



# Federal Register

---

**Friday,  
April 21, 2006**

---

**Part V**

## **Department of Labor**

---

**Employee Benefits Security  
Administration**

---

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

**DEPARTMENT OF LABOR****Employee Benefits Security Administration**

[ZRIN 1210–ZA05; Prohibited Transaction Exemption 2006–06; Application No. D–11201]

**Class Exemption for Services Provided in Connection With the Termination of Abandoned Individual Account Plans**

**AGENCY:** Employee Benefits Security Administration, Department of Labor.

**ACTION:** Grant of class exemption.

**SUMMARY:** This document contains a final 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). The exemption permits 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, to pay itself or an affiliate fees for those services, and to pay itself for services provided prior to the plan’s deemed termination. The exemption also permits a qualified termination administrator of an abandoned plan to: (1) Designate itself or an affiliate as the provider of an individual retirement plan or other account for the distribution of a participant or beneficiary who fails to make an election regarding the disposition of such benefits; (2) select a proprietary investment product as the initial investment for such plan or account; (3) provide a federally insured bank or savings association account for small distributions; and (4) pay itself or its affiliate fees in connection therewith. This exemption is being granted in connection with the Department’s final regulation at 29 CFR 2578.1, relating to the Termination of Abandoned Individual Account Plans, the Department’s final regulation at 29 CFR 2550.404a–3, relating to the Safe Harbor for Distributions From Terminated Individual Account Plans, and the Department’s final regulation at 29 CFR 2520.103–13, relating to the Terminal Report for Abandoned Individual Account Plans, which are being published simultaneously in this issue of the **Federal Register**. The exemption will affect individual account plans, the participants and beneficiaries of such plans, certain plan service providers, and the fiduciaries of such plans.

**DATES:** *Effective Date:* The class exemption is effective May 22, 2006.

**FOR FURTHER INFORMATION CONTACT:**

Brian Buyniski, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, Washington, DC 20210, (202) 693–8545. This is not a toll free number.

**SUPPLEMENTARY INFORMATION:** On March 10, 2005, the Department published a notice in the **Federal Register** (70 FR 12074) of the pendency of a proposed 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 Department proposed the class exemption 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 part 2570, subpart B (55 FR 32836, August 10, 1990).<sup>1</sup>

The notice of pendency gave interested persons an opportunity to comment or request a public hearing on the proposal. Five (5) public comments were received by the Department. No requests for a public hearing were received. Upon consideration of the comments received, the Department has determined to grant the proposed class exemption subject to certain modifications. These modifications and the comments are discussed below.

**Executive Order 12866**

Under Executive Order 12866, the Department must determine whether a regulatory action is “significant” and therefore subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Under section 3(f), 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

<sup>1</sup> 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 exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

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

This exemption is being published simultaneously with a group of three regulatory actions (the Abandoned Plan Regulations) that are also being issued in final form. In the Department’s view, the conditional relief provided by the exemption is necessary in order to effectuate the purposes underlying the Abandoned Plan Regulations. Accordingly, the Department’s basic statement regarding the economic benefits and costs of encouraging efficient, effective termination of abandoned plans, which is described in detail in the preamble to the Abandoned Plan Regulations, published elsewhere in this issue of the **Federal Register**, applies equally to this exemption. The following provides more specific analysis of the exemption and its specific economic costs and benefits.

The purpose of the Abandoned Plan Regulations is to facilitate the orderly, efficient termination of abandoned individual account plans in order to give participants and beneficiaries of those plans access to the amounts held in their individual accounts, which are frequently unavailable to them because of the abandonment. The relief provided by the exemption facilitates this goal by permitting a QTA, under the conditions of the exemption, to select itself or an affiliate to provide services to the plan, to pay itself or an affiliate fees for those services, and to pay itself fees for services provided prior to the plan’s deemed termination, in connection with terminating the abandoned plan. Without the availability of the exemptive relief, QTAs and their affiliates would be unable to use plan assets as a source of compensation for their services; since those plan assets are usually the only available source of payment, QTAs would be highly unlikely to undertake abandoned plan terminations.

