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29 CFR Parts 2520, 2550, et al.

Termination of Abandoned Individual Account Plans and Proposed Class Exemption for Services Provided in Connection With the Termination of Abandoned Individual Account Plans; Proposed Rule and Notice

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, Labor.

ACTION: Proposed Regulations.

SUMMARY: This document contains three proposed regulations under the Employee Retirement Income Security Act of 1974 (ERISA or the Act) 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 first proposed rule would establish a regulatory framework pursuant to which financial institutions and other entities holding the assets of an abandoned individual account plan can terminate the plan and distribute benefits to the plan's participants and beneficiaries, with limited liability. The second proposed rule provides a fiduciary safe harbor for use in connection with making rollover distributions from terminated plans on behalf of participants and beneficiaries who fail to make an election regarding a form of benefit distribution.

Appendices to these rules contain model notices for use in connection therewith. The third proposed rule would establish a simplified method for filing a terminal report for abandoned individual account plans. These proposed regulations, if adopted, would affect fiduciaries, plan service providers, and participants and beneficiaries of individual account pension plans.

DATES: Written comments on the proposed regulations should be received by the Department of Labor on or before May 9, 2005.

ADDRESSES: Comments should be addressed to the Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5669, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, Attn: Abandoned Plan Regulation. Comments also may be submitted electronically to *e-ORI@dol.gov.* All comments received will be available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, 200 Constitution Avenue NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Jeffrey J. Turner or Stephanie L. Ward, 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 (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 formal bankruptcy proceeding. In other cases, abandonment occurs because the plan sponsor has been incarcerated, died, or simply 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 1,354 civil cases involving orphan plans as of September 30, 2004. In the over 800 orphan plan cases closed with results through September 30, 2004, there were approximately 50,000 participants affected and $250 million in assets involved. As of September 30, 2004, there were 372 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 setting forth criteria 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.

The Department carefully considered the recommendations of the Advisory Council, as well as the comments of the

[1] A copy of the Report can be found at *http://www.dol.gov/ebsa/publications/AC_110802_report.html.*

various parties testifying at the public hearing, in developing the proposed regulations contained in this document, which are being promulgated by the Department pursuant to its authority in sections 403(d)(1), 404(a), and 505 of ERISA.

B. Overview of Proposed Abandoned Plan Regulation—29 CFR 2578.1

Generally, this proposed regulation, upon adoption, would establish standards and procedures under title I of ERISA that will facilitate the voluntary, safe and efficient termination of abandoned plans, increasing the likelihood that participants and beneficiaries receive the greatest retirement benefit under the circumstances. Specifically, the proposed regulation establishes standards for determining when a plan may be considered abandoned and deemed terminated, procedures for winding up the affairs of the plan and distributing benefits to participants and beneficiaries, and guidance on who may initiate and carry out the winding-up process.

1. Qualified Termination Administrator

All determinations of plan abandonment, as well as related activities necessary to the termination and winding up of an abandoned individual account plan, under this regulation, may be performed only by a ''qualified termination administrator'' or ''QTA.'' In this regard, paragraph (g) of the proposal provides that a person or entity can qualify as a termination administrator only if it, first, is eligible to serve as a trustee or issuer of an individual retirement plan that is within the meaning of section 7701(a)(37) of the Internal Revenue Code (Code) [2] and, second, if it holds assets of the plan on whose behalf it will serve as the QTA. While the Department believes that a person undertaking to terminate and wind up an abandoned individual account plan should, for purposes of the relief provided by the regulation, be subject to Federal standards and oversight, the Department invites public comment on whether, and how, the definition of a ''qualified termination administrator'' might be expanded to include other parties.[3] Comments on this subject should address financial, operational, regulatory, and other safeguards on which ''QTA'' status might be conditioned to protect the interest of the plan's participants and beneficiaries.

2. Finding of Plan Abandonment

Paragraph (b) of proposed § 2578.1 defines when a plan is abandoned for purposes of the regulation. In this regard, paragraph (b) provides that a QTA may find an individual account plan to be abandoned when there have been no contributions to (or distributions from) a plan for a continuous 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 plan participants and beneficiaries regarding the plan sponsor, benefit distributions, or other plan information) suggest that the plan is or may become abandoned. See § 2578.1(b)(1)(i). The latter standard is intended to permit immediate findings of abandonment where known facts and circumstances clearly obviate the need for 12 consecutive months of plan inactivity. The testimony of various service providers (such as banks, insurance companies, and mutual funds) makes it clear that they frequently acquire knowledge of abandonment, even though contributions or distributions may have occurred within the past 12 months. For example, in some cases, employees of defunct businesses appear personally or call the bank requesting distributions. Under these circumstances, requiring a 12-month wait before taking some action appears to be of little or no benefit to the plan participants, and possibly even harmful to their interests.

A second condition to a finding of abandonment is 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. See § 2578.1(b)(1)(ii). For this purpose, the proposal describes specific steps that would constitute ''reasonable efforts'' by a QTA to locate or communicate with the plan sponsor. See § 2578.1(b)(3) and (4).[4] Among other things, a reasonable effort would include furnishing notice to the plan sponsor of the QTA's intent to terminate the sponsor's individual account plan and distribute benefits to the plan's participants and beneficiaries. The proposal describes other information that must be contained in the notice to the plan sponsor. To facilitate compliance with this notification requirement, the Department has developed a model notice to plan sponsors for use by QTAs. This model notice, the use of which would be voluntary on the part of the QTA, is contained in Appendix A to the proposed rule.

With respect to the phrase ''unable to maintain the plan'' in paragraph (b)(1)(ii), the testimony given to the Advisory Council's Working Group suggests that imprisonment is perhaps the most common reason why a plan sponsor might be considered unable to maintain its plan. This phrase, however, should not be understood to be so limited in nature. Rather, the Department intends for this phrase to encompass physical, mental, legal, financial, or other impediments that, in the judgment of the QTA, prevent the sponsor from making contributions to and administrating the plan in accordance with the documents and instruments governing the plan.

3. Deemed Terminations

Following a QTA's finding that a plan has been abandoned, the plan will be deemed to be terminated under the proposal on the ninetieth (90th) day following the date on which the QTA provides notice of its determination of plan abandonment and its election to serve as a QTA to the U.S. Department of Labor. See § 2578.1(c). 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, the plan will not be deemed terminated

[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.

[3] The subject regulation is not intended to 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. The proposed definition of ''qualified termination administrator'' does not include such parties because they are empowered to take steps to terminate and wind up the affairs of a plan without regard to any authority that might be conferred by the regulation.

[4] The steps described in paragraphs (b)(3) and (4) of the proposed regulation are not intended to be the exclusive method by which a QTA can satisfy the standard of reasonableness in paragraph (b)(1) of the regulation. These steps represent merely what the Department considers to be an appropriate level of effort to locate or communicate with the plan sponsor, given the unique circumstances surrounding abandoned plans, the other requirements and safeguards in the regulation relating to findings of abandonment, and the cost associated with other generally available methods of locating missing plan sponsors. The Department, nevertheless, invites public comment on whether, and how, these steps might be augmented to further reduce the possibility that a QTA might err in concluding that a plan has been abandoned, when in fact the plan sponsor can be located.

until such time as the Department informs the QTA that the Department's concerns have been addressed. See § 2578.1(c)(2)(i).

The proposal would also permit (but does not require) the Department, in its sole discretion, to waive some or all of the 90-day waiting period described above. This might happen, 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 reasonably apparent to the Department that the proposed termination would be unlikely to put the participants' interests at risk. If the Department were to waive some or all of the 90-day period in a particular case, the plan involved would be deemed terminated when the Department furnished notification of the waiver to the QTA. See § 25781(c)(2)(ii).

Paragraph (c)(3) of § 2578.1 provides that the above referenced notice to the Department must be signed and dated by the QTA and include certain information about the QTA and the abandoned plan. Information about the QTA includes the name, EIN, address and phone number of the QTA, a description of the steps it took to locate or communicate with the known plan sponsor, a statement that it elects to terminate and wind up the plan, and an itemized estimate of any expenses the QTA expects to pay (including to itself) as part of the process contemplated by the proposed regulation. The notice must also identify whether the QTA or its affiliate is, or within the past 24 months has been, the subject of an investigation, examination, or enforcement action by specified federal authorities. Information about the plan includes the name of the plan, an estimate of the number of participants in the plan, an estimate of total assets of the plan held by the QTA, identification of known service providers of the plan, and the last known address of the plan sponsor. The Department believes that the required information will be sufficient to allow the Department to assess whether it should object to a proposed termination.

