

DEPARTMENT OF LABOR**Employee Benefits Security Administration**

RIN 1210–zA05

[Application No. D–11201]

Proposed Class Exemption for Services Provided in Connection With the Termination of Abandoned Individual Account Plans**AGENCY:** Employee Benefits Security Administration, Department of Labor.**ACTION:** Notice of proposed class exemption.

SUMMARY: This document contains a notice of a proposed class exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from certain taxes imposed by the Internal Revenue Code of 1986, as amended (the Code). If granted, the proposed class exemption would permit a “qualified termination administrator” (QTA) of an individual account plan that has been abandoned by its sponsoring employer to select itself or an affiliate to provide services to the plan in connection with the termination of the plan, and to pay itself or an affiliate fees for those services. The proposed exemption also would permit a qualified termination administrator of an abandoned plan to: Designate itself or an affiliate as provider of an individual retirement plan or other account; select a proprietary investment product as the initial investment for the rollover distribution of benefits for a participant or beneficiary who fails to make an election regarding the disposition of such benefits; and pay itself or its affiliate fees in connection therewith. This exemption is being proposed in connection with the Department’s proposed regulation to be promulgated at 29 CFR 2578, relating to the Termination of Abandoned Individual Account Plans, and 2550.404a–3, relating to the Safe Harbor For Rollover Distributions from Terminated Individual Account Plans, which are being published simultaneously in this issue of the **Federal Register**. The proposed exemption, if granted, would affect individual account plans, the participants and beneficiaries of such plans, certain plan service providers, and the fiduciaries of such plans.

DATES: Written comments and requests for a public hearing on the proposed exemption shall be submitted to the Department on or before May 9, 2005.

ADDRESSES: All written comments and requests for a public hearing (preferably three (3) copies) concerning the proposed class exemption should be sent to: U.S. Department of Labor, Employee Benefits Security Administration, Room N–5649, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Plan Termination Class Exemption Proposal. Comments and requests for a hearing alternatively may be sent by fax to (202) 219–0204 or submitted electronically to moffitt.betty@dol.gov by the end of the comment period. All comments received will be available for public inspection in EBSA’s Public Documents Room, N–1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Brian Buyniski, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Washington, DC 20210, (202) 693–8540. This is not a toll free number.

SUPPLEMENTARY INFORMATION: This document contains a notice that the Department is proposing a class exemption from the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1) and (b)(2) of the Act 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. The exemption proposed herein is being proposed by the Department on its own motion pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR 2570, subpart B (55 FR 32836, August 10, 1990).¹

Executive Order 12866

Under Executive Order 12866, the Department must determine whether the 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), the order defines a “significant regulatory action” as 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.

It has been determined that the proposed exemption is significant for “raising novel policy issues” under section 3(f)(4) of the Executive Order. Accordingly, the proposed exemption has been reviewed by OMB.

The proposed class exemption is being published concurrently with a proposed regulation entitled, “Termination of Abandoned Individual Account Plans.” The proposed exemption permits a QTA of an individual account plan that has been abandoned by its sponsoring employer to select itself or an affiliate to provide services to the plan in connection with the termination of the plan, and to pay itself or an affiliate fees for those services, provided that such fees are consistent with the conditions of the proposed exemption. The proposed exemption would also permit a QTA to: Designate itself or an affiliate as a provider of an individual retirement plan or other account; select a proprietary investment product as the initial investment for the rollover distribution of benefits for a participant or beneficiary who fails to make an election regarding the disposition of such benefits; and, pay itself or its affiliate in connection with the rollover. The Department has assumed that all QTAs will take advantage of the proposed class exemption.

The proposed exemption would provide conditional relief for QTAs that terminate and wind up the affairs of plans that have been abandoned by the plan sponsor. Because compliance with the proposed regulation is a condition of the proposed exemption, the proposed exemption will only be used in connection with the proposed regulation. In general, the costs and benefits that may be associated with compliance with the proposed exemption have been described and quantified in connection with the economic impact of the proposed regulation.

Certain other costs may be incurred in connection with the conditions of the proposed exemption by QTAs that

¹ Section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996) generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor.