The exemption also permits a QTA to designate itself or an affiliate as the provider of an individual retirement plan or other account for distributions of benefits for which the participant or beneficiary has failed to make an election; select a proprietary investment product as the initial investment for the distributed benefits of a participant or

beneficiary of a terminated plan who fails to make an election regarding the disposition of such benefits; provide federally insured bank or savings association accounts for small distributions of such benefits; and pay itself or its affiliate in connection with such distributions. By removing the barrier to use of proprietary or affiliated investment vehicles for distributions for which the participant or beneficiary has failed to make investment decisions, the exemption facilitates the winding-up of abandoned plan terminations. Because some proportion of the participants or beneficiaries in virtually every termination of an abandoned plan will fail to make decisions regarding the disposition of their benefits, QTAs will need to make distribution decisions for those benefits. Allowing QTAs to use their own or affiliated investment products to receive the distributions will accelerate and simplify the orderly termination and winding-up of a plan's affairs.

The exemption imposes certain conditions on use of proprietary or affiliated investments, including (1) the condition that fees other than establishment fees and expenses attendant to an individual retirement plan or account may be charged only against the income earned by the individual retirement plan or account and (2) the condition that no sales commissions may be imposed in connection with acquiring an Eligible Investment Product. The exemption also conditions relief for payment for services provided prior to a plan's deemed termination on the services' being provided in good faith pursuant to a written agreement and the QTA's providing the Department with a copy of the written agreement and a statement under penalty of perjury that such services were actually performed.

In response to comments on the proposed regulations concerning the limitations on fees, the Department has revised one of the Abandoned Plan Regulations (the QTA Regulation, discussed below under "Discussion of Comments Received") to permit QTAs to transfer certain small accounts to bank or savings association accounts or the unclaimed property fund of the relevant state, but has determined not to make further changes in the conditions imposed on transactions under the exemption. The Department believes that these conditions, which shape the transactions for which relief will be available, are justified by the protection they provide to participants and beneficiaries.

The conditions appropriately limit the extent to which a QTA may pay itself

or its affiliate. Although the conditions restrict the fees that QTAs and their affiliates may receive for their services, they protect against potential self-dealing and depletion of account balances. In these circumstances, the fee limitations substitute for an independent fiduciary's assessment of the value of using products or services of the QTA or its affiliate. Further, QTAs are not required to make use of proprietary or affiliated individual retirement plans or accounts, but are merely permitted by the exemption to choose voluntarily whether to do so. The Department believes that the fee limitations will encourage a QTA to make decisions regarding whether to use its own or an affiliate's individual retirement plans or accounts and investment products based not on the availability of a pool of assets for payment of fees, but on whether it will be in the best interests of the participants and beneficiaries to do so.

#### **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 respondents will be able to provide the requested data in the desired format; that the public understands the Department's collection instruments; that the Department minimizes the reporting burden it imposes, both in time and financial resources; and that the Department properly assesses the impact of its collection requirements on respondents.

Because QTAs that rely on the exemption are required, as a condition for the relief, to comply with the requirements of the Abandoned Plan Regulations, published elsewhere in this issue of the **Federal Register**, the Department has combined the paperwork burden arising from the exemption with the paperwork burden attributable to the Abandoned Plan Regulations, including specifically the QTA Regulation, the Safe Harbor for Distributions From Terminated Individual Account Plans, and the Terminal Report for Abandoned Individual Account Plans, under one Information Collection Request (ICR). By combining these 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 exemption includes a recordkeeping requirement for a QTA that terminates an abandoned plan and chooses to distribute the account balances of missing or nonresponsive participants into proprietary or affiliated individual retirement plans or accounts and a reporting requirement for a QTA that intends to pay itself for services provided to a plan prior to its deemed termination. The reporting requirement includes submitting to the Department a copy of the written agreement under which the services were provided, together with a representation, under penalty of perjury, that the services for which reimbursement is sought were in fact rendered. The hour and cost burdens for the ICR are described more fully in the preamble to the Abandoned Plan Regulations under the section on the Paperwork Reduction Act.