To facilitate compliance with this notification requirement, the Department has developed a model notice for use by QTAs in notifying the Department of plan abandonment. This model notice, the use of which would be voluntary on the part of QTAs, is contained in Appendix B to the proposed rule.

The Department is considering whether this notification, as well as the notification required by § 2578.1(d)(2)(viii) of the proposed regulation, should be required to be submitted to the Department electronically. The Department, therefore, specifically invites comment on whether, and to what extent, the Department should either mandate or provide for the electronic submission of these notices and what, if any, cost or cost savings might result to plans because of either such a requirement or such an opportunity to submit electronically.

4. Winding Up the Affairs of the Plan

A number of witnesses appearing before the Advisory Council's Working Group on Orphan Plans indicated that they would be more likely to participate in a formal process for terminating abandoned plans if the Department established specific guidelines on how to wind up such plans. Paragraph (d) of § 2578.1 is intended to provide that guidance. Paragraph (d)(1) of the proposed regulation prescribes the general authority of the QTA to take steps that are necessary or appropriate to wind up the affairs of the plan and distribute benefits to the plan's participants and beneficiaries.

Paragraph (d)(2) of § 2578.1 sets forth specific steps that a QTA must take and, with respect to most such steps, specifies the standards applicable to carrying out the particular activity (*e.g.,* gathering plan records, engaging service providers, paying reasonable expenses, etc.). The 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.

Paragraph (d)(2)(i) of the proposal deals with locating and updating plan records. Several witnesses appearing before the Advisory Council's Working Group identified incomplete or inaccurate plan records as a possible impediment to winding up the affairs of abandoned plans. In responding to this testimony, the Advisory Council's Report recommended that the Department provide guidance on the extent to which the records of abandoned plans must be updated before benefits may be distributed. Paragraph (d)(2)(i)(A) of the proposal provides that the QTA shall undertake reasonable and diligent efforts to locate and update plan records necessary to determine benefits payable under the plan. In recognition of the fact that there will be circumstances where locating, recreating or updating plan records, may, even when possible, be so costly that the plan's participants and beneficiaries will be better off with benefits being determined on less than complete or accurate records, the proposal, at paragraph (d)(2)(i)(B), provides that the QTA shall not have failed to act reasonably and diligently merely because it 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.

Paragraph (d)(2)(ii) of the proposal provides that the QTA must use reasonable care in calculating the benefits payable based on the plan records assembled. This provision, in conjunction with paragraph (d)(2)(i), is intended to ensure accuracy for the greatest number of distributions, while making it clear that the Department does not expect a QTA to assemble perfect records in every case.

Testimony before the Advisory Council's Working Group indicated a need to address whether and under what circumstances plan assets could be utilized to compensate service providers as part of the termination and winding up process. Paragraphs (d)(2)(iii) and (iv) of the proposal are intended to address the issues relating to the engagement of service providers and the payment of expenses in connection with the termination and winding up of an abandoned plan.

Paragraph (d)(2)(iii) of the proposal provides 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) makes clear that reasonable expenses incurred in connection with the termination and winding up of the plan may be paid from plan assets.

Paragraph (d)(2)(iv)(B) provides guidance concerning when expenses incurred in connection with the termination and winding up of an abandoned plan will be considered ''reasonable.'' In this regard, the Department notes that the guidance provided by that paragraph applies solely for purposes of determining the reasonableness of expenses incurred in connection with the exercise of a QTA's authority under this regulation to terminate and wind up an abandoned plan. Specifically, paragraph (d)(2)(iv)(B) provides that an expense shall be considered reasonable if: the expense is for services necessary to wind up the affairs of the plan and distribute benefits to the plan's participants and beneficiaries; such expense is consistent with industry rates for the provided services, based on the experience of the QTA; such expense is not in excess of rates charged by the QTA (or affiliate) to other customers for comparable services, if

the QTA (or affiliate) provides comparable services to other customers; and the payment of the expense would not constitute a prohibited transaction or is otherwise exempt by virtue of an individual or class exemption from ERISA's prohibited transaction rules.

The reference to ''industry rates'' and ''based on the experience of the QTA'' in paragraph (d)(2)(iv)(B)(2)(i) is intended to enable QTAs, who possess knowledge about the services needed for a plan termination and industry rates for such or similar services, but who do not perform these services for plans, to engage or retain service providers without going through a potentially time-consuming and costly bidding process. By permitting QTA's to rely on their own industry expertise, we believe QTAs can minimize plan termination costs and, thereby, maximize the benefits payable to a plan's participants and beneficiaries.

The rule in paragraph (d)(2)(iv)(B)(2)(ii) is intended to augment the protections provided under the industry rates standard discussed above. Under this rule, if a QTA performs termination and winding up services for customers other than abandoned plans under this regulation, the fees it charges the other customers for such services shall serve as limits for fees for comparable services needed by the abandoned plans.

The Department anticipates that QTAs may wish to be compensated for services they or an affiliate render in connection with the termination and winding up of an abandoned plan. In the absence of an exemption, however, a QTA's decision to compensate itself from plan assets for such services would constitute a prohibited transaction under section 406 of ERISA, thereby making such payment unreasonable under this regulation. See § 2578.1(d)(2)(iv)(B)(3). To address this problem, the Department is publishing in the Notice section of today's Federal Register a proposed class exemption pursuant to which QTAs or their affiliates can be reimbursed or compensated for services performed pursuant to this regulation, following its adoption.

In addition to locating and updating plan records, calculating benefits and engaging service providers, the QTA shall, as one of its duties in winding up the affairs of a plan, notify each of the plan's participants and beneficiaries concerning the termination of their plan. In general, paragraph (d)(2)(v)(A) provides that the notice furnished to participants and beneficiaries include: a statement that the plan has been terminated; a statement of the participant's or beneficiary's account balance and a description of the distribution options available under the plan; a request for the participant or beneficiary to make an election with respect to the form of distribution; a statement explaining that in the event the participant or beneficiary fails to make an election his or her account balance will be rolled over into an individual retirement plan (*i.e.,* individual retirement account or annuity) or other account (in the case of a non-spousal beneficiary) and invested in an investment product that is designed to preserve principal and provide a reasonable rate of return and liquidity; and the name, address, and telephone number of a person to contact with questions or for additional information.[5] Nothing in the regulation would preclude a QTA from also including its e-mail address in this notice.

Appendix C to this section contains a model notice to participants and beneficiaries. The model allows for inclusion of plan-specific information, including a description of the process for electing a form of distribution. While the Department intends that use of an appropriately completed model notice would be considered compliance with the content requirements of paragraph (d)(2)(v)(A) of the proposed regulation, the Department does not intend to require its use and anticipates a variety of other notices could satisfy the requirements of the regulation.

This notice shall be furnished to the last known address of participants and beneficiaries in accordance with the requirements of 29 CFR 2520.104b–1(b)(1). See § 2578.1(d)(2)(v)(B)(1). If the notice is returned undelivered to the QTA, however, the QTA, consistent with the duties of a fiduciary under section 404(a)(1) of ERISA, shall take steps to locate and notify the missing participant or beneficiary before distributing benefits. See § 2578.1(d)(2)(v)(B)(2). A QTA may ensure compliance with this standard by following previous fiduciary guidance issued by the Department in the context of missing participants. See EBSA Field Assistance Bulletin No. 2004–02 (Sept. 30, 2004).

Paragraph (d)(2)(vi) of the proposal addresses distributions of benefits to participants and beneficiaries. The general rule under that paragraph is that a QTA is required to distribute benefits in accordance with elections of participants or beneficiaries. See § 2578.1(d)(2)(vi)(A). In the absence of a timely election by a participant or beneficiary, however, the individual's benefits must be directly rolled over to an individual retirement plan (or other account in the case of a non-spousal beneficiary) in accordance with proposed 29 CFR 2550.404a–3. See § 2578.1(d)(2)(vi)(B).

