individual account balances to appropriate investment vehicles, this regulation will increase retirement security and reduce fiduciaries' uncertainty regarding how to comply with ERISA section 404(a). The benefits of greater retirement savings protection for participants and increased certainty for fiduciaries under the safe harbor cannot be specifically quantified.

The regulation will provide qualitative benefits to fiduciaries by affording them greater assurance of compliance and reduced exposure to risk; the substantive conditions of the safe harbor will benefit many former participants by directing their retirement savings to appropriate retirement savings investment vehicles that minimize risk and offer preservation of principal and liquidity.

Special Terminal Report for Abandoned Plans (29 CFR 2520.103–13)

This regulation provides for simplified reporting to the Department for QTAs that wind up the affairs of an abandoned plan. The time savings resulting from abbreviated reporting requirements will reduce administrative costs for abandoned plans and preserve account balances, resulting in increased benefits to participants and beneficiaries.

Paperwork Reduction Act Statement

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, that the reporting burden (time and financial resources) imposed on respondents is minimized, that collection instruments are clearly understood, and that the Department can properly assess the impact of its collection requirements on respondents.

The Department first solicited comments concerning the information collection request (ICR) included in the Proposed Regulations on Termination of Abandoned Individual Account Plans (29 CFR 2578.1), the Proposed Safe Harbor for Rollovers From Terminated Individual Account Plans (29 CFR 2550.404a–3), and the Proposed Class Exemption for Services Provided in Connection with the Termination of Abandoned Individual Account Plans when these documents were published in the **Federal Register** on March 10, 2005 (70 FR 12046). No comments were received from the public about the hour and costs burdens attributed to the information collection request (ICR). The ICR was reviewed by OMB and approved on April 11, 2005, under the control number 1210–0127. Subsequent to this approval, the ICR was changed to include in the ICR the hour burden for the Department's Class Exemption for the Establishment, Investment and Maintenance of Certain Individual Retirement Plans Pursuant to a Mandatory Distribution (69 FR 57964). OMB approved the change to the ICR on September 19, 2005, under the same control number. The OMB approval will expire on April 30, 2008.

Currently, the Department is soliciting comments concerning revisions in the burden estimates for the ICR resulting from the promulgation of these final regulations, in particular with respect to the Termination of Abandoned Individual Account Plans Regulation (29 CFR 2578.1) (the Abandoned Plan Regulation) and the Class Exemption for Services Provided in Connection with the Termination of Abandoned Individual Account Plans (published simultaneously with this document) (the QTA Exemption). The Department has submitted the revised ICR to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. All other paperwork burdens covered by the ICR, including the recordkeeping burden under the Department's Class Exemption for the Establishment, Investment and Maintenance of Certain

Individual Retirement Plans Pursuant to a Mandatory Distribution (69 FR 57964), which are included in this ICR under the OMB approval described above, remain unchanged. The following discussion describes only the changes in the burden estimates for which the Department is now seeking OMB approval. A copy of the ICR may be obtained by contacting the person listed in the PRA addressee section below. The Department and OMB are particularly interested in comments that:

• Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. Although comments may be submitted through June 20, 2006 OMB requests that comments be received within 30 days of publication of the Notice of Final Rulemaking to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to Susan G. Lahne, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N–5647, Washington, DC 20210. Telephone: (202) 693–8410; Fax: (202) 219–5333. These are not toll-free numbers.

Abandoned Plan Regulation (29 CFR 2578.1)

The information collection provisions of these rules are intended to ensure that, in the case of an abandoned plan, a plan sponsor has been determined to be unavailable to fulfill its responsibilities to the plan before further action is taken by a QTA; to facilitate federal oversight of the actions taken by a QTA in winding up the affairs of an abandoned plan; to ensure that participants and beneficiaries are apprised of actions that might affect their rights and benefits under the plan; and to provide for a final notice and reporting regarding the resolution of the affairs of the plan. The Department has included model notices that may be used to satisfy these notice requirements and has provided for reporting in the format of the Form 5500 for purposes of minimizing compliance burden.

The Department has modified the requirements for the content of the notices to the Department under the final Abandoned Plan Regulation to require a QTA to report any delinquent contributions discovered in the course of terminating an abandoned plan in either the Notice to the Department or the Final Notice. The regulation provides that, if a QTA provides such information to the Department in either notice, nothing in the regulations will be construed to require the QTA to collect the delinquent contributions. Although a QTA may elect to report delinquent contribution information in either notice, for purposes of this estimation of paperwork burden, the Department has assigned the cost adjustment solely to the Final Notice (paragraph (d)(2)(ix)).

The Department estimates, based on its experience in NEPOP in providing assistance to identify and terminate abandoned plans over the last two years, that QTAs will report delinquent contributions in approximately 14 percent of abandoned plan terminations. Therefore, the Department estimates that 560 respondents (14 percent of 4,000 QTAs terminating the existing abandoned plans) will complete the new section in either the Notice to the Department or the Final Notice. Similarly, for plans that will be abandoned in the future, the Department has estimated that 244 respondents (14 percent of 1,650 QTAs terminating plans that newly become abandoned each year) will complete the new section in each subsequent year. Accordingly, the Department has adjusted the cost burdens for these notices to account for the additional information collection.

For the 560 QTAs that will require an estimated 15 minutes to complete the notice, the cost burden will rise to $9,492; for the remaining 3,440 QTAs that need only the originally estimated 10 minutes to complete the notice, the cost burden will be $38,872. After adding the costs of supplies and postage, the aggregate cost burden for this notice is estimated at $ 52,364. (Mailing, including the cost of the Terminal Report that will be filed with the Final Notice, remains the same, at an estimated $1.00 each, for a total cost of $4,000.) Estimated annual costs for future abandoned plans, derived in a similar fashion, are increased to $3,915 annually for QTAs reporting delinquent contributions and remains $16,035 annually for QTAs not reporting delinquent contributions, for a total, including supplies and postage, of $21,733 for 1,650 plans annually.

QTA Exemption

Under the regulation on Termination of Abandoned Individual Account Plans, a QTA that terminates an abandoned plan is permitted, under certain specified conditions, to distribute account balances by directly transferring or depositing them into an individual retirement plan or account. The QTA exemption, also published in final form in today's **Federal Register**, provides relief from the restrictions of section 406(a)(1)(A) through (D), 406(b)(1) and (b)(2) of ERISA and from 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, for a QTA to select itself, or an affiliate, as a service provider to the plan. The exemption also permits QTAs, under the specified conditions, to receive payment from the plan for providing services in connection with plan termination. In addition, the exemption permits a QTA to designate itself, or an affiliate, as the provider of the investment vehicle to which distributions from a terminated abandoned plan are directly transferred when participants or beneficiaries fail to make an election as to the form of the distribution. The Department has modified the proposed exemption to permit QTAs to receive payment from the plan for services rendered before becoming a QTA, provided that the services are performed pursuant to a written agreement previously entered into with the plan sponsor and that such agreement is provided to the Department, together with a statement under penalty of perjury. This new requirement imposes a small paperwork burden on QTAs that is in addition to the recordkeeping requirement previously approved under this ICR.

Inasmuch as banks, insurance companies, and other financial institutions acting as QTAs to provide services to abandoned plans will act in accordance with customary business practices in entering into this type of transaction, the Department assumes that both the added requirement of providing the written agreement to the

Department, like the previously established recordkeeping requirement, will be handled by the QTA and will be small. Accordingly, the Department believes that its prior assumption of one hour of burden for compliance with the paperwork requirements of the exemption continues to be sufficiently conservative to encompass the small additional burden of providing a copy of the written agreement and a statement under penalty of perjury. The Department has therefore not increased its estimate of burden with respect to the exemption.

