0007

AMERICAN BENEFITS COUNCIL

May 9, 2005

RECEIVED
OFFICE OF REGULATIONS
AND INTERPRETATIONS
2005 MAY -9 PM 3:51

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210
Attention: Abandoned Plan Regulation

**Re: Comment on Proposed Rule Concerning Termination of Abandoned Individual Account Plans**

Sir or Madam:

The American Benefits Council (Council) appreciates the opportunity to comment on the proposed regulations concerning termination of abandoned plans published by the Employee Benefits Security Administration (EBSA) in the Federal Register on March 10, 2005. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

We would like to start by applauding the EBSA for proposing rules on the growing problem of abandoned or orphaned plans. Many plan participants have been frustrated when they are unable to obtain a distribution of their benefits because their former employer, the sponsor of the plan, cannot be found or is otherwise unable to maintain the plan. In order to facilitate use of this process, the Council recommends that EBSA make certain changes and additions as well as address several areas not already mentioned in the proposed regulations. We believe these modifications will result in the termination of more abandoned/orphaned plans.

The proposed regulations generally provide rules under which qualified termination administrators (QTAs) can determine that a plan has been abandoned and ultimately pay out benefits to participants and beneficiaries. The regulations establish specific procedures the QTAs must follow including (1) notifying EBSA before and after terminating and winding up the plan, (2)

locating and updating plan records, (3) calculating benefits payable to participants and beneficiaries, (4) notifying participants and beneficiaries of the termination and their rights and options, (5) distributing benefits to participants and beneficiaries, and (6) filing a summary terminal report. The proposed rule also provides a safe harbor for the investment of rollover distributions from terminated plans to Individual Retirement Accounts (IRAs) for missing participants that applies both to abandoned plans as well as plans terminated by the original plan fiduciaries.

The Council believes certain changes to the process will make it more likely that QTAs will choose to use the guidance to terminate abandoned plans. The Council recommends changes and additions in the following general areas: (1) definition of QTA, (2) fiduciary responsibilities, (3) need for small account exception and fee issues (fee issues are addressed in more detail in our comment letter on the proposed class exemption), (4) distribution options and joint and survivor annuity requirements, (5) long-abandoned plans and qualification requirements, and (6) notices to participants. These recommendations are discussed below in more detail.

Definition of QTA

Determination of whether a plan has been abandoned, and all the activities necessary to terminate and wind up the abandoned plan, can only be performed by a QTA under the proposed regulation. A QTA is defined as an entity or person eligible to serve as a trustee or issuer of an individual retirement plan that holds assets of the abandoned plan. The proposed regulations ask for comments on whether, and how, the definition of a QTA should be expanded to other parties. The Council believes that the definition should be expanded to include independent recordkeepers that meet the requirements outlined below.

Generally, in the retirement plan recordkeeping industry, recordkeepers are either affiliated with a mutual fund complex, insurance company or bank or other financial institution that can both hold tax qualified defined contribution retirement plan assets and serve as trustee or custodian of an individual retirement plan, or they are independent and have assembled a "bundled" service offering for clients through relationship agreements with such institutions. The current definition of QTA covers the former group but not the latter.

For independent recordkeepers, the recordkeeper bears the burden of continuing to recordkeep abandoned plans, while the trustees and custodians that hold the plan assets generally rely on the recordkeeper to do their recordkeeping and provide most administrative services. As a business matter, independent recordkeepers need to distribute these plans' assets, but the trustees/custodians

holding the assets have no incentive to become QTAs and, in fact, may not wish to become an IRA provider (or arrange for an IRA provider) for such plans. (A number of institutional trustees and custodians serve institutional investors and do not include "retail" arrangements such as IRAs or investment vehicles for individual investors among their service offerings.)

Independent recordkeepers are better positioned than a trustee or custodian to perform the administrative tasks necessary to shutdown orphaned plans, because they hold the plans' records, and have the systems, procedures and personnel in place necessary to terminate and distribute benefits from a plan. The regulations should be revised to permit retirement plan recordkeepers to serve as QTAs – but in a manner that shields them from fiduciary status, as discussed below.