The last step in the winding-up process is for the QTA to notify the Department that all benefits have been distributed in accordance with the regulation. Paragraph (d)(2)(viii) of the proposal sets forth the content requirements of this notification, which is referred to in the regulation as the final notice. Among other things, the final notice is required to include: A statement that the plan has been terminated and all assets held by the QTA have been distributed to the plan's participants and beneficiaries on the basis of the best available information; a statement that the special terminal report meeting the requirements of proposed 29 CFR 2520.103–13 is attached to the final notice; a statement that plan expenses were paid out of plan assets by the QTA in accordance with applicable federal law; and, in cases where the QTA paid itself 20 percent or more than it had estimated it would be paying itself, a statement acknowledging and explaining the overrun.

Appendix D to this section contains a model final notice. The model allows for inclusion of plan-specific information. While the Department intends that use of an appropriately completed model notice would be considered compliance with the content requirements of paragraph (d)(2)(viii) of the proposed regulation, the Department does not intend to require its use and anticipates a variety of other notices could satisfy the requirements of the proposed regulation.

[5] A QTA is not required under this regulation to select an individual retirement plan provider (or other account provider in cases of non-spousal beneficiaries) as of the date it furnishes to participants and beneficiaries the notice described in paragraph (d)(2)(v) of the proposal. The Department, however, believes that efficient QTAs routinely will know who, even at that early juncture, eventually will be the individual retirement plan (or other account) provider, particularly in those cases where the QTA has selected, or intends to select, itself (or an affiliate) to be the individual retirement plan (or other account) provider. Accordingly, in situations in which a QTA, at the time the notice in paragraph (d)(2)(v) is furnished, has selected or knows who it will select to provide individual retirement plan services (or other account services in the case of non-spousal beneficiaries), such notice also must include an identification of the individual retirement plan (or other account) provider and, if known, a statement of the fees, if any, that will be paid from the participant or beneficiary's individual retirement plan (or other account in the case of non-spousal beneficiaries), such as establishment or maintenance fees. See § 2578.1(d)(2)(v)(A)(5)(ii)&(iii); § 2550.404a–3(e)(v)&(vi).

5. Plan Amendments

Paragraph (d)(3) of section 2578.1 provides 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 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.

6. Limited Liability of Qualified Termination Administrator

In a further effort to limit the liability of a QTA, paragraph (e) of the proposed regulation 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 is 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, with respect to its selection and monitoring duties, 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.

7. Internal Revenue Service

The Advisory Council's Working Group on Orphan Plans recommended that the Department coordinate with the Internal Revenue Service (IRS) in the development of this proposed regulation in order to prevent participants and beneficiaries of abandoned plans, insofar as possible under the Code, from losing the favorable tax treatment otherwise accorded distributions from qualified plans. The Department, therefore, has conferred with representatives of the IRS regarding the qualification requirements under the Code as applied to plans that would be terminated pursuant to this proposed regulation. The IRS has advised the Department that it will not challenge the qualified status of any plan terminated under this 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.[6] 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, 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.

C. Overview of Proposed Safe Harbor for Rollovers From Terminated Individual Account Plans—29 CFR 2550.404a–3

Under proposed § 2578.1, as discussed above, if a participant or beneficiary fails to elect a form of benefit distribution, the QTA is required to distribute that person's benefits in the form of a direct rollover into an individual retirement plan (or other account in the case of a rollover on behalf of a non-spousal beneficiary). See § 2578.1(d)(2)(vi)(B). In a different context, the Department previously took the position that the selection of IRA providers and investments for purposes of a default rollover pursuant to a plan provision is a fiduciary act.[7] The Department, therefore, is concerned that this position, in the absence of guidance regarding ERISA's fiduciary standards in the context of directly rolling over benefits under proposed § 2578.1, could make potential QTAs apprehensive about assuming the status of a QTA, solely for fear of fiduciary liability in connection with such rollovers.

Accordingly, the Department is proposing a fiduciary safe harbor, at 29 CFR 2550.404a–3, for QTAs that roll over distributions pursuant to proposed § 2578.1(d)(2)(vi)(B). This fiduciary safe harbor was modeled on the fiduciary safe harbor recently adopted by the Department for the automatic rollover of mandatory distributions described in section 401(a)(31)(B) of the Code.[8] If the conditions of the safe harbor are met, a QTA would be deemed to have satisfied the requirements of section 404(a) of the Act with respect to both the selection of an individual retirement plan provider (or other account provider in the context of a rollover on behalf of a non-spousal beneficiary) and the investment of the distributed funds.

The safe harbor has three conditions, set forth in paragraph (d) of the proposed regulation. First, each distribution must be rolled over into an individual retirement plan, as defined in section 7701(a)(37) of the Code or, in the case of a distribution on behalf of a non-spousal distributee,[9] to 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. Second, in connection with each such distribution, the QTA and the individual retirement plan provider (or other account provider in the context of a rollover on behalf of a non-spousal beneficiary) must enter into a written agreement that provides that: Rolled-over funds must 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; the investment product selected for the rolled-over funds shall seek to maintain a stable dollar value equal to the amount invested in the product by the individual retirement plan (or other account in the context of a rollover on behalf of a non-spousal beneficiary); fees and expenses attendant to the individual retirement plan (or other account in the context of a rollover on behalf of a non-spousal beneficiary), including investments of such plan, do not exceed certain limits; and, the participant or beneficiary on whose behalf the QTA makes a direct rollover shall have the right to enforce the terms of the contractual agreement establishing the individual retirement plan (or other account in the context of a rollover on behalf of a non-spousal beneficiary), with regard to his or her

[6] These Code sections, and regulations thereunder, set forth qualified joint and survivor and qualified preretirement survivor annuity requirements and related notice, election and consent rules.

[7] See Rev. Rul. 2000–36, n. 1, where the Department stated that the selection of an IRA trustee, custodian or issuer and IRA investment for purposes of a default rollover pursuant to a plan provision would constitute a fiduciary act under ERISA; see also EBSA Field Assistance Bulletin 2004–02 (Sept. 30, 2004).

[8] See 69 FR 58018 (Sept. 28, 2004).

[9] See 26 CFR 1.402(c)–2, Q&A—12.

rolled-over funds, against the individual retirement plan or other account provider. Third, if the QTA designates itself as the transferee of rollover proceeds, such designation must be exempt from the restrictions imposed by section 406 of ERISA pursuant to section 408(a) of ERISA.[10]

The Department, in developing this safe harbor for QTAs of abandoned plans, observed strong similarities between QTAs of abandoned plans and fiduciaries of terminated defined contribution plans generally. In particular, in either situation, the QTA or fiduciary will find that the winding-up process may be severely complicated or even postponed indefinitely if participants or beneficiaries fail to affirmatively elect a form of distribution. In such cases, the responsible decision maker is faced with a choice of either halting the winding-up process or finishing it in the absence of an affirmative direction from a participant or beneficiary regarding the distribution of his or her benefits.

The Department, therefore, has concluded that the sound administration of ERISA is furthered by not limiting the applicability of § 2550.404a–3 to QTAs. Rather, the Department is proposing to make available safe harbor relief to fiduciaries in connection with rollover distributions from any terminated defined contribution plan, without regard to whether the particular plan is considered abandoned pursuant to proposed section 2578.1, whenever the participant or beneficiary on whose behalf the rollover is being made fails to affirmatively elect a form of distribution.

Of course, as with abandoned plans, the safe harbor is not available unless plan fiduciaries satisfy certain notification requirements before making a rollover distribution. See § 2550.404a–3(e).[11] To facilitate compliance with this notice requirement, the Department has developed a model notice for use by fiduciaries to notify participants and beneficiaries of their distribution options and to request that each such participant or beneficiary elect a form of distribution. This model notice, the use of which would be voluntary, is contained in the appendix to this proposed regulation.

Finally, the Department, after consulting with the IRS, has decided to limit the applicability of the fiduciary safe harbor to rollovers from tax qualified plans. Specifically, with respect to rollover distributions from plans that are not abandoned plans under section 2578.1, such plans must be in compliance with the requirements of section 401(a) of the Code at the time of each rollover distribution. See § 2550.404a–3(a)(2)(ii). In the context of a rollover distribution from an abandoned plan, the safe harbor is available if such plan is intended to be maintained as a tax-qualified plan in accordance with the requirements of section 401(a) of the Code, even if such plan is not operationally qualified at the time of a rollover distribution pursuant to section 2578.1. See § 2550.404a–3(a)(2)(i). The Department invites comments on whether the safe harbor should be made available to fiduciaries for rollovers from arrangements described in section 403 of the Code, where such arrangements are covered by title I of ERISA.