Type of Review: Currently approved collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Termination of Abandoned Individual Account Plans.

OMB Number: 1210–0127.

Affected public: Individuals or households; business or other for-profit; not-for-profit institutions.

Respondents: Existing approval: 44,123; New request: 44,123.

Responses: Existing approval: 164,240; New request: 164,240.

Frequency of Response: On occasion.

Estimated Total Burden Hours: Existing approval: 7,313; New request: 7,313.

Total Annualized Capital/ Start-Up Costs: Existing approval: $652,300; New request: $658,679.

Total Annual Costs: Existing approval: $336,000; New request: $337,600.

Total Annualized Costs: Existing approval: $988,000; New request: $996,279.

Regulatory Flexibility Act Statement

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires that the agency present a final regulatory flexibility analysis at the time of the publication of the Notice of Final Rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations and governmental jurisdictions.

For purposes of analysis under the RFA, EBSA proposes to continue to consider a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46 and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans, covering fewer than 100 participants and which satisfy certain other requirements.

Further, while some large employers may have small plans, in general small employers maintain most small plans. Thus, EBSA believes that assessing the impact of these rules on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business which is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). EBSA therefore requested comments on the appropriateness of the size standard used in evaluating the impact of the proposed rules on small entities. No comments were received.

For purposes of analyzing the economic impact of this regulation, the Department has assumed that all abandoned plans are small plans. As explained earlier in the regulatory analysis for these regulations, the final rules will have a significant beneficial economic impact on a substantial number of small entities. Efficiency gains are assumed to arise from the provision of specific standards and procedures for terminating abandoned plans and the resolution of uncertainty concerning what are reasonable efforts to satisfy these standards. The model notices provided as part of the regulations are also intended to minimize compliance burdens. In an effort to provide a sound basis for this conclusion, EBSA prepared an initial regulatory flexibility analysis when the proposed regulations were published. Financial institutions and service providers that commented on the proposed regulations were appreciative of the Department's efforts to establish guidelines to assist them in terminating abandoned plans and distributing benefits to participants and beneficiaries. Changes that have been made to the final regulations are, for the most part, clarifications and explanations of the proposed rules. No comments were received that related specifically to small plan issues and plan termination. Comments related to abandoned plans in general, the majority of which are small plans, have been discussed earlier in the preamble.

The final rules will have an impact on participants and beneficiaries, abandoned individual account plans, entities that provide a variety of services to plans, and financial institutions and entities acting as QTAs that undertake the termination of individual account plans that have been abandoned.

Termination of Abandoned Individual Account Plans (29 CFR 2578.1)

As explained earlier in the preamble, in drafting the final regulations, the Department relied on recommendations in a 2002 report to the ERISA Advisory Council by the Working Group on Orphan Plans. Witnesses before the Working Group recommended that regulatory action be undertaken to encourage the early termination of abandoned plans and distribution of their assets to participants and beneficiaries. The conditions set forth in this regulation are intended to facilitate voluntary, safe, and efficient terminations of abandoned plans and to increase the likelihood that participants and beneficiaries will receive the greatest retirement benefit practicable under the circumstances. The final rules meet the objectives of providing QTAs the authority and incentive they need for undertaking to terminate abandoned plans by offering them greater certainty on how to comply with the requirements of ERISA section 404(a), to the extent applicable. Streamlined procedures for terminating and winding up an abandoned plan will reduce some of the cost that would otherwise have been incurred to terminate abandoned plans.

The Department estimated that there are 4,000 currently abandoned plans, with 78,500 participants. Another 1,650 plans, with 33,000 participants, are expected to be abandoned annually in subsequent years. All plans are assumed to be small plans with approximately 20 participants. Currently, small abandoned plans represent less than one percent of all small plans; the 1,650 small plans expected to be abandoned annually hereafter represent less than ½ of one percent of all small plans. The 5,650 small plans potentially affected, however, may still be considered a substantial number.

Because essentially all abandoned plans are assumed to be small plans, the more detailed discussion earlier in the preamble of the costs and benefits of this regulation is directly applicable to this analysis of costs and benefits under the RFA. In summary, under varying assumptions, the net benefits of terminating the 4,000 plans currently assumed to be abandoned range from $900,000 for efficiency gains to $6.6 million in administrative cost savings, if it is assumed that the plans would otherwise have remained abandoned for at least one year following the year of termination, and to $27 million, if the plans would have remained abandoned for five years following termination. The estimated beneficial impact on small plans therefore ranges from $225 per plan to $1,650 per plan, or $6,750 per plan over five years. The per-plan net benefits are very similar for the 1,650 plans assumed to become newly abandoned annually in future years.

The Department has revised the final regulation to allow forfeiture of an account with a balance less than the estimated share of plan expenses allocable to that account. See § 2578.1(d)(2)(ii)(A). Commenters requested this option, in part, as an alternative to requiring a QTA to undertake a costly and time-consuming search for account holders with small balances, which would frequently result in the extinguishment of those small accounts. Although not measurable, this change may produce additional benefit for abandoned plans due to the time savings, and participants may benefit from increased account balances as a result of the reallocations and forfeitures. There is no cost to small plans for this option.

Safe Harbor for Distributions From Terminated Individual Account Plans (29 CFR 2550.404a–3)

The final regulation provides safe harbor protection under section 404(a) of ERISA for fiduciaries that terminate small plans and directly transfer account balances into specified types of investment vehicles in cases in which the participant or beneficiary fails to elect a form of distribution. This regulation benefits fiduciaries by providing clarity on how to fulfill fiduciary obligations under ERISA and plan participants and beneficiaries by increasing retirement savings. In addition, the two model Notices to Participants provided by the Department for use in connection with the safe harbor will contribute to lower administrative costs for small plans that terminate. Based on an estimated 78,500 participants in currently abandoned plans, the initial cost to small plans is estimated at $207,800. The annual cost to ongoing terminating plans is considerably less in future years when current small abandoned plans will have been terminated, an estimated $95,820.

The Department has revised this final regulation to permit QTAs that would generally, in the absence of participant direction, roll over individual account distributions into proprietary investment vehicles, to choose instead, if the QTA's minimum account requirement for such investments is greater than $1,000 and greater than the amount to be rolled over, to deposit such distributions in an interest-bearing federally insured bank account or in an unclaimed property fund of the State. See § 2550.404a–3(d)(iii). This alternative and the benefits that will accrue to small plans are discussed more fully earlier in the preamble. There is no cost to small plans for this option.

Special Terminal Report for Abandoned Plans (29 CFR 2520.103–13)

The final regulation provides simplified terminal reporting to the Department for QTAs that wind up the affairs of small abandoned plans. The resulting time-savings will reduce administrative costs, thereby increasing benefits to participants and beneficiaries. No cost has been attributed to the final regulation.

Congressional Review Act Statement

This notice of final rulemaking is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and has been transmitted to the Congress and the Comptroller General for review.

Unfunded Mandates Reform Act Statement

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, the final rules do not include any federal mandate that will result in expenditures by state, local, or tribal governments in the aggregate of more than $100 million, or increased expenditures by the private sector of more than $100 million.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires federal agencies to adhere to specific criteria in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The final rules do not have federalism implications because they have no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the final rules do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects

29 CFR Part 2520

Accounting, Employee benefit plans, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 2550

Employee benefit plans, Employee Retirement Income Security Act, Employee stock ownership plans, Exemptions, Fiduciaries, Investments, Investments foreign, Party in interest, Pensions, Pension and Welfare Benefit Programs Office, Prohibited transactions, Real estate, Securities, Surety bonds, Trusts and Trustees.