#### **Discussion of Comments Received**

The Department received five comment letters regarding the proposed class exemption.<sup>2</sup> Additionally, the Department received a number of comments in connection with the regulation relating to the Termination of Abandoned Individual Account Plans (the QTA Regulation) and the regulation relating to the Safe Harbor for Distributions from Terminated Individual Account Plans (the Safe Harbor Regulation). Interested persons should refer to these regulations, published elsewhere in this issue of the **Federal Register**, for a discussion of those comments.

The Department received several comments regarding the fees associated with the establishment of an account for participants and beneficiaries who fail to provide direction as to the disposition of their account balances. Two commenters requested that the Department eliminate the requirement in section III(i)(2) of the proposed exemption that 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.

The Department recognizes that the fee limitations in the class exemption may serve as a disincentive to a QTA providing an individual retirement plan for distributions from abandoned

<sup>2</sup> The Department received one request for a public hearing which was subsequently withdrawn by the commenter after the Department informed the commenter that the issues raised in the comment letter would be addressed in the final exemption.

individual account plans, particularly with respect to accounts with small balances.<sup>3</sup> In such cases, the QTA Regulation permits the distribution to be made to an interest-bearing federally insured bank account in the name of the participant or beneficiary, to the unclaimed property fund of the state in which the participant's or beneficiary's last known address is located, or to an individual retirement plan provided by an unrelated financial institution. In light of this modification to the QTA Regulation, the Department does not believe that further relief is warranted. However, the Department has determined to modify the final exemption to provide relief for a QTA (or its affiliate) that is a provider of an interest-bearing, federally insured bank or savings association account, to designate itself or its affiliate as provider of such an account for the distribution of the account balances of participants or beneficiaries who do not provide direction as to the disposition of such balances, and to receive fees in connection with the establishment and maintenance of such accounts for distributions \$1,000 or less.

A commenter also requested that the Department clarify that a one-time closing fee would be treated the same as an establishment fee which, under the exemption, is not limited to the amount of income earned by the account. The Department continues to believe that only establishment fees may be charged against the principal balance of the account. All other fees, including termination costs, can only be charged against the income earned.

The commenter further requested that the Department clarify whether an IRA owner's ability to transfer his or her account to a different institution must be made without penalty to principal. Section III(h) of the proposed exemption provided that the IRA owner 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 commenter asked for clarification of how this rule would apply if the transfer was made to a different financial institution. In response to this comment, the Department does not believe that a participant who determines to transfer his or her account balance to a different financial institution should be faced with a penalty deducted from the principal amount of the investment. Thus, the final exemption has been

clarified to provide that the IRA owner must be able to transfer his or her account balance to a different financial institution without penalty to the principal.

Several comments addressed the definitions contained in section V of the proposed exemption. One commenter recommended that the definition of "Eligible Investment Product" be expanded to permit investments in lifestyle, retirement date and other balanced fund options. The commenter stated that these options are designed for long-term investors who choose not to actively manage their accounts. The Department notes that, given the nature of the accounts governed by this exemption, investments should be designed to minimize risk, preserve assets for retirement and maintain liquidity until the IRA owner becomes available to take control of his or her account. Accordingly, the Department has determined not to expand the definition of "Eligible Investment Product" as requested.

Several commenters requested expansion of the definition of QTA in the Regulation, as well as certain related changes to the class exemption. For reasons more fully set forth in the QTA Regulation, the Department has determined not to expand the definition of QTA. In light of the determination not to modify this final definition under the QTA Regulation, no changes have been made to the class exemption.