D. Overview of Proposed Reporting Regulation—29 CFR 2520.103–13

Several witnesses before the Advisory Council's Working Group on Orphan Plans testified that, in order to be successful, a program for terminating and winding up abandoned plans must include relief from the annual reporting requirements in section 103 of ERISA. In this regard the Advisory Council recommended the creation of special reporting rules for abandoned plans, placing emphasis on relief from the requirement to engage an independent qualified public accountant. The Council also recommended that the Department make clear the extent to which the QTA, rather than the plan administrator (within the meaning of section 3(16) of ERISA), would be responsible for missing or deficient annual reports for plan years preceding the year in which the plan is deemed terminated.

The Department is proposing to add to part 2520 of the Code of Federal Regulations a new section 2520.103–13 to provide annual reporting relief relating to abandoned plan filings by QTAs. This proposed regulation addresses the content, timing, and method of filing rules for the reporting requirement imposed on qualified termination administrators pursuant to proposed 29 CFR 2578.1(d)(2)(vii). In addition to basic identifying information of the plan and QTA, the report would, as proposed, be 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. This report would be required to be filed within 2 months after the month in which all of the plan's affairs have been completed (except for the requirements in 29 CFR 2578.1(d)(2)(vii) and (viii)). This report would be required to be filed on the Form 5500 in accordance with the special instructions for abandoned plans terminated pursuant to 29 CFR 2578.1. The filing of this report with the Department would be accomplished when a report meeting the requirements of proposed section 2520.103–13 is furnished to the Department as an attachment to the notice described in section 2578.1(d)(2)(viii).

Paragraph (e) of proposed 2520.103-13 is intended to address 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 section 2578.1.

E. Effective Date

The Department is considering making these three proposed regulations, *i.e.,* sections 2578.1, 2550.404a–3, and 2520.103–13, effective 60 days after the date of publication of final rules in the **Federal Register**. The Department invites comments on whether the final regulations should be made effective on an earlier or later date.

[10] Section 406 of the Act prohibits certain transactions involving plans and parties in interest with respect to those plans. Pursuant to section 408(a) of ERISA, the Department may grant an exemption from the restrictions imposed by section 406 of ERISA upon finding that such exemption is administratively feasible, in the interests of the plan and its participants and beneficiaries and protective of the rights of participants and beneficiaries. The Department is publishing a proposed class exemption in today's **Federal Register** that is intended to deal with prohibited transactions resulting from a QTA's selection of itself as the provider of an individual retirement plan (or other account provider in the context of a rollover on behalf of a non-spousal beneficiary) and/or issuer of an investment held by such plan.

[11] The Department notes that the notice requirement in paragraph (e) of the proposed safe harbor does not relieve a plan administrator of its obligation to notify participants or beneficiaries of their rights under section 402(f) of the Code. Section 402(f) notification should be included in, or attached to, the notice described in paragraph (e) of this proposed safe harbor.

F. Regulatory Impact Analysis

Summary

This regulatory initiative consists of three proposed regulations. One proposal, entitled Rules and Regulations for Abandoned Plans, establishes procedures and standards for the termination of, and distribution of benefits from, an abandoned pension plan. The second proposal, entitled Safe Harbor for Rollovers From Terminated Individual Account Plans, provides relief from ERISA's fiduciary responsibility rules in connection with a rollover distribution on behalf of a missing or unresponsive plan participant. The last proposal, entitled Special Terminal Report for Abandoned Plans, provides annual reporting relief for terminated abandoned plans.

Rules and Regulations for Abandoned Plans (29 CFR 2578.1)

The standards and procedures set forth in this proposed regulation are intended to facilitate the voluntary, safe, and efficient termination of individual account plans that have been abandoned and to increase the likelihood that participants and beneficiaries will receive the greatest retirement benefit practicable under the circumstances. Participants and beneficiaries that had previously been denied access to their benefits because there was no authority willing or able to assume responsibility for the abandoned plan will be able to direct the QTA concerning the distribution of their account balances as permitted under the terms of the plan and federal regulations.

Without this regulation, plans that have been abandoned by a plan sponsor might eventually be terminated through government enforcement or other legal action. However, information gathered by the Advisory Council's Working Group suggests that more often the assets of abandoned plans continue to be diminished by ongoing administrative expenses at the same time that participants and beneficiaries are denied access to their benefits. The Department assumes for purposes of its analysis of the impact of these proposed rules that most plans that would currently meet the criteria for a finding of abandonment would remain abandoned without the establishment of a regulatory framework and specific standards and procedures such as those described in this proposed regulation. It is also assumed that an accumulated number of plans meeting the criteria for abandonment would be terminated and wound up pursuant to these rules, and that a smaller number of plans would become abandoned and terminated in future years.

Although certain costs will be incurred and paid from plan assets in the course of the termination and winding up of abandoned plans pursuant to this regulation, the qualitative and quantitative benefits of the regulation are expected to be both numerous and substantial. The most significant qualitative benefit of the regulation will arise from the facilitation of the voluntary termination of abandoned plans. It is assumed, for purposes of cost estimates presented here, that all fees and expenses for terminating an abandoned plan, to the extent that they are reasonable, will be charged to the plan.

Absent the proposed regulation, the persons or other entities holding assets of abandoned plans would not in most cases have the authority or incentive to see that such plans are terminated and that benefits are distributed to participants and beneficiaries. The specificity of the proposed standards and procedures, along with provisions that limit the liability of the QTA in certain circumstances, will support the rights of participants and beneficiaries by establishing the authority and incentive for a QTA to wind up the affairs of an abandoned plan. The requirements pertaining to the timing and content of notices to the Department and to the participants and beneficiaries, as well as guidance that addresses the obligations of the QTA with respect to the condition of plan records, selection and monitoring of service providers, payment of fees and expenses, and requirements for plan amendments and continued tax qualification, will serve to protect the benefits of affected participants and beneficiaries in the course of the termination and winding up of abandoned plans.

The termination of plans that would otherwise remain abandoned also has quantitative economic implications. The termination of these plans in accordance with the regulation would serve to maximize the benefits ultimately payable to participants and beneficiaries in two important ways. First, termination would preclude the ongoing payment of administrative expenses that diminish assets but only minimally contribute to the management of the plan. In addition, the specific standards and procedures of the proposed regulation would limit the costs that would otherwise be associated with plan termination. Each of these in turn would moderate the extent to which individual account balances of the abandoned plan would be drawn upon for plan administration.

Costs will be incurred and paid from plan assets to wind up the affairs of abandoned plans. However, these costs are meaningful only in the context of the savings of administrative expenses that would otherwise have continued to be paid indefinitely absent the termination. An assessment of the net effect of the termination cost and administrative savings is complicated by the fact that the cost is incurred once, while the savings would occur repeatedly in future years of what would otherwise be continuing abandonment.

In analyzing the costs and potential savings, and relying on available data and certain assumptions described in detail later in this discussion, the Department compared the aggregate projected termination costs of an estimated number of potentially abandoned plans with the present value of future ongoing administrative costs for those plans. This comparison shows that while the termination costs exceed administrative savings in the year of termination, by the end of the next year and thereafter, the termination has prevented the payment of a significantly greater aggregate expense, resulting in a substantial preservation of retirement benefits.

In the absence of direct measures for the number of abandoned plans, the Department, based on Form 5500 data and certain assumptions, estimates that there are approximately 4,000 abandoned plans at present.[12] Assuming 4,000 abandoned plans, and based on Form 5500 data and certain assumptions concerning ordinary plan termination expenses and typical annual administrative expenses, the Department estimates that the aggregate termination cost for those abandoned plans amounts to $8.4 million, while one year of ongoing administrative costs would amount to $7.7 million. However, by the end of the next following year, termination will have had the effect of saving $6.6 million. In other words, the net benefit in administrative cost savings for facilitating termination of abandoned plans would be $6.6 million for plans that would have remained abandoned for two years. If these plans remained abandoned for five years, it is estimated that the net benefit of facilitating termination would exceed $27 million.

[12] Testimony before the Advisory Council suggests that the number of abandoned plans might be nearer to 2%. If this witness's experience is representative, approximately 11,700 plans could be considered abandoned plans.

These net benefits represent plan assets preserved for retirement benefits.