29 CFR Part 2578

Employee benefit plans, Pensions, Retirement.

■ For the reasons set forth in the preamble, the Department of Labor amends 29 CFR chapter XXV as follows:

Title 29—Labor

Subchapter G—Administration and Enforcement Under the Employee Retirement Income Security Act of 1974

■ 1. Amend subchapter G to add the following new part:

PART 2578—RULES AND REGULATIONS FOR ABANDONED PLANS

Sec.
2578.1 Termination of abandoned individual account plans.

Authority: 29 U.S.C. 1135; 1104(a); 1103(d)(1).

§ 2578.1 Termination of abandoned individual account plans.

(a) *General.* The purpose of this part is to establish standards for the termination and winding up of an individual account plan (as defined in section 3(34) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act)) with respect to which a qualified termination administrator (as defined in paragraph (g) of this section) has determined there is no responsible plan sponsor or plan administrator within the meaning of section 3(16)(B) and (A) of the Act, respectively, to perform such acts.

(b) *Finding of abandonment.* (1) A qualified termination administrator may find an individual account plan to be abandoned when:

(i) Either: (A) No contributions to, or distributions from, the plan have been made for a period of at least 12 consecutive months immediately preceding the date on which the determination is being made; or

(B) Other facts and circumstances (such as a filing by or against the plan sponsor for liquidation under title 11 of the United States Code, or communications from participants and beneficiaries regarding distributions) known to the qualified termination administrator suggest that the plan is or may become abandoned by the plan sponsor; and

(ii) Following reasonable efforts to locate or communicate with the plan sponsor, the qualified termination administrator determines that the plan sponsor:

(A) No longer exists;

(B) Cannot be located; or

(C) Is unable to maintain the plan.

(2) Notwithstanding paragraph (b)(1) of this section, a qualified termination administrator may not find a plan to be abandoned if, at any time before the plan is deemed terminated pursuant to paragraph (c) of this section, the qualified termination administrator receives an objection from the plan sponsor regarding the finding of abandonment and proposed termination.

(3) A qualified termination administrator shall, for purposes of paragraph (b)(1)(ii) of this section, be deemed to have made a reasonable effort to locate or communicate with the plan sponsor if the qualified termination administrator sends to the last known address of the plan sponsor, and, in the case of a plan sponsor that is a corporation, to the address of the person designated as the corporation's agent for service of legal process, by a method of delivery requiring acknowledgement of receipt, the notice described in paragraph (b)(5) of this section.

(4) If receipt of the notice described in paragraph (b)(5) of this section is not acknowledged pursuant to paragraph (b)(3) of this section, the qualified termination administrator shall be deemed to have made a reasonable effort to locate or communicate with the plan sponsor if the qualified termination administrator contacts known service providers (other than itself) of the plan and requests the current address of the plan sponsor from such service providers and, if such information is provided, the qualified termination administrator sends to each such address, by a method of delivery requiring acknowledgement of receipt, the notice described in paragraph (b)(5) of this section.

(5) The notice referred to in paragraph (b)(3) of this section shall contain the following information:

(i) The name and address of the qualified termination administrator;

(ii) The name of the plan;

(iii) The account number or other identifying information relating to the plan;

(iv) A statement that the plan may be terminated and benefits distributed pursuant to 29 CFR 2578.1 if the plan sponsor fails to contact the qualified termination administrator within 30 days;

(v) The name, address, and telephone number of the person, office, or department that the plan sponsor must contact regarding the plan;

(vi) A statement that if the plan is terminated pursuant to 29 CFR 2578.1, notice of such termination will be furnished to the U.S. Department of Labor's Employee Benefits Security Administration;

(vii) The following statement: ''The U.S. Department of Labor requires that you be informed that, as a fiduciary or plan administrator or both, you may be personally liable for costs, civil penalties, excise taxes, etc. as a result of your acts or omissions with respect to this plan. The termination of this plan will not relieve you of your liability for any such costs, penalties, taxes, etc.''; and

(viii) A statement that the plan sponsor may contact the U.S Department of Labor for more information about the federal law governing the termination and winding-up process for abandoned plans and the telephone number of the appropriate Employee Benefit Security Administration contact person.

(c) *Deemed termination.* (1) Except as provided in paragraph (c)(2) of this section, if a qualified termination administrator finds, pursuant to paragraph (b)(1) of this section, that an individual account plan has been abandoned, the plan shall be deemed to be terminated on the ninetieth (90th) day following the date of the letter from EBSA's Office of Enforcement acknowledging receipt of the notice of plan abandonment, described in paragraph (c)(3) of this section.

(2) If, prior to the end of the 90-day period described in paragraph (c)(1) of this section, the Department notifies the qualified termination administrator that it—

(i) Objects to the termination of the plan, the plan shall not be deemed terminated under paragraph (c)(1) of this section until the qualified termination administrator is notified that the Department has withdrawn its objection; or

(ii) Waives the 90-day period described in paragraph (c)(1), the plan shall be deemed terminated upon the qualified termination administrator's receipt of such notification.

(3) Following a qualified termination administrator's finding, pursuant to paragraph (b)(1) of this section, that an individual account plan has been abandoned, the qualified termination administrator shall furnish to the U.S. Department of Labor a notice of plan abandonment that is signed and dated by the qualified termination administrator and that includes the following information:

(i) *Qualified termination administrator information.* (A) The name, EIN, address, and telephone number of the person electing to be the qualified termination administrator, including the address, e-mail address, and telephone number of the person signing the notice (or other contact person, if different from the person signing the notice);

(B) A statement that the person (identified in paragraph (c)(3)(i)(A) of this section) is a qualified termination administrator within the meaning of paragraph (g) of this section and elects to terminate and wind up the plan (identified in paragraph (c)(3)(ii)(A) of this section) in accordance with the provisions of this section; and

(C) An identification whether the person electing to be the qualified termination administrator or its affiliate is, or within the past 24 months has been, the subject of an investigation, examination, or enforcement action by the Department, Internal Revenue Service, or Securities and Exchange Commission concerning such entity's conduct as a fiduciary or party in interest with respect to any plan covered by the Act.

(ii) *Plan information.* (A) The name, address, telephone number, account number, EIN, and plan number of the plan with respect to which the person is electing to serve as the qualified termination administrator;

(B) The name and last known address and telephone number of the plan sponsor; and

(C) The estimated number of participants in the plan;

(iii) *Findings.* A statement that the person electing to be the qualified termination administrator finds that the plan (identified in paragraph (c)(3)(ii)(A) of this section) is abandoned pursuant to paragraph (b) of this section. This statement shall include an explanation of the basis for such a finding, specifically referring to the provisions in paragraph (b)(1) of this section, a description of the specific steps (set forth in paragraphs (b)(3) and (b)(4) of this section) taken to locate or communicate with the known plan sponsor, and a statement that no objection has been received from the plan sponsor;

(iv) *Plan asset information.* (A) The estimated value of the plan's assets held by the person electing to be the qualified termination administrator;

(B) The length of time plan assets have been held by the person electing to be the qualified termination administrator, if such period of time is less than 12 months;

(C) An identification of any assets with respect to which there is no readily ascertainable fair market value, as well as information, if any, concerning the value of such assets; and

(D) An identification of known delinquent contributions pursuant to paragraph (d)(2)(iii) of this section;

(v) *Service provider information.* (A) The name, address, and telephone number of known service providers (*e.g.*, record keeper, accountant, lawyer, other asset custodian(s)) to the plan; and

(B) 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; and

(vi) *Perjury statement.* A statement that the information being provided in the notice is true and complete based on the knowledge of the person electing to be the qualified termination administrator, and that the information is being provided by the qualified termination administrator under penalty of perjury.