For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

select their own proprietary products or those of an affiliate for investment of individual retirement plans and other accounts. These costs would not otherwise be incurred by the QTA absent the conditions of the prohibited transaction exemption. For example, a QTA that rolls over an individual account from an abandoned plan into an individual retirement plan is not permitted, under the exemption, to charge a sales commission in connection with the investment product. In addition, the Regulated Financial Institution is limited with regard to certain fees and expenses that may be charged against the individual retirement plan or other account. Foregone commissions and fees may correspond to costs for some Regulated Financial Institutions.

The Department has no basis for estimating the impact of the wide array of factors that could affect these particular costs, such as the amount of fees or expenses that might not be fully charged to the individual retirement plans or other accounts, the extent to which QTAs will use one or more proprietary products, the number of account balances that could be rolled over into individual retirement plans or other accounts, or the aggregate effect of unpaid sales commissions. Therefore, the Department has not estimated a cost for these provisions of the proposed exemption. However, QTAs are in no event required to make use of individual retirement plans or other accounts offered by the QTA or an affiliate. In any case, it is likely that a QTA will use its own or an affiliate's individual retirement plans or accounts and investment products only if it is financially beneficial to do so, for example, as a way to retain deposits and increase earnings.

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.

The proposed exemption, if granted, will only be used by certain QTAs that

also take advantage of the proposed regulation on Termination of Abandoned Individual Account Plans, if finalized, published elsewhere in this issue of the **Federal Register**. The Department has combined the burdens for the two proposed rules, along with the burden for the proposed regulation, Safe Harbor for Rollover Distributions From Terminated Individual Account Plans, also published today, under one Information Collection Request (ICR). By combining the three collections of information, the Department believes that the general public will gain a better understanding of the burden impact as it relates to terminating plans. The specific burden for the proposed exemption includes a recordkeeping requirement for a QTA that terminates an abandoned plan and chooses to roll over the account balances of missing or nonresponsive participants into individual retirement plans offered by the QTA or an affiliate of the QTA. The hour and cost burdens for the ICR are described more fully in the preamble to the proposed regulation, Termination of Abandoned Individual Account Plans under the section on The Paperwork Reduction Act.

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 as 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 these 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 that a Federal court appoint an independent fiduciary to manage, terminate, and distribute the assets of the plan.

During 2002, the ERISA Advisory Council created the Working Group on Orphan Plans to study the causes and extent of 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*, 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 "plan 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.

Having carefully considered the recommendations of the Advisory Council, as well as the comments of the various parties testifying before the Council's Working Group on Orphan Plans, the Department is publishing in this issue of the **Federal Register** proposed regulations addressing these issues to be codified at 29 CFR parts 2550 and 2578 (Termination of Abandoned Individual Account Plans). One proposed regulation would establish a regulatory framework pursuant to which financial institutions and other entities holding the assets of an abandoned individual account plan can take action to terminate the plan and distribute benefits to the plan's participants and beneficiaries, with limited liability. The other proposed regulation would establish a simplified method for filing a special terminal report for abandoned individual account plans. Lastly, the third regulation would provide a safe harbor for rollover distributions from all terminated plans, whether abandoned or not, on behalf of participants who fail to elect a specific distribution.

The Department notes that a trustee or issuer of an individual retirement plan within the meaning of section 7701(a)(37) of the Code that qualifies under the proposed Termination of Abandoned Individual Account Plans regulation (hereinafter the QTA Regulation) as a "qualified termination administrator"² may select itself or an affiliate to provide termination services to the plan which will result in the receipt of compensation by the QTA or its affiliate. Moreover, if a participant or beneficiary of the abandoned plan fails to make a timely election as to the form of distribution of his or her benefits pursuant to the proposed QTA Regulation, the QTA will be required to distribute the participant's or beneficiary's benefits in the form of a direct rollover into an individual retirement plan, or to an account (other than an individual retirement plan in the case of a rollover on behalf of a non-spousal beneficiary), if the abandoned

plan was intended to be in compliance with section 401(a) of the Code.

If the QTA is a financial institution or an affiliate of a financial institution, and is eligible to establish and maintain individual retirement plans, it may designate itself or its affiliate as the individual retirement plan provider or other account provider. In addition, the QTA may invest the rollover distribution in the individual retirement plan or other account into a proprietary investment product.