These estimates are, however, based on what is known about average ordinary administrative expenses and the way those expenses compare with plan termination costs. The Department has crafted the proposed regulation with the intention of increasing efficiency and significantly reducing the administrative cost of terminating abandoned plans through specificity as to procedures, timing, obligations pertaining to records, selection and monitoring of service providers, payment of fees and expenses, plan amendments, tax qualification issues, and reporting. The Department has also proposed models for required notices in an effort to increase efficiency and reduce the cost of termination. The cost for completing and mailing notices for currently abandoned plans is estimated at $652,300; additional annual costs for plans that become abandoned in the future are $87,340. These costs are explained more fully in the section of the preamble related to the Paperwork Reduction Act.

Because the circumstances of abandoned plans are thought to vary considerably, the estimates of savings in termination costs that might arise from efficiency gains are subject to some uncertainty. However, each 10% reduction in the cost of termination is estimated to produce savings in excess of $800,000. Assuming that the specific provisions of the proposed regulation would increase efficiency and reduce costs by at least 20%, about $1.7 million in termination costs would be saved, further preserving retirement benefits for participants and beneficiaries of currently abandoned plans. In this circumstance, the benefits of these terminations exceed their administrative costs by about $900,000 in the year of termination. Similar effects will be seen for the somewhat smaller number of plans that become abandoned from year to year.

It is estimated that the net benefit of the proposed regulation might vary considerably relative to actual efficiency gains and the duration of plan abandonment. For plans potentially abandoned at this time, this net benefit is expected to range from at least $900,000, to $6.6 million if abandonment continued for a year beyond the year of termination, to $27 million if abandonment continued for four years beyond the year of termination. In future years, termination of an additional 1,650 plans 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, 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.

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

In addition to plans that are terminated by a QTA because of abandonment, other individual account plans may terminate as a result of a plan sponsor's voluntary decision to discontinue the plan. Similar to a QTA's experience with abandoned plans, a plan administrator or service provider responsible for distributing assets from individual accounts may find that certain participants and beneficiaries fail to elect a form of distribution because they are either missing or unresponsive. In order to select an institution and an investment for rolling over account balances of missing or unresponsive participants or beneficiaries, fiduciaries would benefit from a safe harbor that will limit their liability under section 404(a) of ERISA. Accordingly, fiduciaries that comply with the requirements of this proposed regulation will be deemed to have complied with section 404(a) of ERISA in connection with a rollover from a terminated plan, including an abandoned plan, into an individual retirement plan or other account.

Costs related to establishing individual retirement plans and other accounts and selecting institutions and investments for rolled over accounts, have been accounted for in the Department's regulation on Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974 Automatic Rollover Safe Harbor (69 FR 58018). The cost for the proposed regulation is attributable only to the Notice to Participants that must be provided to affected participants and beneficiaries informing them about the termination and the need to make an election concerning the distribution of their benefits. The cost for the Notice to Participants in currently abandoned plans is estimated at $207,800. Annual costs for notifying the 56,500 participants in terminating plans, including abandoned plans, estimated to be missing or unresponsive on an ongoing basis are $149,500.

Qualitative benefits will accrue to fiduciaries that rollover accounts under this proposed regulation through greater certainty and reduced exposure to risk, and to former participants through regulatory standards concerning: individual retirement plan or other account providers; investment products, including preservation of principal, rates of return, and liquidity; fees and expenses; and, disclosure.

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

The proposed regulation simplifies the content, timing, and method for final reporting by a QTA to the Department. No cost has been attributed to this proposed regulation, nor has the benefit been estimated.

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 subject to 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 proposed regulations. OMB has reviewed this regulatory action.

Costs

Rules and Regulations for Abandoned Plans (29 CFR 2578.1)

Under the proposed regulation, individual account plans that are found to be abandoned will incur certain costs and fees in connection with the termination and winding up of the plan. These expenses include, among others, the costs associated with determining whether the plan is, in fact, abandoned, as well as notifying participants and the government of the abandonment. There may also be expenses associated with

updating records, distributing benefits, and reporting.

The total expense will arise from the number of plans abandoned. However, the actual number of abandoned plans is not known. To estimate for purposes of this analysis the number of plans that might be abandoned, the Department examined the contribution and distribution activity of individual account pension plans as reported on Form 5500 filings. This information would not by itself indicate whether any plan was abandoned; nor do Form 5500 filings indicate that a plan is abandoned. It is assumed, however, that a QTA would normally have access to more information about a specific plan than can be extracted from Form 5500 data. Nonetheless, Form 5500 data was considered the only source of information for approximating a number of plans that could be considered abandoned based on contribution and distribution activity.

To arrive at its estimate, the Department reviewed the number of plans that filed a Form 5500 in 1999 indicating that no contributions had been received by the plan and no distributions had been made to participants or beneficiaries. Reports by these same filers were compared for each year from 2000 to 2002 in order to determine whether there had been contributions to or distributions from those plans. The Department considered plans to be potentially abandoned for the purpose of this analysis if neither form of activity was present throughout this period. The Department has used this methodology for its estimate of the number of potentially abandoned plans because preliminary analyses of Form 5500 data for plans without contributions and distributions in only a 12-consecutive-month period showed that a portion of those plans resumed activity or terminated in subsequent years. This methodology is merely thought to produce a reasonable estimate that allows for observed variations in plan financial activity from year to year; it does not bear on the actual requirements of a QTA with respect to a finding of abandonment set out in the proposed rules.

This approach yielded an estimate of about 4,000 plans that may be currently abandoned. Because witnesses before the Working Group indicated that most plans were small plans with 20 or fewer participants, it is estimated that the 4,000 plans include 78,500 participants. Other analysis of Form 5500 data suggests that, going forward, an estimated 1,650 plans, with 33,000 participants, and an estimated $868 million in assets, may be abandoned annually. These estimates do not include any abandoned plans that did not file in 1999 or later.

Using the Form 5500 to estimate the number of plans that may have been abandoned results in a fair degree of uncertainty. The fact that a plan has filed an annual report indicates that certain obligations are being met with regard to administration of the plan and that there may be other circumstances that would explain a lack of financial activity. For example, a lack of contributions or distributions from a profit sharing plan may not necessarily indicate that the plan has been abandoned. Testimony by service providers before the Working Group and information gathered under NEPOP indicate, however, that continued administrative activity does not mean that a plan is not abandoned. It is also possible that additional efforts by a QTA in connection with a potential finding of abandonment would reveal that any given plan did not meet the standard for a finding of abandonment. The number of plans actually abandoned, and therefore the number of participants in those plans, may be lower. While each of these factors introduces uncertainty into the estimates, without the advantage of additional information available to a QTA that makes a timely inquiry into the activities of a potentially abandoned plan, the Department believes it is reasonable to rely on the 4,000 plans that showed no activity with regard to contributions or distributions over a four-year period, and the 1,650 plans expected to be abandoned on an annual basis going forward, for reasonable approximations of the number of abandoned plans that might be terminated pursuant to these rules.

The Department has estimated the net impact of the proposed regulation by comparing the ongoing administrative costs for maintaining an abandoned plan with the cost for terminating such a plan. The Department has assumed that termination costs will be significantly affected by the degree to which plan administration was maintained following abandonment. There is expected to be an inverse relationship between ongoing administrative costs 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. Where service providers to the plan have continued to fulfill their contractual obligations, and participants in these more well-maintained plans can be located, the costs for terminating such plans are assumed to be at the lower end of a range. At the higher end of the range are abandoned plans that have not been administered consistent with ERISA's standards, such as where reporting and recordkeeping activities have been discontinued.

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 potentially abandoned plans. Weighting the number of abandoned plans equally between those that have been more and less actively administered 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 based on these assumptions. Similarly, the annual administrative costs for the 1,650 plans estimated to be abandoned annually is estimated at $3.2 million; while the one-time termination cost would be $3.5 million. The actual proportions of more and less actively administered plans may be different from those assumed.

Although this aspect of the analysis suggests that termination is more costly than ongoing administration, the future savings of ongoing expenses that result from termination will continue through the entire period that the plan would otherwise have remained abandoned. Because costs and savings occur in different years, a single-year comparison of expenses does not adequately account for the net impact of termination under these proposed regulations, as is addressed in the discussion of benefits that follows.