(d) *Winding up the affairs of the plan.* (1) In any case where an individual account plan is deemed to be terminated pursuant to paragraph (c) of this section, the qualified termination administrator shall take steps as may be necessary or appropriate to wind up the affairs of the plan and distribute benefits to the plan's participants and beneficiaries.

(2) For purposes of paragraph (d)(1) of this section, the qualified termination administrator shall:

(i) *Update plan records.* (A) Undertake reasonable and diligent efforts to locate and update plan records necessary to determine the benefits payable under the terms of the plan to each participant and beneficiary.

(B) For purposes of paragraph (d)(2)(i)(A) of this section, a qualified termination administrator shall not have failed to make reasonable and diligent efforts to update plan records merely because the administrator determines in good faith that updating the records is either impossible or involves significant cost to the plan in relation to the total assets of the plan.

(ii) *Calculate benefits.* Use reasonable care in calculating the benefits payable to each participant or beneficiary based on plan records described in paragraph (d)(2)(i) of this section. A qualified termination administrator shall not have failed to use reasonable care in calculating benefits payable solely because the qualified termination administrator—

(A) Treats as forfeited an account balance that, taking into account estimated forfeitures and other assets allocable to the account, is less than the estimated share of plan expenses allocable to that account, and reallocates that account balance to defray plan expenses or to other plan accounts in accordance with (d)(2)(ii)(B) of this section;

(B) Allocates expenses and unallocated assets in accordance with the plan documents, or, if the plan document is not available, is ambiguous, or if compliance with the plan is unfeasible,

(*1*) Allocates unallocated assets (including forfeitures and assets in a suspense account) to participant accounts on a per capita basis (allocated equally to all accounts); and

(*2*) Allocates expenses on a pro rata basis (proportionately in the ratio that each individual account balance bears to the total of all individual account balances) or on a per capita basis (allocated equally to all accounts).

(iii) *Report delinquent contributions.* (A) Notify the Department of any known contributions (either employer or employee) owed to the plan in conjunction with the filing of either the notification required in paragraph (c)(3) or (d)(2)(ix) of this section.

(B) Nothing in paragraph (d)(2)(iii)(A) of this section or any other provision of the Act shall be construed to impose an obligation on the qualified termination administrator to collect delinquent contributions on behalf of the plan, provided that the qualified termination administrator satisfies the requirements of paragraph (d)(2)(iii)(A) of this section.

(iv) *Engage service providers.* Engage, on behalf of the plan, such service providers as are necessary for the qualified termination administrator to wind up the affairs of the plan and distribute benefits to the plan's participants and beneficiaries in accordance with paragraph (d)(1) of this section.

(v) *Pay reasonable expenses.* (A) Pay, from plan assets, the reasonable expenses of carrying out the qualified termination administrator's authority and responsibility under this section.

(B) Expenses of plan administration shall be considered reasonable solely for purposes of paragraph (d)(2)(v)(A) of this section if:

(*1*) Such expenses are for services necessary to wind up the affairs of the plan and distribute benefits to the plan's participants and beneficiaries,

(*2*) Such expenses: (i) Are consistent with industry rates for such or similar services, based on the experience of the qualified termination administrator; and

(ii) Are not in excess of rates ordinarily charged by the qualified termination administrator (or affiliate) for same or similar services provided to customers that are not plans terminated pursuant to this section, if the qualified termination administrator (or affiliate) provides same or similar services to such other customers, and

(*3*) The payment of such expenses would not constitute a prohibited transaction under the Act or is exempted from such prohibited transaction provisions pursuant to section 408(a) of the Act.

(vi) *Notify participants.* (A) Furnish to each participant or beneficiary of the plan a notice written in a manner calculated to be understood by the average plan participant and containing the following:

(*1*) The name of the plan;

(*2*) A statement that the plan has been determined to be abandoned by the plan sponsor and, therefore, has been terminated pursuant to regulations issued by the U.S. Department of Labor;

(*3*)(*i*) A statement of the account balance and the date on which it was calculated by the qualified termination administrator, and (*ii*) The following statement: ''The actual amount of your distribution may be more or less than the amount stated in this letter depending on investment gains or losses and the administrative cost of terminating your plan and distributing your benefits.'';

(*4*) A description of the distribution options available under the plan and a request that the participant or beneficiary elect a form of distribution and inform the qualified termination administrator (or designee) of that election;

(*5*) A statement explaining that, if a participant or beneficiary fails to make an election within 30 days from receipt of the notice, the qualified termination administrator (or designee) will distribute the account balance of the participant or beneficiary directly:

(*i*) To an individual retirement plan (*i.e.*, individual retirement account or annuity),

(*ii*) To an account described in § 2550.404a–3(d)(1)(ii) of this chapter (in the case of a distribution on behalf of a distributee other than a participant or spouse),

(*iii*) In any case where the amount to be distributed meets the conditions in § 2550.404a–3(d)(1)(iii), to an interest-bearing federally insured bank account, the unclaimed property fund of the State of the last known address of the participant or beneficiary, or an individual retirement plan (or to an account described in § 2550.404a–3(d)(1)(ii) of this chapter in the case of a distribution on behalf of a distributee other than a participant or spouse), or

(*iv*) To an annuity provider in any case where the qualified termination administrator determines that the survivor annuity requirements in sections 401(a)(11) and 417 of the Internal Revenue Code (or section 205 of ERISA) prevent a distribution under paragraph (d)(2)(vii)(B)(*1*) of this section;

(*6*) In the case of a distribution to an individual retirement plan (or to an account described in § 2550.404a–3(d)(1)(ii) of this chapter) a statement explaining that the account balance will be invested in an investment product designed to preserve principal and provide a reasonable rate of return and liquidity;

(*7*) A statement of the fees, if any, that will be paid from the participant or beneficiary's individual retirement plan or other account (including accounts described in § 2550.404a–3(d)(1)(ii) or (iii)(A) of this chapter), if such information is known at the time of the furnishing of this notice;

(*8*) The name, address and phone number of the provider of the individual retirement plan, qualified survivor annuity, or other account (including accounts described in § 2550.404a–3(d)(1)(ii) or (iii)(A) of this chapter), if such information is known at the time of the furnishing of this notice; and

(*9*) The name, address, and telephone number of the qualified termination administrator and, if different, the name, address and phone number of a contact person (or entity) for additional information concerning the termination and distribution of benefits under this section.

(B)(*1*) For purposes of paragraph (d)(2)(vi)(A) of this section, a notice shall be furnished to each participant or beneficiary in accordance with the requirements of § 2520.104b–1(b)(1) of this chapter to the last known address of the participant or beneficiary; and

(*2*) In the case of a notice that is returned to the plan as undeliverable, the qualified termination administrator shall, consistent with the duties of a fiduciary under section 404(a)(1) of ERISA, take steps to locate and provide notice to the participant or beneficiary prior to making a distribution pursuant to paragraph (d)(2)(vii) of this section. If, after such steps, the qualified termination administrator is unsuccessful in locating and furnishing notice to a participant or beneficiary, the participant or beneficiary shall be deemed to have been furnished the notice and to have failed to make an election within the 30-day period described in paragraph (d)(2)(vii) of this section.

(vii) *Distribute benefits.* (A) Distribute benefits in accordance with the form of distribution elected by each participant or beneficiary with spousal consent, if required.

(B) If the participant or beneficiary fails to make an election within 30 days from the date the notice described in paragraph (d)(2)(vi) of this section is furnished, distribute benefits—

(*1*) In accordance with § 2550.404a–3 of this chapter; or

(*2*) If a qualified termination administrator determines that the survivor annuity requirements in sections 401(a)(11) and 417 of the Internal Revenue Code (or section 205 of ERISA) prevent a distribution under paragraph (d)(2)(vii)(B)(*1*) of this section, in any manner reasonably determined to achieve compliance with those requirements.