As proposed, the class exemption permitted a QTA to select itself to furnish services to the plan in its capacity as a QTA, and to pay itself for those services. It was suggested to the Department that the final exemption also should permit a QTA to pay itself for services rendered prior to becoming a QTA. Such services may have been rendered in connection with a determination of plan abandonment under the QTA Regulation or pursuant to an existing written contract previously entered into with the plan sponsor or other independent fiduciary prior to the time the service provider became the plan's QTA.

After considering the issues, the Department has expanded the class exemption to permit a QTA to pay itself for services rendered before becoming a QTA. In this regard, the exemption applies to two scenarios involving the payment of fees. First, the exemption permits the payment for services provided pursuant to the terms of a written contract previously entered into with the plan sponsor, or other independent fiduciary. This modification recognizes that a service provider might be viewed as exercising

authority or control with respect to the disposition of a plan's assets, and therefore acting as a fiduciary, when paying itself fees from plan assets for services under circumstances where the service provider knows that there is no plan fiduciary monitoring plan services or otherwise responsible for the management of the plan, as would be the case in a plan that is determined to have been abandoned by the plan sponsor. Second, the exemption also permits payment for services that were not provided pursuant to a written contract, but were rendered in connection with a determination of plan abandonment under the QTA Regulation. Such services will generally take place prior to the service provider becoming a QTA.

One commenter on the QTA Regulation requested clarification on how a QTA would be able to effect a distribution on behalf of a missing or non-responsive participant in circumstances when the benefit payable is subject to the Code's survivor annuity requirements. The Department has modified the final QTA Regulation by adding a provision that provides that if a QTA determines that the survivor annuity requirements in section 401(a)(11) and 417 of the Code prevent a distribution in accordance with the Safe Harbor Regulation, the QTA shall distribute benefits in any manner reasonably determined to achieve compliance with the survivor annuity requirements of the Code.

Although the commenter did not request exemptive relief for the purchase of annuity contracts from the QTA or an affiliate, it does not foreclose future consideration of additional exemptive relief if the requisite findings under section 408(a) of the Act can be made. Specifically, the Department is interested in information with regard to the types of products that are currently available in the marketplace to annuitize benefits, and the standards and safeguards that the Department would include in an exemption for the purchase of such annuities.

#### Description of the Exemption

The class exemption has five sections. Section I describes the transactions that are covered by the exemption. Section II contains conditions for the provision of termination services and the receipt of fees. Section III contains the conditions for distributions. Section IV contains the general recordkeeping provisions imposed on the QTA, and section V contains definitions.

Under section I(a), relief is provided from the restrictions of sections 406(a)(1)(A) through (D), 406(b)(1) and

<sup>3</sup> See the Safe Harbor Regulation at 2550.404a-3 at d(1)(iii).

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" (QTA) within the meaning of section V(a) of the 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, to receive fees for services provided as a QTA, and to pay itself fees for services provided to the plan prior to the deemed termination of the plan.

Section I(b) of the 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 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. The other accounts authorized by the exemption include an account, other than an individual retirement account, as described in section (d)(1)(ii) of the Safe Harbor Regulation, for a distribution made to a distributee other than a participant or spouse, and an interest-bearing, federally insured bank or savings association account for distributions of less than \$1,000, as described in section (d)(1)(iii) of the Safe Harbor Regulation.

Section I(b) of the class exemption further permits the QTA to make the initial investment of the distributed proceeds in a proprietary investment product, receive fees in connection with the establishment or maintenance of the individual retirement plan or other account, and 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.

Section II of the exemption describes the conditions that apply to a transaction described in section I(a) of the exemption. The QTA must comply with the requirements of the QTA Regulation, which is published elsewhere in this issue of the **Federal Register**. Additionally, the QTA is required to provide, in a timely manner, any other reasonably available information requested by the

Department regarding the proposed termination.

Under the exemption, fees and expenses paid to the QTA and its affiliate must be consistent with industry rates for such or similar services, based on the experience of the QTA, and must not be 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 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" are 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.