In this regard, section 406(a)(1) of the Act prohibits in part, a fiduciary of a plan from causing the plan to engage in a transaction that constitutes a direct or an indirect sale, exchange or leasing of any property between the plan and a party in interest; lending of money or other extension of credit between the plan and a party in interest; furnishing of goods, services, or facilities between the plan and a party in interest; and a transfer to, or use by or for the benefit of, a party in interest of any assets of the plan. Section 406(b)(1) and (b)(2) of the Act prohibits a fiduciary with respect to a plan from dealing with the assets of the plan in his own interest or for his own account; and from acting in his individual or in any other capacity in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

A violation of section 406(a) and/or (b) of the Act may occur if the QTA determines to pay itself or an affiliate for services rendered to the plan from the assets of an abandoned plan. Also, additional violations may occur if the QTA designates itself or an affiliate as the provider of an individual retirement plan or other account established for the benefit of participants and beneficiaries who do not make an election as to the form of distribution. Finally, a prohibited transaction may occur if the QTA determines to invest the rollover distribution in the QTA's own proprietary investment product.

Section 408(b)(2) of the Act provides a conditional statutory exemption for the provision of services by a party in interest to a plan and the payment of reasonable compensation to the party in interest. However, section 408(b)(2) of the Act does not provide relief from the prohibitions described in section 406(b) of the Act.³

The Department, therefore, is proposing this class exemption which, if granted, would provide conditional relief for a QTA of an abandoned individual account plan to use its

authority to select itself or an affiliate to provide services in connection with the termination of the plan, and to pay itself or an affiliate fees for the services performed. With respect to the participants and beneficiaries who failed to elect a distribution option, the proposed exemption also would permit a qualified termination administrator of an abandoned individual account plan to designate itself or an affiliate as an individual retirement plan provider or other account provider and to select the QTA's (or an affiliate's) proprietary investment product for rollover distributions of the benefits of a participant or beneficiary. Lastly, the proposal would provide relief for the QTA to pay itself or its affiliate fees in connection with such transactions.

Description of the Proposed Exemption

Section I describes the transactions that are covered by the proposed exemption. Under section I(a), relief is provided from the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, for a "qualified termination administrator" within the meaning of section V(a) of this proposed exemption, to use its authority in connection with the termination of an abandoned individual account plan to select itself or an affiliate to provide services to the plan and to pay itself or an affiliate fees for services provided as a QTA.

Under section I(b), the proposed exemption provides relief from the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, for a QTA, to use its authority in connection with the termination of an abandoned individual account plan to: (i) Designate itself or an affiliate as provider of an individual retirement plan or other account to receive the account balance of a participant that does not provide direction as to the disposition of such assets, (ii) make the initial investment of the distributed proceeds in a proprietary investment product, (iii) receive fees in connection with the establishment or maintenance of the individual retirement plan or other account, and (iv) receive investment fees as a result of the investment of the individual retirement plan or other account's assets in a proprietary investment product in which the QTA or an affiliate has an interest.

² See proposed regulation 29 CFR 2578.1(g), which states that an eligible qualified termination administrator is qualified only if it holds assets of the plan that is considered abandoned and if it is eligible to serve as an individual retirement plan trustee or issuer under section 7701(a)(37) of the Code.

³ See 29 CFR section 2550.408b-2(e).

The following conditions would apply to a transaction described in section I(a) of the proposed exemption. The QTA must comply with the requirements of the proposed QTA Regulation, which is published elsewhere in this issue of the **Federal Register**.

Under the proposal, fees and expenses paid to the QTA and its affiliate: (i) Are consistent with industry rates for such or similar services, based on the experience of the QTA, and (ii) are not in excess of rates charged by the QTA (or its affiliate) for the same or similar services provided to customers that are not individual account plans terminated pursuant to the proposed QTA Regulation, if the QTA (or its affiliate) provides the same or similar services to such other customers. The reference to "industry rates" and "based on the experience of the QTA" is intended to enable a QTA, who possesses knowledge about the services needed for a plan termination and industry rates for such or similar services, to engage or retain itself, an affiliate, and other service providers without going through a potentially timely and costly bidding process. By permitting QTAs to rely on their own industry expertise, the Department believes QTAs can minimize plan termination costs and, thereby, maximize the benefits payable to a plan's participants and beneficiaries.