(C) For purposes of distributions pursuant to paragraph (d)(2)(vii)(B) of this section, the qualified termination administrator may designate itself (or an affiliate) as the transferee of such proceeds, and invest such proceeds in a product in which it (or an affiliate) has an interest, only if such designation and investment is exempted from the prohibited transaction provisions under the Act pursuant to section 408(a) of the Act.

(viii) *Special Terminal Report for Abandoned Plans.* File the Special Terminal Report for Abandoned Plans in accordance with § 2520.103–13 of this chapter.

(ix) *Final Notice.* No later than two months after the end of the month in which the qualified termination administrator satisfies the requirements in paragraph (d)(2)(i) through (d)(2)(vii) of this section, furnish to the Office of Enforcement, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, a notice, signed and dated by the qualified termination administrator, containing the following information:

(A) The name, EIN, address, e-mail address, and telephone number of the qualified termination administrator, including the address and telephone number of the person signing the notice (or other contact person, if different from the person signing the notice);

(B) The name, account number, EIN, and plan number of the plan with respect to which the person served as the qualified termination administrator;

(C) A statement that the plan has been terminated and all the plan's assets have been distributed to the plan's participants and beneficiaries on the basis of the best available information;

(D) A statement that plan expenses were paid out of plan assets by the qualified termination administrator in accordance with the requirements of paragraph (d)(2)(v) of this section;

(E) If fees and expenses paid to the qualified termination administrator (or its affiliate) exceed by 20 percent or more the estimate required by paragraph (c)(3)(v)(B) of this section, a statement that actual fees and expenses exceeded estimated fees and expenses and the reasons for such additional costs;

(F) An identification of known delinquent contributions pursuant to paragraph (d)(2)(iii) of this section (if not already reported under paragraph (c)(3)(iv)(D)); and

(G) A statement that the information being provided in the notice is true and complete based on the knowledge of the qualified termination administrator, and that the information is being provided by the qualified termination administrator under penalty of perjury.

(3) The terms of the plan shall, for purposes of title I of ERISA, be deemed amended to the extent necessary to allow the qualified termination

administrator to wind up the plan in accordance with this section.

(e) *Limited liability.* (1)(i) Except as otherwise provided in paragraph (e)(1)(ii) and (iii) of this section, to the extent that the activities enumerated in paragraph (d)(2) of this section involve the exercise of discretionary authority or control that would make the qualified termination administrator a fiduciary within the meaning of section 3(21) of the Act, the qualified termination administrator shall be deemed to satisfy its responsibilities under section 404(a) of the Act with respect to such activities, provided that the qualified termination administrator complies with the requirements of paragraph (d)(2) of this section.

(ii) A qualified termination administrator shall be responsible for the selection and monitoring of any service provider (other than monitoring a provider selected pursuant to paragraph (d)(2)(vii)(B) of this section) determined by the qualified termination administrator to be necessary to the winding up of the affairs of the plan, as well as ensuring the reasonableness of the compensation paid for such services. If a qualified termination administrator selects and monitors a service provider in accordance with the requirements of section 404(a)(1) of the Act, the qualified termination administrator shall not be liable for the acts or omissions of the service provider with respect to which the qualified termination administrator does not have knowledge.

(iii) For purposes of a distribution pursuant to paragraph (d)(2)(vii)(B)(*2*) of this section, a qualified termination administrator shall be responsible for the selection of an annuity provider in accordance with section 404 of the Act.

(2) Nothing herein shall be construed to impose an obligation on the qualified termination administrator to conduct an inquiry or review to determine whether or what breaches of fiduciary responsibility may have occurred with respect to a plan prior to becoming the qualified termination administrator for such plan.

(3) If assets of an abandoned plan are held by a person other than the qualified termination administrator, such person shall not be treated as in violation of section 404 (a) the Act solely on the basis that the person cooperated with and followed the directions of the qualified termination administrator in carrying out its responsibilities under this section with respect to such plan, provided that, in advance of any transfer or disposition of any assets at the direction of the qualified termination administrator, such person confirms with the Department of Labor that the person representing to be the qualified termination administrator with respect to the plan is the qualified termination administrator recognized by the Department of Labor.

(f) *Continued liability of plan sponsor*. Nothing in this section shall serve to relieve or limit the liability of any person other than the qualified termination administrator due to a violation of ERISA.

(g) *Qualified termination administrator*. A termination administrator is qualified under this section only if:

(1) It 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

(2) It holds assets of the plan that is considered abandoned pursuant to paragraph (b) of this section.

(h) *Affiliate*. (1) Except as provided in paragraph (h)(2) of this section, the term affiliate means any person directly or indirectly controlling, controlled by, or under common control with, the person; or any officer, director, partner or employee of the person.

(2) For purposes of paragraph (c)(3)(i)(C) of this section, the term affiliate means a 50 percent or more owner of a qualified termination administrator, or any person described in paragraph (h)(1) of this section that provides services to the plan.

(3) For purposes of paragraph (h)(1) of this section, the term control means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(i) *Model notices*. Appendices to this section contain model notices that are intended to assist qualified termination administrators in discharging the notification requirements under this section. Their use is not mandatory. However, the use of appropriately completed model notices will be deemed to satisfy the requirements of paragraphs (b)(5), (c)(3), (d)(2)(vi), and (d)(2)(ix) of this section.

BILLING CODE 4150–29–P

APPENDIX A TO § 2578.1

NOTICE OF INTENT TO TERMINATE PLAN

[*Date of notice*]

[*Name of plan sponsor*]
[*Last known address of plan sponsor*]

Re: [*Name of plan and account number or other identifying information*]

Dear [*Name of plan sponsor*]:

We are writing to advise you of our concern about the status of the subject plan. Our intention is to terminate the plan and distribute benefits in accordance with federal law if you do not contact us within 30 days of your receipt of this notice. See 29 CFR 2578.1.

Our basis for taking this action is that our records reflect that there have been no contributions to, or distributions from, the plan within the past 12 months. *{If the basis for sending this notice is under § 29 CFR 2578.1(b)(1)(i)(B), complete and include the sentence below rather than the sentence above.}* Our basis for taking this action is *{provide a description of the facts and circumstances indicating plan abandonment}*.

We are sending this notice to you because our records show that you are the sponsor of the subject plan. The U.S. Department of Labor requires that you be informed that, as a fiduciary or plan administrator or both, you may be personally liable for all costs, civil penalties, excise taxes, etc. as a result of your acts or omissions with respect to this plan. The termination of this plan by us will not relieve you of your liability for any such costs, penalties, taxes, etc. Federal law also requires us to notify the U.S. Department of Labor, Employee Benefits Security Administration, of the termination of any abandoned plan. For information about the federal law governing the termination of abandoned plans, you may contact the U.S. Department of Labor at [*telephone number of appropriate EBSA contact person*].

Please contact [*name, address, and telephone number of the person, office, or department that the sponsor must contact regarding the plan*] within 30 days in order to prevent this action.