The Department expects that one-time termination costs may in fact be less than one year's ongoing administrative expense as a result of its efforts in these proposed regulations to increase efficiency through establishment of specific standards and procedures, and through clarifying and limiting the responsibilities and liabilities of the QTA. The aggregate termination cost savings that would arise from this greater efficiency is subject to uncertainty. However, each 10% reduction in the cost of termination is assumed to produce savings in excess of $800,000. Assuming that the provisions

of these proposed regulations would increase efficiency and reduce costs by at least 20%, $1.7 million in termination costs would 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 abandoned in future years, reducing ongoing estimated termination costs from $3.5 million to $2.8 million.

Finally, the Department has estimated the cost for a QTA to complete the notices required to be furnished to the Department, plan sponsor, and participants at $652,300 for currently abandoned plans. Future costs for notices for the 1,650 plans estimated to be abandoned on an annual basis are $87,340. These costs are explained in more detail in the Paperwork Reduction Act section of the preamble.

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

The safe harbor in section 2550.404a–3 requires the furnishing of a notification to participants and beneficiaries informing them of the termination and the options available for the distribution of assets in an account. The number of notices to 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 rolled over 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 the number that will fail to make an election concerning distribution of the assets in their account balances is not known, other information about participants and beneficiaries in defined benefit plans has led the Department to assume that the number is approximately 1%, or 23,500 annually. As such, in order to take advantage of the safe harbor under section 404(a), plan administrators will be required to furnish 23,500 Notices to Participants. The cost for these notices, at 2 minutes per notice and $.38 each for mailing, is $62,170.

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

There are no costs attributable to the changes in annual reporting for abandoned plans in the proposed regulation. Simplified reporting represents a benefit to abandoned plans, as explained below.

Benefits

Rules and Regulations for Abandoned Plans (29 CFR 2578.1)

The proposed regulation would have qualitative and quantitative benefits. The standards and procedures set forth here are intended to facilitate the voluntary, safe, and efficient termination of individual account pension plans that have been abandoned, and to increase the likelihood that participants and beneficiaries will receive the greatest retirement benefit practicable under the circumstances.

The most significant qualitative benefit of the regulation will arise from the facilitation of the voluntary termination of abandoned plans. Absent the proposed standards and procedures, along with provisions that limit the liability of the QTA in certain circumstances, the persons or other entities holding assets of abandoned plans would not in most cases have the authority or incentive to see that such plans are terminated in accordance with applicable requirements, and that benefits are distributed to participants and beneficiaries.

The termination of abandoned plans upon adoption of the regulation would allow participants and beneficiaries that have been unable to access their benefits to elect, according to procedures established by the QTA, a form of distribution for the balance in their individual accounts. The requirements addressing the obligations of the QTA with regard to winding up the affairs of an abandoned plan will serve to protect the benefits of affected participants and beneficiaries in the course of the termination and winding up process. Benefits ultimately payable to participants and beneficiaries are maximized in two important ways. First, termination would preclude the ongoing payment of administrative expenses that diminish assets but only minimally contribute to the management of the plan. In addition, the specific standards and procedures of the proposed regulation would limit the costs that would otherwise be associated with plan termination. Each of these in turn would moderate the extent to which benefits were drawn upon for plan administration.

Costs to be paid from plan assets to wind up the affairs of abandoned plans are meaningful only in the context of the savings of administrative expenses that would otherwise have continued to be paid absent the termination. A comparison of the termination cost with administrative savings is complicated by the fact that the cost is incurred once, while the savings would be incurred repeatedly throughout the years the plan would have been abandoned. To address this timing difference, the Department has estimated the present value of future ongoing administrative expenses using a 3% discount rate over a period from one year after the year of termination 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 the termination costs exceed the $7.7 million savings in the year of termination, the present value of administrative expenses to be paid in the year following termination exceeds the estimated termination cost by $6.6 million, resulting in a substantial preservation of retirement benefits. The present value of administrative expenses estimated to be paid over the five years following termination exceeds the termination cost by $27 million. Similarly, the cost of termination of the 1,650 plans assumed to be abandoned each year would be slightly greater than ongoing costs in the year of termination, but termination would have had the effect of saving over $2.8 million by the end of the next year, and $11.6 million if the plans remained abandoned for five years. These net benefits would also represent plan assets preserved for retirement benefits.

As noted earlier, the estimates of savings in termination costs that might arise from efficiency gains are subject to some uncertainty. However, each 10% reduction in the cost of termination of existing plans that are potentially abandoned is assumed to produce savings in excess of $800,000. Assuming that the specific provisions of the proposed regulation would increase efficiency and reduce costs by at least 20%, an additional $1.7 million in termination costs would be saved, further preserving retirement benefits for participants and beneficiaries of currently abandoned plans. In this circumstance, the benefits of these terminations exceed their costs by about $900,000 in the year of termination. Efficiency gains for the 1,650 plans that become abandoned from year to year are expected to amount to $710,000, such that the benefits of termination of these

abandoned plans exceed their termination costs by about $400,000.

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

By providing a safe harbor for plan fiduciaries that roll over individual account balances, the Department has increased certainty concerning compliance with ERISA section 404(a) for fiduciaries that designate institutions and investment products for rolled over accounts and has expanded the opportunity for retirement savings for plan participants. The benefits of greater certainty to fiduciaries under the safe harbor, and of savings protection for participants, cannot be specifically quantified. The proposed 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 likewise benefit former participants by directing their retirement savings to individual retirement plan and other account providers, regulated financial institutions, and investment products that minimize risk and offer preservation of principal and liquidity. The Department welcomes comments on the data, assumptions, and estimates presented in this analysis.

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

The proposed regulation provides simplified annual 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 to abandoned plans and increase benefits to participants and beneficiaries.

Paperwork Reduction Act

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

Currently, the Department is soliciting comments concerning the information collection request (ICR) included in the Proposed Regulations on Termination of Abandoned Individual Account Plans (29 CFR 2578.1), the 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. A copy of the ICR may be obtained by contacting the person listed in the PRA Addressee section below.

The Department has submitted a copy of the proposed information collection to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed 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 May 9, 2005 OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to Gerald B. Lindrew, 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.

The burden estimates for this ICR are derived from notice requirements in two proposed regulations and a recordkeeping requirement in a proposed class exemption as follows: the Regulations for Abandoned Plans (29 CFR 2578.1); the Safe Harbor for Rollovers From Terminated Individual Account Plans (29 CFR 2550.404a–3) (together, ''terminating plans''); and, the Proposed Class Exemption for Services Provided in Connection with the Termination of Abandoned Individual Account Plans. A Notice to Participants is required under two of the proposed regulations. The burden for all other notices is attributable only to the Regulations for Abandoned Plans. No burden has been estimated for the third proposed regulation, Special Terminal Report for Abandoned Plans (29 CFR 2520.103–13), because the proposal simplifies ERISA annual reporting requirements for abandoned plans. All burdens under the two proposed regulations are considered cost burdens because a terminating plan will most likely use a service provider or a QTA to inform participants, plan sponsors, and the Department about the termination. The burden under the proposed exemption is an hour burden.

Terminating Plans

Terminating plans that roll over the account balances of participants and beneficiaries that are either missing or unresponsive, must, in order to take advantage of the safe harbor under 29 CFR 2550.404a–3 of ERISA, send to participants and beneficiaries a notice that includes information about their right to elect a form of distribution for their benefits.

Notice to Participants (29 CFR 2578.1(d)(2)(v) and (29 CFR 2550.404a–3(e))

Fiduciaries that terminate plans are required to notify participants and beneficiaries about such terminations and the need to elect a form of distribution for the assets in their accounts. The Department has provided two models for this notice, only one of which will require completion, depending on whether the plan is an abandoned plan. At 2 minutes per notice, the cost to complete 78,500 notices for currently abandoned plans is $177,933. Mailing costs, at $.38 per notice, are $29,830.

Ongoing costs for completing and mailing 33,000 notices to participants and beneficiaries in 1,650 plans estimated to be abandoned annually in the future, as well as to 23,500 missing or unresponsive participants and beneficiaries in terminated plans that are not abandoned plans, are estimated at $149,500 for a total of 56,500 Notices to Participants.

Rules and Regulations for Abandoned Plans (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.

As described in detail earlier, the Department assumes that there are currently 4,000 abandoned plans with 78,500 participants, and that in each future year, 1,650 plans with a total of 33,000 participants will become abandoned.