The following conditions would apply to a transaction described in I(b) of the proposed exemption. The conditions of the proposed QTA Regulation must be met. The QTA must also inform the participant or beneficiary in the notice required by the proposed QTA Regulation that: (1) Absent his or her election within the 30-day period from receipt of the notice to be provided by the QTA to inform participants of their election options, the QTA will directly roll over the account balance of the participant or beneficiary to an individual retirement plan or other account offered by the QTA or its affiliate; and (2) the account balance may be invested in the QTA's own proprietary investment product, which is designed to preserve principal and provide a reasonable rate of return and liquidity.

Under the proposal, the individual retirement plan or other account must be established and maintained for the exclusive benefit of the individual retirement plan or other account holder, his or her spouse or their beneficiaries.

The terms of the individual retirement plan or other account, including the fees and expenses for establishing and maintaining the individual retirement

plan or other account, must be no less favorable than those available to comparable individual retirement plans or other accounts established for reasons other than the receipt of a rollover distribution described in the proposed QTA Regulation.

The proposal requires that the distribution must be invested in an Eligible Investment Product, as defined in section V(c) of this proposed exemption. The rate of return or the investment performance received by the individual retirement plan or other account from an investment product must be no less than that received by comparable individual retirement plans or other accounts that are not established pursuant to the proposed QTA Regulation but are invested in the same product. For example, the rate of return received by the individual retirement plan for an investment in a one-year certificate of deposit which is an Eligible Investment Product cannot be less than the rate of return received by an individual retirement plan or other account established for reasons other than the receipt of a rollover distribution that is invested in an identical one-year certificate of deposit.

The proposal does not permit the individual retirement plan or other account to pay a sales commission in connection with the acquisition of an Eligible Investment Product.

Under the proposed exemption, the individual retirement plan or other account holder must be able to, within a reasonable period of time after his or her request and without penalty to the principal amount of the investment, transfer his or her individual retirement plan or other account balance to a different investment offered by the QTA or its affiliate. Also, the individual retirement plan holder may transfer his or her individual retirement plan balance to an individual retirement plan sponsored by a different financial institution. Similarly, the other account holder may transfer his or her account balance to another account sponsored by a different financial institution.

Under the proposal, fees and expenses attendant to the individual retirement plan or other account, including the investment of the assets of such plan or account, (e.g., establishment charges, maintenance fees, investment expenses, termination costs, and surrender charges) must not exceed the fees and expenses charged by the QTA for comparable individual retirement plans or other accounts established for reasons other than the receipt of a rollover distribution made pursuant to the proposed QTA regulation. Additionally, fees and expenses attendant to the

individual retirement plan or other account, other than establishment charges, may be charged only against the income earned by the individual retirement plan or other account. Finally, fees and expenses shall not exceed reasonable compensation within the meaning of section 4975(d)(2) of the Code.

Section IV of the proposed exemption contains a recordkeeping requirement. The QTA must maintain records to enable certain persons to determine whether the applicable conditions of the class exemption have been met. The records must be available for examination by the IRS, the Department, and any account holder or duly authorized representative of such account holder of an individual retirement plan or other account, for at least six years from the date the QTA provides notice to the Department of its determination of plan abandonment and its election to serve as the QTA.

Lastly, section V of the proposed exemption contains certain definitions. The term "qualified termination administrator" is defined in section V(a) as an entity that is eligible to serve as a trustee or issuer of an individual retirement plan within the meaning of section 7701(a)(37) of the Code and that holds the assets of the abandoned plan.

The term "Eligible Investment Product" is defined in section V(c) to mean an investment product designed to preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with liquidity. In this regard, the product must be offered by a Regulated Financial Institution as defined in section V(d) and must 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. Such term includes money market funds maintained by registered investment companies, and interest-bearing savings accounts and certificates of deposit of a bank or similar financial institution. In addition, the term includes stable value products issued by a financial institution that are fully benefit-responsive to the individual retirement plan or other account holder. For purposes of this proposed class exemption, the term "benefit responsive" means a stable value product that provides a liquidity guarantee by a financially responsible third party of principal and previously accrued interest for liquidations or transfers initiated by the individual retirement plan or other account holder exercising his or her right to withdraw or transfer funds under the terms of an

arrangement that does not include substantial restrictions to the account holder's access to the individual retirement plan or other account assets.