Sincerely,

[*Name and address of qualified termination administrator or appropriate designee*]

APPENDIX B TO § 2578.1

NOTIFICATION OF PLAN ABANDONMENT AND INTENT TO SERVE AS QUALIFIED TERMINATION ADMINISTRATOR

[*Date of notice*]

Abandoned Plan Coordinator, Office of Enforcement
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Suite 600
Washington, DC, 20210

Re:	Plan Identification	Qualified Termination Administrator
	[*Plan name and plan number*]	[N*ame*]
	[*EIN*]	[*Address*]
	[*Plan account number*]	[*E-mail address*]
	[*Address*]	[*Telephone number*]
	[*Telephone number*]	[*EIN*]

Abandoned Plan Coordinator:

Pursuant to 29 CFR 2578.1(b), we have determined that the subject plan is or may become abandoned by its sponsor. We are eligible to serve as a Qualified Termination Administrator for purposes of terminating and winding up the plan in accordance with 29 CFR 2578.1, and hereby elect to do so.

We find that the {*check the appropriate box below and provide additional information as necessary*}:

There have been no contributions to, or distributions from, the plan for a period of at least 12 consecutive months immediately preceding the date of this letter. Our records indicate that the date of the last contribution or distribution was {*enter appropriate date*}.

The following facts and circumstances suggest that the plan is or may become abandoned by the plan sponsor {*add description below*}:

____
____
____
____

We have also determined that the plan sponsor {*check appropriate box below*}:

No longer exists

Cannot be located

Is unable to maintain the plan

We have taken the following steps to locate or communicate with the known plan sponsor and have received no objection {*provide an explanation below*}:

____

____

____

Part I – Plan Information

1. Estimated number of individuals (participants and beneficiaries) with accounts under the plan: [*number*]

2. Plan assets held by Qualified Termination Administrator:

   A. Estimated value of assets: [*value*]

   B. Months we have held plan assets, if less than 12: [*number*]

   C. Hard to value assets {*select "yes" or "no" to identify any assets with no readily ascertainable fair market value, and include for those identified assets the best known estimate of their value*}:

		Yes	No	
(a)	Partnership/joint venture interests			[*value*]
(b)	Employer real property			[*value*]
(c)	Real estate (other than (b))			[*value*]
(d)	Employer securities			[*value*]
(e)	Participant loans			[*value*]
(f)	Loans (other than (e))			[*value*]
(g)	Tangible personal property			[*value*]

3. Name and last known address and telephone number of plan sponsor:

____

____

____

4. Other:

____

____

Part II – Known Service Providers of the Plan

	Name	Address	Telephone
1.			
2.			
3.			

Part III – Services and Related Expenses to be Paid

	Services	Service Provider	Estimated Cost
1.			
2.			
3.			

Part IV – Investigation

In the past 24 months {*check one box*}:

Neither we nor our affiliates are or have been the subject of an investigation, examination, or enforcement action by the Department, Internal Revenue Service, or Securities and Exchange Commission concerning such entity's conduct as a fiduciary or party in interest with respect to any plan covered by the Act.

We or our affiliates are or have been the subject of an investigation, examination, or enforcement action by the Department, Internal Revenue Service, or Securities and Exchange Commission concerning such entity's conduct as a fiduciary or party in interest with respect to any plan covered by the Act.

Part V – Contact Person {*enter information only if different from signatory*}:

[*Name*]
[*Address*]
[*E-mail address*]
[*Telephone number*]

Under penalties of perjury, I declare that I have examined this notice and to the best of my knowledge and belief, it is true, correct and complete.

[*Signature*]
[*Title of person signing on behalf the Qualified Termination Administrator*]
[*Address, e-mail address, and telephone number*]

APPENDIX C TO § 2578.1

NOTICE OF PLAN TERMINATION

[*Date of notice*]

[*Name and last known address of plan participant or beneficiary*]

Re: [*Name of plan*]

Dear [*Name of plan participant or beneficiary*]:

We are writing to inform you that the [*name of plan*] (Plan) has been terminated pursuant to regulations issued by the U.S. Department of Labor. The Plan was terminated because it was abandoned by [*name of the plan sponsor*].

We have determined that you have an interest in the Plan, either as a plan participant or beneficiary. Your account balance on [*date*] is/was [*account balance*]. We will be distributing this money as permitted under the terms of the Plan and federal regulations. The actual amount of your distribution may be more or less than the amount stated in this letter depending on investment gains or losses and the administrative cost of terminating the Plan and distributing your benefits.

Your distribution options under the Plan are {*add a description of the Plan's distribution options*}. It is very important that you elect one of these forms of distribution and inform us of your election. The process for informing us of this election is {*enter a description of the election process established by the qualified termination administrator*}.

{*Select the next paragraph from options 1 through 4, as appropriate.*}

{*Option 1: If this notice is for a participant or participant's spouse, complete and include the following paragraph.*}

If you do not make an election within 30 days from your receipt of this notice, your account balance will be transferred directly to an individual retirement plan maintained by {*insert the name, address, and phone number of the provider if known, other wise insert the following language* [a bank or insurance company or other similar financial institution]}. Pursuant to federal law, your money in the individual retirement plan would then be invested in an investment product designed to preserve principal and provide a reasonable rate of return and liquidity. {*If fee information is known, include the following sentence:* Should your money be transferred into an individual retirement plan, [*name of the financial institution*] charges the following fees for its services: {*add a statement of fees, if any, that will be paid from the participant or beneficiary's individual retirement plan*}.}

{*Option 2: If this notice is for a beneficiary other than the participant's spouse, complete and include the following paragraph.*}

If you do not make an election within 30 days from your receipt of this notice, your account balance will be transferred directly to an account maintained by {*insert the name, address and phone number of the financial institution if known, otherwise insert the following language* [a bank or insurance company or other similar financial institution].} Pursuant to federal law, your money would then be invested in an investment product designed to preserve principal and provide a reasonable rate of return and liquidity. {*If fee information is known, include the following sentence:* Should your money be transferred into such an account, [*name of the financial institution*] charges the following fees for its services: {*add a statement of fees, if any, that will be paid from the beneficiary's account*}.}

{*Option 3: If this notice is for a participant or beneficiary whose account balance meets the conditions of §2550.404a-3(d)(1)(iii), complete and include the following paragraph.*}

If you do not make an election within 30 days from your receipt of this notice, and your account balance is $1,000 or less, federal law permits us to transfer your balance to an interest-bearing federally insured bank account, to the unclaimed property fund of the State of your last known address, or to an individual retirement plan (or special account for non-spousal beneficiaries if you are a beneficiary other than the participant's spouse). Pursuant to federal law, your money, if transferred to an individual retirement plan (or special non-spousal account) would then be invested in an investment product designed to preserve principal and provide a reasonable rate of return and liquidity. {*If known, include the name, address, and telephone number of the financial institution or State fund into which the individual's account balance will be transferred or deposited. If the individual's account balance is to be transferred to a financial institution and fee information is known, include the following sentence:* Should your money be transferred into a plan or account, [*name of the financial institution*] charges the following fees for its services: {*add a statement of fees, if any, that will be paid from the individual's account*}.}

{*Option 4: If this notice is for participant or participants spouse whose distribution is subject to the survivor annuity requirements in sections 401(a)(11) and 417 of the Internal Revenue Code (or section 205 of ERISA), complete and include the following paragraph.*}

If you do not make an election within 30 days from your receipt of this notice, your account balance, will be distributed in the form of a qualified joint and survivor annuity or qualified preretirement annuity as required by the Internal Revenue Code. {*If the name of the annuity provider is known, include the following sentence:* The name of the annuity provider is [*name, address and phone number of the provider*].}

For more information about the termination, your account balance, or distribution options, please contact [*name, address, and telephone number of the qualified termination administrator and, if different, the name, address, and telephone number of the appropriate contact person*].