The Council suggests that EBSA establish a mechanism whereby an independent recordkeeper can apply to the Department of Labor (DOL) to be a QTA (and make clear that the recordkeeping affiliates of QTAs as defined in the proposed regulation can become QTAs as well). The DOL would establish the required application information. Once the DOL approves an independent recordkeeper as a QTA, it could serve so long as the conditions set forth by the DOL are met. The independent recordkeeper would be required to notify the DOL promptly if at any time it no longer met any such condition, and would not be permitted to act as a QTA for any plan it was not already in the process of winding up at the time the notice is given. We would propose that the DOL provide for one or more of the following conditions for an independent recordkeeper to serve as a QTA, which the recordkeeper would be required to document in its DOL application:

(1) The recordkeeper meets a net worth test and/or "assets under administration" test specified by the DOL (similar in concept to that contained in Prohibited Transaction Class Exemption 84-14).

(2) The recordkeeper has a substantial relationship with one or more institutions that hold the assets of plans as custodian or trustee.

(3) The custodian or trustee offers or makes available IRAs for non-responding participants, or the recordkeeper has an agreement with an independent third party provider of IRAs making them available.

Fiduciary Responsibilities

The proposed regulations would require QTAs to take on certain fiduciary responsibilities and the resulting potential liability in order to terminate a plan. In addition to the specific procedures outlined in the third paragraph of this

comment letter, the QTA would be required to (1) attempt to locate or communicate with the known plan sponsor, (2) find lost participants and use the rollover safe harbor for participants still missing after diligent and reasonable efforts, (3) select and monitor service providers, (4) enter into agreements with IRA providers, and (5) ensure that appropriate notices are provided to plan participants.

Virtually all retirement plan recordkeeping and administrative service providers – indeed, many institutional trustees – structure their service model so they are not acting in a discretionary capacity and thus are not plan fiduciaries. These entities are not likely to take on a process that commences or increases their potential fiduciary liability. The Council recommends the abandoned plan guidance provide stronger protection so the actions necessary to terminate a plan and distribute its assets would not constitute fiduciary functions when undertaken within the scope of, and in the manner prescribed by, the abandoned plan program.

In addition, independent recordkeepers often receive asset-based fees from investment options, which could be construed to be a prohibited transaction were the independent recordkeepers to take on the role of QTA. In order for an independent recordkeeper to serve as a QTA, EBSA would need to consider the issuance of further relief under its proposed prohibited transaction class exemption from the receipt of asset based fees by recordkeepers, particularly from section 406(b) of ERISA.

Small Account Exception and Fees

The Council recommends the proposed rule be amended to allow distribution through (1) establishment of an interest-bearing federally insured bank account, or (2) payment into state unclaimed property funds, if the QTA is unable to find a willing IRA provider for certain accounts.

Both Congress and the DOL clearly recognize that plans would find it difficult to find providers willing to set up individual retirement accounts for small amounts. Congress recognized the problem by limiting the automatic rollover requirements to amounts of at least $1,000. The DOL recognized this issue in Field Assistance Bulletin 2004-02 on the fiduciary duties related to missing participants in terminated defined benefit plans that are not abandoned:

> If a plan fiduciary is unable to locate an individual retirement plan provider that is willing to accept a rollover distribution on behalf of a missing participant, plan fiduciaries may consider either establishing an interest-bearing federally insured bank account in the name of a missing

participant or transferring missing participants' account balances to state unclaimed property funds.

The Council also recommends that EBSA clarify the type of account that can be used for a distribution to a non-spouse beneficiary. Presumably, these "rollovers" for non-spouse beneficiaries, as well as the other non-IRA rollover distributions described above would actually be taxable distributions.

In addition, as discussed in more detail in the Council's comment letter on the proposed class exemption, the Council recommends eliminating the requirement that fees and expenses be no more than the income earned by the IRA if the IRA is provided by the QTA. In many cases, the QTA may be unable to find any IRA provider willing to set up the accounts (especially for small amounts as discussed above). The proposed rule and exemption already provides that fees and expenses cannot exceed fees and expenses charged by the provider for comparable IRAs. A rule also limiting the QTA's IRA fees to the income earned by the IRA may eliminate the only viable IRA provider for the plan.