The term "Regulated Financial Institution" is defined in section V(d) to mean an entity that: (i) Is subject to state or federal regulation, and (ii) is 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.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which require, among other things, that a fiduciary discharge his duties with respect to the plan solely in the interests of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act;

(2) Before an exemption may be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and protective of the rights of participants and beneficiaries of such plans;

(3) If granted, the proposed exemption will be applicable to a transaction only if the conditions specified in the exemption are met; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Written Comments

All interested persons are invited to submit written comments or requests for

a public hearing on the proposed exemption to the address and within the time period set forth above. All comments will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed exemption. Comments received will be available for public inspection with the referenced application at the above address.

Proposed Exemption

The Department has under consideration the grant of the following class exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

I. Transactions

(a) The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1) and 406(b)(2) of the Act, and 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, shall not apply to a QTA, (as defined in section V (a) of this proposed class exemption), using its authority in connection with the termination of an abandoned individual account plan pursuant to the proposed QTA Regulation to:

(1) Select itself or an affiliate to provide services to the plan, and

(2) Receive fees for the services performed as a QTA, provided that the conditions set forth in sections II and IV of this proposed exemption are satisfied.

(b) The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1) and 406(b)(2) of the Act, and 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, shall not apply to a QTA, using its authority in connection with the termination of an abandoned individual account plan pursuant to the proposed QTA Regulation to:

(1) Designate itself or an affiliate as provider of an individual retirement plan or, under the limited circumstances described in section (d)(1) of the Rollover Safe Harbor Regulation for Terminated Plans (20 CFR 2550.404a-3) as provider of an account (other than an individual retirement plan) for the rollover of the account balance of the participant or beneficiary of the abandoned individual account plan who does not provide direction as to the disposition of such assets;

(2) Make the initial investment of the account balance of the participant or

beneficiary in the QTA's or its affiliate's proprietary investment product;

(3) Receive fees in connection with the establishment or maintenance of the individual retirement plan or other account; and

(4) Pay itself or an affiliate investment fees as a result of the investment of the individual retirement plan or other account assets in the QTA's or its affiliate's proprietary investment product, provided that the conditions set forth in sections III and IV of this exemption are satisfied.

II. Conditions for Provision of Termination Services and Receipt of Fees in Connection Therewith

(a) The requirements of the proposed QTA Regulation are met. The QTA provides, in a timely manner, any other reasonably available information requested by the Department regarding the proposed termination.

(b) Fees and expenses paid to the QTA, and its affiliate, in connection with the termination of the plan and the distribution of benefits:

(1) Are consistent with industry rates for such or similar services, based on the experience of the QTA, and

(2) Are not in excess of rates charged by the QTA (or affiliate) for the same or similar services provided to customers that are not plans terminated pursuant to the proposed QTA regulation, if the QTA (or affiliate) provides the same or similar services to such other customers.

III. Conditions for Rollover Distributions

(a) The conditions of the proposed QTA Regulation are met.

(b) In connection with the notice to participants and beneficiaries described in the proposed QTA Regulation, a statement explaining that:

(1) If the participant or beneficiary fails to make an election within the 30-day period referenced in the proposed QTA Regulation, the QTA will directly roll over the account balance to an individual retirement plan or other account offered by the QTA or its affiliate;

(2) The proceeds of the distribution may be invested in the QTA's (or affiliate's) own proprietary investment product, which is designed to preserve principal and provide a reasonable rate of return and liquidity.

(c) The individual retirement plan or other account is established and maintained for the exclusive benefit of the individual retirement plan account holder or other account holder, his or her spouse or their beneficiaries.

(d) The terms of the individual retirement plan or other account,

including the fees and expenses for establishing and maintaining the individual retirement plan or other account, are no less favorable than those available to comparable individual retirement plans or other accounts established for reasons other than the receipt of a rollover distribution described in the proposed QTA Regulation.

(e) The distribution proceeds are invested in an Eligible Investment Product(s), as defined in section V(c) of this proposed class exemption.

(f) The rate of return or the investment performance of the individual retirement plan or other account is no less favorable than the rate of return or investment performance of an identical investment(s) that could have been made at the same time by comparable individual retirement plans or other accounts established for reasons other than the receipt of a rollover distribution described in the proposed QTA Regulation.

(g) The individual retirement plan or other account does not pay a sales commission in connection with the acquisition of an Eligible Investment Product.