Sincerely,

[*Name of qualified termination administrator or appropriate designee*]

APPENDIX D TO § 2578.1

FINAL NOTICE

[*Date of notice*]

Abandoned Plan Coordinator, Office of Enforcement
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Suite 600
Washington, DC, 20210

Re: Plan Identification
[*Plan name and plan number*]
[*Plan account number*]
[*EIN*]

Qualified Termination Administrator
[*Name*]
[*Address and e-mail address*]
[*Telephone number*]
[*EIN*]

Abandoned Plan Coordinator:

General Information

The termination and winding-up process of the subject plan has been completed pursuant to 29 CFR 2578.1. Benefits were distributed to participants and beneficiaries on the basis of the best available information pursuant to 29 CFR 2578.1(d)(2)(i). Plan expenses were paid out of plan assets pursuant to 29 CFR 2578.1(d)(2)(v).

{*Include and complete the next section, entitled "Contact Person," only if the contact person is different from the signatory of this notice.*}

Contact Person

[*Name*] [*Address and e-mail address*] [*Telephone number*]

{*Include and complete the next section, entitled "Expenses Paid to Qualified Termination Administrator," only if fees and expenses paid to the QTA (or its affiliate) exceeded by 20 percent or more the estimate required by 29 CFR 2578.1(c)(3)(v)(B).*}

Expenses Paid to Qualified Termination Administrator

The actual fees and/or expenses we received in connection with winding up the Plan exceeded by {*insert either*: [20 percent or more] *or* [*enter the actual percentage*]} the estimate required by 29 CFR 2578.1(c)(3)(v)(B). The reason or reasons for such additional costs are {*provide an explanation of the additional costs*}.

Other

Under penalties of perjury, I declare that I have examined this notice and to the best of my knowledge and belief, it is true, correct and complete.

[*Signature*]
[*Title of person signing on behalf the Qualified Termination Administrator*]
[*Address, e-mail address, and telephone number*]

Attachment

BILLING CODE 4150–29–C

Subchapter F—Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

■ 2. The authority citation for part 2550 is revised to read as follows:

Authority: 29 U.S.C. 1135; and Secretary of Labor's Order No. 1–2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2550.401b–1 also issued under sec. 102, Reorganization Plan No. 4 of 1978, 43 FR 47713 (Oct. 17, 1978), 3 CFR, 1978 Comp. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), 3 CFR, 1978 Comp. 332. Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sec. 2550.404c–1 also issued under 29 U.S.C. 1104. Sec. 2550.407c–3 also issued under 29 U.S.C. 1107. Sec. 2550.404a–2 also issued under 26 U.S.C. 401 note (sec. 657, Pub. L. 107–16, 115 Stat. 38). Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b) (1) and sec. 102, Reorganization Plan No. 4 of 1978, 3 CFR, 1978 Comp. p. 332, effective Dec. 31, 1978, 44 FR 1065 (Jan. 3, 1978), and 3 CFR, 1978 Comp. 332. Sec. 2550.412–1 also issued under 29 U.S.C. 1112.

■ 3. Add § 2550.404a–3 to read as follows:

§ 2550.404a–3 Safe harbor for distributions from terminated individual account plans.

(a) *General.* (1) This section provides a safe harbor under which a fiduciary (including a qualified termination administrator, within the meaning of § 2578.1(g) of this chapter) of a terminated individual account plan, as described in paragraph (a)(2) of this section, will be deemed to have satisfied its duties under section 404(a) of the Employee Retirement Income Security Act of 1974, as amended (the Act)), 29 U.S.C. 1001 *et seq.*, in connection with a distribution described in paragraph (b) of this section.

(2) This section shall apply to an individual account plan only if—

(i) In the case of an individual account plan that is an abandoned plan within the meaning of § 2578.1 of this chapter, such plan was intended to be maintained as a tax-qualified plan in accordance with the requirements of section 401(a), 403(a), or 403(b) of the Internal Revenue Code of 1986 (Code); or

(ii) In the case of any other individual account plan, such plan is maintained in accordance with the requirements of section 401(a), 403(a), or 403 (b) of the Code at the time of the distribution.

(3) The standards set forth in this section apply solely for purposes of determining whether a fiduciary meets the requirements of this safe harbor. Such standards are not intended to be the exclusive means by which a fiduciary might satisfy his or her responsibilities under the Act with respect to making distributions described in this section.

(b) *Distributions.* This section shall apply to a distribution from a terminated individual account plan if, in connection with such distribution:

(1) The participant or beneficiary, on whose behalf the distribution will be made, was furnished notice in accordance with paragraph (e) of this section or, in the case of an abandoned plan, § 2578.1(d)(2)(vi) of this chapter, and

(2) The participant or beneficiary failed to elect a form of distribution within 30 days of the furnishing of the notice described paragraph (b)(1) of this section.

(c) *Safe harbor.* A fiduciary that meets the conditions of paragraph (d) of this section shall, with respect to a distribution described in paragraph (b) of this section, be deemed to have satisfied its duties under section 404(a) of the Act with respect to the distribution of benefits, selection of a transferee entity described in paragraph (d)(1)(i) through (iii) of this section, and the investment of funds in connection with the distribution.

(d) *Conditions.* A fiduciary shall qualify for the safe harbor described in paragraph (c) of this section if:

(1) The distribution described in paragraph (b) of this section is made'

(i) To an individual retirement plan within the meaning of section 7701(a)(37) of the Code;

(ii) In the case of a distribution on behalf of a distributee other than a participant or spouse, within the meaning of section 402(c) of the Code, to an account (other than an individual retirement plan) with an institution eligible to establish and maintain individual retirement plans within the meaning of section 7701(a)(37) of the Code; or

(iii) In the case of a distribution by a qualified termination administrator with respect to which the amount to be distributed is $1000 or less and that amount is less than the minimum amount required to be invested in an individual retirement plan product offered by the qualified termination administrator to the public at the time of the distribution, to:

(A) An interest-bearing federally insured bank or savings association account in the name of the participant or beneficiary,

(B) The unclaimed property fund of the State in which the participant's or beneficiary's last known address is located, or

(C) An individual retirement plan within the meaning of section 7701(a)(37) of the Code (or to an account described in paragraph (d)(1)(ii) of this section in the case of a distribution on behalf of a distributee other than a participant or spouse) offered by a financial institution other than the qualified termination administrator to the public at the time of the distribution.

(2) Except with respect to distributions to State unclaimed property funds (described in paragraph (d)(1)(iii)(B) of this section), the fiduciary enters into a written agreement with the transferee entity which provides:

(i) The distributed funds shall be invested in an investment product designed to preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with liquidity (except that distributions under paragraph (d)(1)(iii)(A) of this section to a bank or savings account are not required to be invested in such a product);

(ii) For purposes of paragraph (d)(2)(i) of this section, the investment product shall—

(A) 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, and

(B) Be offered by a State or federally regulated financial institution, which shall be: 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;

(iii) All fees and expenses attendant to the transferee plan or account, including investments 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 provider of the plan or account for comparable plans or accounts established for reasons other than the receipt of a distribution under this section; and

(iv) The participant or beneficiary on whose behalf the fiduciary makes a distribution shall have the right to enforce the terms of the contractual agreement establishing the plan or account, with regard to his or her transferred account balance, against the plan or account provider.

(3) Both the fiduciary's selection of a transferee plan or account and the investment of funds would not result in a prohibited transaction under section 406 of the Act, unless such actions are exempted from the prohibited transaction provisions by a prohibited transaction exemption issued pursuant to section 408(a) of the Act.