Most tasks involved in normal plan administration, such as calculating or distributing benefits, recordkeeping, and reporting are not accounted for as burden in this proposed regulation because they are either part of the usual business practices of plans, or have already been accounted for in ICRs for other statutory and regulatory provisions under Title I of ERISA.

The proposed regulation requires that a QTA notify, at different times and under different circumstances: the plan sponsor, or, if unable to do so, service providers that might know the whereabouts of the plan sponsor; the Department; and, participants and beneficiaries of the plan. Because the termination and winding up of an abandoned plan will be performed by a QTA or other service providers that will develop and distribute the required notices and report, the burden for this collection of information is considered a cost burden. Hourly costs are estimated at $68 per hour for a QTA. Supplies and postage costs include: regular mail, $.38; certified mail, $2.68; certified mail, return receipt requested, $4.43. The costs for the notices that make up the ICR in the proposed regulations, for both the 4,000 currently abandoned plans and the 1,650 plans estimated to be abandoned annually in the future, are analyzed below.

Notice of Intent to Terminate (paragraph (b)(5)). The Department has provided a model notice of intent to terminate, which is sent by a QTA to the sponsor of a plan that the QTA suspects is abandoned. The QTA will add to the model, identifying information about the plan sponsor and the QTA. The notice is estimated to require 2 minutes of a QTA's time per letter for a cost of $9,067 for the 4,000 currently abandoned plans. Mailing costs for the 4,000 currently abandoned plans amount to $4.43 for each notice or a total of $17,720. Prospective annual costs for QTA time and mailings for 1,650 plans are estimated to be $11,050.

Notice to Plan Sponsor Sent to Current Address (paragraph (b)(4)). If the Notice of Intent to Terminate was not acknowledged as received by the plan sponsor (or its agent) at the address known to the QTA, the QTA must contact known service providers to the plan in an attempt to obtain a current address for the plan sponsor. If any service provider responds to the QTA with a current address for the plan sponsor, the QTA must re-send the Notice of Intent to Terminate to the new address provided by the service provider(s). Because there is no relevant data for estimating the number of notices that may be required to be sent to additional addresses, the Department has assumed that all plans will be required to send one such notice. Mailing costs for the 4,000 currently abandoned plans are $4.43 for each notice, or $17,720. Prospective annual mailing costs for 1,650 plans are $7,310.

Notice to the Department (paragraph (c)(3)). Once a QTA has found that a plan has been abandoned, it notifies the Department of the abandonment and its intention to serve as a QTA. A model notice has been provided that is to be completed by the QTA. A QTA will require an estimated 75 minutes to complete the model form at a cost of $350,720. Mailing is expected to be by certified mail, at $2.68 each, or $10,720 for 4,000 plans. Ongoing annual costs for preparation and mailing for 1,650 plans are estimated at $144,672.

Final Notice (paragraph (d)(2)(viii)). Upon payment of all plan expenses and distribution of assets, the QTA is required to notify the Office of Enforcement, EBSA, that all benefits have been distributed in accordance with the regulation. If fees and expenses paid by the QTA (or its affiliate) exceed by 20 percent the QTA's initial estimate of costs, the amount of increased fees and expenses, along with an explanation for the increase, are to be included in the Final Notice. QTAs will require an estimated ten minutes to complete the notice at a cost of $45,300 for 4,000 plans. Mailing, including the cost of the Terminal Report that will be filed with the Final Notice, is estimated at $1.00 for a cost of $4,000. Estimated annual costs for future abandoned plans are $20,350 for 1,650 plans.

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

Written Agreement (paragraph (d)(2)). A fiduciary that rolls over assets from an individual account plan into an individual retirement plan or other account must enter into a written agreement with the individual retirement plan or other account provider. The agreement must include provisions related to investment products, rates of return, and fees and expenses among other requirements. The Department understands that it is customary business practice for agreements related to the establishment of individual retirement plans or other accounts to be set forth in writing and that no new burden is created by this requirement.

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

The rules and regulations described in section 2520.103–13 of the proposed regulation would establish a simplified method for filing a Terminal Report for abandoned individual account plans. The Terminal Report is required to be sent to EBSA along with the Final Notice. No cost is estimated for completing the special Terminal Report because it is assumed that this report will be less burdensome than the annual report that would otherwise be required to be filed by a plan.

Proposed Exemption

Under the proposed regulation on Termination of Abandoned Individual Account Plans, a QTA that terminates an abandoned plan would be permitted to distribute participant or beneficiary account balances by rolling them over into an individual retirement plan or other account. The proposed exemption, also published in today's **Federal Register**, among other provisions, 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 QTAs of plans that have been abandoned to select and pay themselves or an affiliate for services to the plans. In addition, for participants or beneficiaries that are missing or nonresponsive, a QTA would be permitted to: Designate itself or an affiliate as provider of an individual

retirement plan or other account for the rolled over balance; select a proprietary investment product as the initial investment; and, pay itself or the affiliate fees in connection with the rollover. In order to ensure that the records necessary to determine whether the conditions of the proposed exemption have been met and are available for examination by participants, the IRS, and the Department, the Department has included a condition in the proposed exemption requiring a QTA to maintain such records for a period of six years.

Banks, insurance companies, and other financial institutions that provide services to abandoned plans and their participants and beneficiaries will act in accordance with customary business practices, which would include maintaining the records required under the terms of the proposed class exemption. Accordingly, the recordkeeping burden attributable to the proposed exemption will be handled by the QTA and is expected to be small. Assuming that all QTAs will take advantage of the proposed exemption, and that each abandoned plan will have a separate QTA, the start up hour burden attributable to recordkeeping for QTAs of currently abandoned plans, at one hour for each QTA, is 4,000 hours; the on-going hour burden for QTAs of plans that may be abandoned in the future is 1,650 hours annually.

Type of Review: New collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Notices for Terminated Individual Account Plans.

OMB Number: 1210–0NEW.

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

Respondents: 10,123.

Responses: 157,590.

Frequency of Response: On occasion.

Estimated Total Burden Hours: 5,650.

Total Annualized Capital/Startup Costs: $652,300.

Total Burden Cost (Operating and Maintenance): $333,000.

Total Annualized Costs: $985,300.

Regulatory Flexibility Act

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 which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposed rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. 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 that 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 proposed 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 requests comments on the appropriateness of the size standard used in evaluating the impact of these proposed rules on small entities.

EBSA has preliminarily determined that these proposed rules may have a significant beneficial economic impact on a substantial number of small entities. In an effort to provide a sound basis for this conclusion, EBSA has prepared the following initial regulatory flexibility analysis. Efficiency gains are assumed to arise from the Department's efforts to provide specific standards and procedures, and to address questions concerning what are reasonable efforts to satisfy these standards. The model notices provided as part of the proposed regulations are also intended to minimize compliance burdens.

To the Department's knowledge, there are no federal regulations that might duplicate, overlap, or conflict with the provisions of the proposed regulations.

Rules and Regulations for Abandoned Plans (29 CFR 2578.1)

As explained earlier in the preamble, in drafting the proposed regulation, 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 testified that regulatory action should be undertaken that would allow for the termination of abandoned plans and the distribution of assets to participants and beneficiaries. The conditions set forth in this proposed regulation are intended to facilitate voluntary, safe, and efficient terminations of abandoned plans, and to increase the likelihood of participants and beneficiaries receiving the greatest retirement benefit practicable under the circumstances. The proposed rules would meet the objectives of providing the authority and incentive for termination by offering greater certainty to QTAs concerning their compliance with the requirements of ERISA section 404(a), to the extent applicable, and of preserving future retirement assets for plan participants. 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 proposed rules would impact 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.

As described earlier in the preamble, the Department determined 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 1% of all small plans; the 1,650 small plans expected to be abandoned annually hereafter represent less than ½ of 1% of all small plans. The 5,650 small plans potentially affected may still be considered a substantial number, however.

Because essentially all abandoned plans are assumed to be small plans, the more detailed discussion earlier in the

preamble on the costs and benefits of the proposed regulation is applicable to this analysis of costs and benefits under the RFA. In summary, 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 the plans had remained abandoned for one year following the year of termination, or $27 million if the plans had 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 be abandoned in future years.