Distribution Options and QJSA

The Council recommends that EBSA consider limiting distributions for missing or otherwise non-responsive participants and beneficiaries to the three options outlined above under Small Account Exception and Fees (IRA rollover, insured bank account or state abandoned property) and, in consultation with the Internal Revenue Service, clarify that (1) such a distribution will not violate any qualified joint and survivor annuity rules under the plan, and (2) the IRA provider is not required to provide survivor annuity protections on distribution from the IRA that would have applied on distribution from the plan had the participant responded to the distribution notice at that time.

Furthermore, to encourage use of the process, the Council recommends that options available upon termination of the plan be limited to a lump-sum distribution or purchase of a deferred annuity if the plan is subject to the joint and survivor annuity requirements. This would eliminate the need to describe the plan's other distribution options and is similar to the treatment now permitted upon plan termination for a non-abandoned plan.

Long-Abandoned Plans

The proposed regulations require that a plan be intended to be qualified, even if the plan is not operationally qualified at the time of the termination and rollover. The Council recommends that EBSA clarify that plans abandoned for many years, and therefore not amended to reflect many statutory and regulatory requirements, are intended to be qualified. Some providers service abandoned

plans that may no longer be qualified in form because no representative of the plan sponsor was available to execute a plan restatement for GUST, for example.

The Council does appreciate, however, EBSA's likely concern that plan sponsors should not be encouraged to abandon their plans in these and other circumstances. We recommend the preamble to the final regulations contain language pointing out the employer's responsibilities in this area.

Notices to Participants

The proposed regulations would require that the notice to participants include a statement of the account balance, the date it was calculated, and a caveat that the actual value may vary. A significant amount of programming would be required to produce a notice with this sort of "live" information which is often readily available on a voice-response system or website.

The Council recommends the final regulations include an exception to this requirement if the participants and beneficiaries can access a voice response system or website providing them with this information. The participants/beneficiaries should be notified both how they can access the information (via telephone or the Internet) and that they can request via telephone a written statement of their account balance.

The Council also recommends using a "mailbox rule" to provide certainty with respect to the 30-day notice requirement. The proposed regulations would require the notice to participants to include a statement that if a participant fails to make an election within 30 days from "receipt" of the notice, the QTA will rollover the account balance. The QTA has no way to know when – or whether, for that matter – a participant or beneficiary received the participant notice. Common practice for other notices allows the notice to use the date the notice will be mailed and require a response within a certain number of days after the date on the notice (e.g., 33 days after the date of mailing).

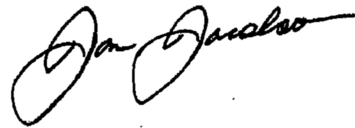
The Council also suggests that EBSA clarify that certain notices required under the regulation can be provided together in one notice. QTAs should be allowed to combine the participant termination of the plan notice required by 2578.1(d)(2)(v) with the safe harbor rollover notice required by Reg. Section 2550.404a-3. The Council also recommends extending the deadline for filing the final notice required by 2578.1(d)(2)(viii) and terminal notice required by 2520-103-13 to the end of the 3rd or 4th month after final distributions. A two-month deadline will be difficult for some QTAs to meet.

Finally, the Council recommends that EBSA clarify that an objection of the plan sponsor to a determination of plan abandonment must be made in writing, and

should include an acknowledgement that the plan sponsor will either fulfill its responsibilities to the plan on an ongoing basis or the plan sponsor will begin the termination process. Otherwise, a simple phone call to the QTA or a side comment could be interpreted as an objection while the plan sponsor continues to "abandon" the plan.

Again, we appreciate the opportunity to comment on these proposed regulations. If additional information from us would be helpful, please do not hesitate to contact me.

Sincerely,



Jan M. Jacobson
Director, Retirement Policy
American Benefits Council