(h) The individual retirement plan account holder or other account holder may, within a reasonable period of time after his or her request and without penalty to the principal amount of the investment, transfer his or her account balance to a different investment offered by the QTA or its affiliate. The individual retirement plan account holder may also transfer his or her balance to an individual retirement plan sponsored at a different financial institution or in the case of an other account holder, to an account sponsored at a different financial institution.

(i)(1) Fees and expenses attendant to the individual retirement plan or other account, including the investment of the assets of such plan or account, (e.g., establishment charges, maintenance fees, investment expenses, termination costs, and surrender charges) shall not exceed the fees and expenses charged by the QTA for comparable individual retirement plans or other accounts established for reasons other than the receipt of a rollover distribution made pursuant to the proposed QTA Regulation;

(2) Fees and expenses attendant to the individual retirement plan or other account, with the exception of establishment charges, may be charged only against the income earned by the individual retirement plan or other account; and

(3) Fees and expenses attendant to the individual retirement plan or other

account are not in excess of reasonable compensation within the meaning of section 4975(d)(2) of the Code.

IV. Recordkeeping

(a) The QTA maintains or causes to be maintained, for a period of six (6) years from the date the QTA provides notice to the Department of its determination of plan abandonment and its election to serve as the QTA described in the proposed QTA Regulation, the records necessary to enable the persons described in paragraph (b) of this section to determine whether the applicable conditions of this exemption have been met. Such records must be readily available to assure accessibility by the persons identified in paragraph (b) of this section.

(b) Notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (a) of this section are unconditionally available at their customary location for examination during normal business hours by—

(1) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service; and

(2) Any account holder of an individual retirement plan or other account established pursuant to this exemption, or any duly authorized representative of such account holder.

(c) A prohibited transaction will not be considered to have occurred if the records necessary to enable the persons described in paragraph (a) to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the QTA, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records, and no party in interest other than the QTA shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by sections 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (b).

(3) None of the persons described in paragraph (b)(2) of this section shall be authorized to examine the trade secrets of the QTA or its affiliates or commercial or financial information that is privileged or confidential.

V. Definitions

(a) A termination administrator is “qualified” for purposes of the proposed QTA Regulation and this proposed exemption if:

(1) The QTA is eligible to serve as a trustee or issuer of an individual retirement plan or other account, within the meaning of section 7701(a)(37) of the Code, and

(2) The QTA holds plan assets of the plan that is considered abandoned.

(b) The term “individual retirement plan” means an individual retirement plan described in section 7701(a)(37) of the Code. For purposes of this exemption, the term individual retirement plan shall not include an individual retirement plan which is an employee benefit plan covered by Title I of ERISA.

(c) The term “Eligible Investment Product” means an investment product designed to preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with liquidity. For this purpose, the product must be offered by a Regulated Financial Institution as defined in paragraph (d) of this section and 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. Such term includes money market funds maintained by registered investment companies, and interest-bearing savings accounts and certificates of deposit of a bank or similar financial institution. In addition, the term includes “stable value products” issued by a financial institution that are fully benefit-responsive to the individual retirement plan account holder or other account holder, *i.e.*, that provide a liquidity guarantee by a financially responsible third party of principal and previously accrued interest for liquidations or transfers initiated by the individual retirement plan account holder or other account holder exercising his or her right to withdraw or transfer funds under the terms of an arrangement that does not include substantial restrictions to the account holder access to the individual retirement plan or other account’s assets.

(d) The term “Regulated Financial Institution” means an entity that: (i) Is subject to state or federal regulation, and (ii) is 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.

(e) An “affiliate” of a person includes:

(1) Any person directly or indirectly controlling, controlled by, or under common control with, the person; or

(2) Any officer, director, partner or employee of the person.

(f) The term “control” means the power to exercise a controlling

influence over the management or policies of a person other than an individual.

(g) The term “individual account plan” means an individual account plan as that term is defined in section 3(34) of the Act.

Signed at Washington, DC, this 23rd day of February, 2005.

Ivan L. Strasfeld,

*Director of Exemption, Determinations,
Employee Benefits Security Administration,
U.S. Department of Labor.*

[FR Doc. 05-4465 Filed 3-9-05; 8:45 am]

BILLING CODE 4510-29-P