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

The proposed regulation provides safe harbor protection under section 404(a) of ERISA for fiduciaries that terminate small plans and roll over balances into individual retirement plans or other accounts for participants and beneficiaries that failed to elect a form of distribution for their benefits. Fiduciaries will benefit from increased confidence that they have fulfilled their fiduciary obligations under ERISA, and plan participants will benefit from increased retirement savings. In particular, the two model Notices to Participants provided by the Department 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.

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

The proposed regulation provides simplified annual 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 this proposed regulation.

Congressional Review Act

The notice of proposed rulemaking being issued here is subject to the provisions of the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and, if finalized, will be transmitted to the Congress and the Comptroller General for review.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, the proposed rules do not include any federal mandate that may 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 the adherence to specific criteria by federal agencies 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 proposed rules would not have federalism implications because it has 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 proposed 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 2578

Employee benefit plans, Pensions, Retirement.

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.

For the reasons set forth in the preamble, the Department of Labor proposes to amend 29 CFR chapter XXV as follows:

SUBCHAPTER G—ADMINISTRATION AND ENFORCEMENT UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

1. Add part 2578 to subchapter G to read as follows:

PART 2578—RULES AND REGULATIONS FOR ABANDONED PLANS

Sec.

Sec. 2578.1 Termination of abandoned individual account plans.
Appendix A to § 2578.1 Notice of Intent to Terminate Plan
Appendix B to § 2578.1 Notification of Plan Abandonment and Intent to Serve as Qualified Termination Administrator
Appendix C to § 2578.1 Notice of Plan Termination
Appendix D to § 2578.1 Final Notice

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 anytime 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; and

(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.''

(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 on which a notice of plan abandonment, as described in paragraph (c)(3) of this section, is furnished to the U.S. Department of Labor.

(2) If, prior to the ninetieth (90th) day following the date on which notice, in accordance with paragraph (c)(3) of this section, is furnished to the U.S. Department of Labor, 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;

(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;

(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, and 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;

(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; and

(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;

(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) 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.

(4) For purposes of calculating the 90-day period referred to in paragraph (c)(1) of this section, the notice described in paragraph (c)(3) of this section shall be considered furnished to the Department:

(i) Upon mailing, if accomplished by United States Postal Service certified mail or Express mail;

(ii) Upon receipt by the delivery service, if accomplished using a ''designated private delivery service'' within the meaning of 26 U.S.C. 75029 (f); or

(iii) In the case of any other method of furnishing, upon receipt by the Department.

(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) *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.

(iii) *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.

(iv) *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)(iv)(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 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.

(v) *Notify participants.* (A) Furnish to each participant or beneficiary of the plan a notice 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*)(*i*) 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 roll over the account balance of the participant or beneficiary directly to an individual retirement plan (*i.e.*, individual retirement account or annuity) or other account (in the case of distributions described in § 2550.404a–3(d)(1)(ii) of this chapter) and the account balance will be invested in an investment product designed to preserve principal and provide a reasonable rate of return and liquidity;

(*ii*) A statement of the fees, if any, that will be paid from the participant or beneficiary's individual retirement plan, if such information is known at the time of the furnishing of this notice; and

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

(*6*) 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)(v)(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)(vi) 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)(vi) of this section.

(vi) *Distribute benefits.* (A) Distribute benefits in accordance with the form of distribution elected by each participant or beneficiary.

(B) If the participant or beneficiary fails to make an election within 30 days from receipt of the notice described in paragraph (d)(2)(v) of this section, distribute benefits in the form of a direct

rollover in accordance with § 2550.404a–3 of this chapter.

(C) For purposes of distributions pursuant to paragraph (d)(2)(vi)(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 Act.

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

(viii) *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)(vi) of this section, furnish to the Office of Enforcement, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Ave., 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 assets held by the qualified termination administrator have been distributed to the plan's participants and beneficiaries on the basis of the best available information;

(D) A statement that the Special Terminal Report for Abandoned Plans meeting the requirements of § 2520.103–13 of this chapter is attached to this notice;

(E) 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)(iv) of this section;

(F) 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; 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 of qualified termination administrator.* (1) Except as otherwise provided in paragraph (e)(2) of this section, to the extent that the responsibilities 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 to the extent the qualified termination administrator complies with the requirements of paragraph (d)(2) of this section.

(2) A qualified termination administrator shall be responsible for the selection and monitoring of any service provider (other than monitoring an individual retirement plan provider selected pursuant to paragraph (d)(2)(vi)(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. To the extent that a qualified termination administrator, in accordance with the requirements of section 404(a)(1) of the Act, selects and monitors a service provider, and does not otherwise enable the service provider to commit fiduciary breaches, 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.

(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.

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 begin the process of terminating the plan in accordance with federal law if you do not contact us within 30 days of your receipt of this notice.

Our basis for taking this action is that *{insert the following language in the brackets*: [our records reflect that there have been no contributions to, or distributions from, the plan within the past 12 months] *or* [*if the basis is under § 29 CFR 2578.1(b)(1)(i)(B), 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 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.

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 has been 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 plan is abandoned within the meaning of 29 CFR 2578.1(b) because [*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 [*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 of the plan: [*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:

_____

_____

_____

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 your retirement plan, identified above, has been terminated pursuant to regulations issued by the U.S. Department of Labor. The plan was terminated because it was abandoned by [*enter the name of the plan sponsor*].

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 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 election process established by the qualified termination administrator*].

[*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, [*enter the name of the financial institution*] charges the following fees for its services: [*add 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 [*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, [*enter the name of the financial institution*] charges the following fees for its services: [*add statement of fees, if any, that will be paid from the participant or beneficiary's individual retirement plan*].}

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

Abandoned Plan Coordinator:

Part I – 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)(iv). A Special Terminal Report for Abandoned Plans meeting the requirements of 29 CFR 2520.103-13 is attached to this notice.

Part II – Contact Person [*complete only if different from signatory*]

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

[*Include Part III 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).*]

Part III – 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* [*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*].

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 C—REPORTING AND DISCLOSURE UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE

2. 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.

3. 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)(vii) 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)(vi) of this chapter and a statement regarding whether any such distributions were transfers under § 2578.1(d)(2)(vi)(B) of this chapter.

(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)(vi) of this chapter;

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

(3) As an attachment to the notice described in § 2578.1(d)(2)(viii) of this chapter.

(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)(vi) 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.

SUBCHAPTER F—FIDUCIARY RESPONSIBILITY UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

4. 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.

5. Add § 2550.404a–3 and its appendix to read as follows:

§ 2550.404a–3 Safe Harbor for Rollovers 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 rollover of a distribution, described in paragraph (b) of this section, to an individual retirement plan or other account.

(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) 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) 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 rollovers described in this section.

(b) *Distributions.* This section shall apply to the rollover of a distribution from a terminated individual account plan to an individual retirement plan or other account if, in connection with such distribution:

(1) The participant or beneficiary, on whose behalf the rollover 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)(v) 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 both the selection of an individual retirement plan provider or other account provider and the investment of funds in connection with a rollover distribution described in this section.

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

(1)(i) Except as provided in paragraph (d)(1)(ii) of this section, the distribution is 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, such distribution is 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.

(2) The fiduciary enters into a written agreement with the individual retirement plan or other account provider that provides:

(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 paragraph (d)(2)(i) of this section, 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;

(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;

(iv) All fees and expenses attendant to an individual retirement plan or other account, including investments of such plan, (*e.g.*, establishment charges, maintenance fees, investment expenses, termination costs and surrender charges) shall not exceed the fees and expenses charged by the individual retirement plan or other account provider for comparable individual retirement plans or other accounts established for reasons other than the receipt of a rollover distribution under this section; and

(v) The participant or beneficiary on whose behalf the fiduciary makes a direct rollover shall have the right to enforce the terms of the contractual agreement establishing the individual retirement plan or other account, with regard to his or her rolled-over account balance, against the individual retirement plan or other account provider.

(3) Both the fiduciary's selection of an individual retirement plan or other 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 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 directly roll over 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 rollover 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.

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.

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, [*enter the name of the financial institution*] charges the following fees for its services: [*add 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 [*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, [*enter the name of the financial institution*] charges the following fees for its services: [*add statement of fees, if any, that will be paid from the participant or beneficiary's individual retirement plan*].}

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*]

Signed at Washington, DC, this 2nd day of March, 2005.

Ann L. Combs,

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

[FR Doc. 05–4464 Filed 3–9–05; 8:45 am]

BILLING CODE 4150–29–C