(e) *Notice to participants and beneficiaries.* (1) *Content.* Each participant or beneficiary of the plan shall be furnished a notice written in a manner calculated to be understood by the average plan participant and containing the following:

(i) The name of the plan;

(ii) A statement of the account balance, the date on which the amount was calculated, and, if relevant, an indication that the amount to be distributed may be more or less than the amount stated in the notice, depending on investment gains or losses and the administrative cost of terminating the plan and distributing benefits;

(iii) A description of the distribution options available under the plan and a request that the participant or beneficiary elect a form of distribution and inform the plan administrator (or other fiduciary) identified in paragraph (e)(1)(vii) of this section of that election;

(iv) A statement explaining that, if a participant or beneficiary fails to make an election within 30 days from receipt of the notice, the plan will distribute the account balance of the participant or beneficiary to an individual retirement plan (i.e., individual retirement account or annuity) or other account (in the case of distributions described in paragraph (d)(1)(ii)) and the account balance will be invested in an investment product designed to preserve principal and provide a reasonable rate of return and liquidity;

(v) A statement explaining what fees, if any, will be paid from the participant or beneficiary's individual retirement plan or other account, if such information is known at the time of the furnishing of this notice;

(vi) The name, address and phone number of the individual retirement plan or other account provider, if such information is known at the time of the furnishing of this notice; and

(vii) The name, address, and telephone number of the plan administrator (or other fiduciary) from whom a participant or beneficiary may obtain additional information concerning the termination.

(2) *Manner of furnishing notice.* (i) For purposes of paragraph (e)(1) of this section, a notice shall be furnished to each participant or beneficiary in accordance with the requirements of § 2520.104b–1(b)(1) of this chapter to the last known address of the participant or beneficiary; and

(ii) In the case of a notice that is returned to the plan as undeliverable, the plan fiduciary shall, consistent with its duties under section 404(a)(1) of ERISA, take steps to locate the participant or beneficiary and provide notice prior to making the distribution. If, after such steps, the fiduciary is unsuccessful in locating and furnishing notice to a participant or beneficiary, the participant or beneficiary shall be deemed to have been furnished the notice and to have failed to make an election within 30 days for purposes of paragraph (b)(2) of this section.

(f) *Model notice.* The appendix to this section contains a model notice that may be used to discharge the notification requirements under this section. Use of the model notice is not mandatory. However, use of an appropriately completed model notice will be deemed to satisfy the requirements of paragraph (e)(1) of this section.

BILLING CODE 4150–29–P

APPENDIX TO § 2550.404a-3

NOTICE OF PLAN TERMINATION

[*Date of notice*]

[*Name and last known address of plan participant or beneficiary*]

Re: [*Name of plan*]

Dear [*Name of plan participant or beneficiary*]:

This notice is to inform you that [*name of the plan*] (the Plan) has been terminated and we are in the process of winding it up.

We have determined that you have an interest in the Plan, either as a plan participant or beneficiary. Your account balance in the Plan on [*date*] is/was [*account balance*]. We will be distributing this money as permitted under the terms of the Plan and federal regulations. {*If applicable, insert the following sentence:* The actual amount of your distribution may be more or less than the amount stated in this notice depending on investment gains or losses and the administrative cost of terminating your plan and distributing your benefits.}

Your distribution options under the Plan are {*add a description of the Plan's distribution options*}. It is very important that you elect one of these forms of distribution and inform us of your election. The process for informing us of this election is {*enter a description of the Plan's election process*}.

{*If this notice is for a participant or participant's spouse, complete and include the following paragraph.*}

If you do not make an election within 30 days from your receipt of this notice, your account balance will be transferred directly to an individual retirement plan. {*If the name of the provider of the individual retirement plan is known, include the following sentence:* The name of the provider of the individual retirement plan is [*name, address and phone number of the individual retirement plan provider*].} Pursuant to federal law, your money in the individual retirement plan would then be invested in an investment product designed to preserve principal and provide a reasonable rate of return and liquidity. {*If fee information is known, include the following sentence:* Should your money be transferred into an individual retirement plan, [*name of the financial institution*] charges the following fees for its services: {*add a statement of fees, if any, that will be paid from the participant or beneficiary's individual retirement plan*}.}

{If this notice is for a beneficiary other than the participant's spouse, complete and include the paragraph below rather than the paragraph above.}

If you do not make an election within 30 days from your receipt of this notice, your account balance will be transferred directly to an account maintained by *{insert the name, address and phone number of the financial institution if known, otherwise insert the following language* [a bank or insurance company or other similar financial institution.].} Pursuant to federal law, your money would then be invested in an investment product designed to preserve principal and provide a reasonable rate of return and liquidity. *{If fee information is known, include the following sentence:* Should your money be transferred into such an account, [*name of the financial institution*] charges the following fees for its services: *{add a statement of fees, if any, that will be paid from the beneficiary's account}.}*

For more information about the termination, your account balance, or distribution options, please contact [*name, address, and telephone number of the plan administrator or other appropriate contact person*].

Sincerely,

[*Name of plan administrator or appropriate designee*]

BILLING CODE 4150–29–C

Subchapter C—Reporting and Disclosure Under the Employee Retirement Income Security Act of 1974

PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE

■ 4. The authority citation for part 2520 continues to read as follows:

Authority: 29 U.S.C. 1021–1025, 1027, 1029–31, 1059, 1134 and 1135; and Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sec. 2520.101–2 also issued under 29 U.S.C. 1132, 1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.102–3, 2520.104b–1 and 2520.104b–3 also issued under 29 U.S.C. 1003, 1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.104b–1 and 2520.107 also issued under 26 U.S.C. 401 note, 111 Stat. 788. Section 2520.101–4 also issued under sec. 103 of Pub. L. 108–218.

■ 5. Add § 2520.103–13 to read as follows:

§ 2520.103–13 Special terminal report for abandoned plans.

(a) *General.* The terminal report required to be filed by the qualified termination administrator pursuant to § 2578.1(d)(2)(viii) of this chapter shall consist of the items set forth in paragraph (b) of this section. Such report shall be filed in accordance with the method of filing set forth in paragraph (c) of this section and at the time set forth in paragraph (d) of this section.

(b) *Contents.* The terminal report described in paragraph (a) of this section shall contain:

(1) Identification information concerning the qualified termination administrator and the plan being terminated.

(2) The total assets of the plan as of the date the plan was deemed terminated under § 2578.1(c) of this chapter, prior to any reduction for termination expenses and distributions to participants and beneficiaries.

(3) The total termination expenses paid by the plan and a separate schedule identifying each service provider and amount received, itemized by expense.

(4) The total distributions made pursuant to § 2578.1(d)(2)(vii) of this chapter and a statement regarding whether any such distributions were transfers under § 2578.1(d)(2)(vii)(B) of this chapter.

(5) The identification, fair market value and method of valuation of any assets with respect to which there is no readily ascertainable fair market value.

(c) *Method of filing.* The terminal report described in paragraph (a) shall be filed:

(1) On the most recent Form 5500 available as of the date the qualified termination administrator satisfies the requirements in § 2578.1(d)(2)(i) through § 2578.1(d)(2)(vii) of this chapter; and

(2) In accordance with the Form's instructions pertaining to terminal reports of qualified termination administrators.

(d) *When to file.* The qualified termination administrator shall file the terminal report described in paragraph (a) within two months after the end of the month in which the qualified termination administrator satisfies the requirements in § 2578.1(d)(2)(i) through § 2578.1(d)(2)(vii) of this chapter.

(e) *Limitation.* (1) Except as provided in this section, no report shall be required to be filed by the qualified termination administrator under part 1 of title I of ERISA for a plan being terminated pursuant to § 2578.1 of this chapter.

(2) Filing of a report under this section by the qualified termination administrator shall not relieve any other person from any obligation under part 1 of title I of ERISA.

Signed at Washington, DC, this 17th day of April, 2006.

Ann L. Combs,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 06–3814 Filed 4–20–06; 8:45 am]

BILLING CODE 4150–29–P