With respect to payment to the QTA for services provided to the plan prior to its deemed termination, the exemption provides relief in two situations. First, the exemption covers payment for services performed by a service provider pursuant to the QTA Regulation prior to the deemed termination of the plan and the service provider becoming a QTA. Such services will generally have been performed by the service provider in determining that a plan has been abandoned and in preparing the notice of plan abandonment as required by section (c)(3) of the QTA Regulation.

Second, the exemption covers payment for services provided in good faith pursuant to the terms of a written agreement prior to the service provider becoming a QTA. This includes services provided under a valid, unexpired contract, as well as the continuation of such services after the contract had expired. With respect to such services, the QTA must demonstrate to the Department, in its initial notification of plan abandonment (as required in section (c)(3) of the QTA Regulation), by a representation under penalty of perjury, that such services were actually performed. The QTA also must provide a copy of the executed contract between the QTA and the plan fiduciary or plan sponsor that authorized such services.

Section III contains conditions for transactions described in section I(b) of the exemption. In this regard, the conditions of the QTA Regulation must be met. In addition, the QTA must inform the participant or beneficiary in the notice required by section (d)(2)(vi) of the QTA Regulation that: (1) Absent his or her election within the 30-day

period from receipt of the notice, the QTA will directly distribute 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.

The exemption also requires that 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 distribution described in the QTA Regulation.

In addition, the exemption requires that, other than in the case of a bank or savings account described in section I(b)(1)(iii) of the exemption for distributions of less than \$1,000, the distribution must be invested in an Eligible Investment Product, as defined in section V(c) of the 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 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 distribution that is invested in an identical one-year certificate of deposit.

The exemption 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 exemption, the individual retirement plan or other account holder must be able, within a reasonable period of time after his or her request and without penalty to the principal amount of the investment, to 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 or other account holder must be able, within a reasonable period of time after his or her request and without penalty to the principal amount of the investment, to transfer his or her individual retirement plan or other account balance to a different financial institution not related to the QTA or its affiliate.

Under the exemption, 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 distribution made pursuant to the 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 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 made 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 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, a 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 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) In accordance with section 408(a) of the Act and section 4975(c)(2) of the

Code, the Department finds 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) The exemption is applicable to a transaction only if the conditions specified in the exemption are met; and

(4) The exemption is 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.

#### Exemption

Accordingly, the following exemption is granted 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. Covered 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 class exemption), using its authority in connection with the termination of an abandoned individual account plan pursuant to the Department's regulation at 2550.404a-3, relating to the Termination of Abandoned Individual Account Plans (the QTA Regulation) to:

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

(2) Receive fees for the services performed as a QTA; and

(3) Pay itself fees for services provided to the plan prior to the deemed termination of the plan, provided that the conditions set forth in sections II and IV of this 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 QTA Regulation to:

(1) Designate itself or an affiliate as:  
(i) Provider of an individual retirement plan; (ii) provider of an account (other

than an individual retirement plan) under the limited circumstances described in section (d)(1)(ii) of the Safe Harbor Regulation for Terminated Plans (2550.404a-3) (Safe Harbor Regulation); or (iii) provider of an interest-bearing, federally insured bank or savings association account maintained in the name of the participant or beneficiary, in the case of a distribution described in section (d)(1)(iii) of the Safe Harbor Regulation, for the distribution 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 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 ordinarily charged by the QTA (or affiliate) for the same or similar services provided to customers that are not plans terminated pursuant to the QTA regulation, if the QTA (or affiliate) provides the same or similar services to such other customers.

(c) In the case of a transaction described in section I(a)(3):

(1) Such services: (i) Were performed in good faith pursuant to the terms of a written agreement executed prior to the service provider becoming a QTA, or (ii) were performed pursuant to the QTA Regulation; and

(2) The QTA, in the initial notification of plan abandonment described in section (c)(3) of the QTA Regulation: (i)

Represents under penalty of perjury that such services were actually performed and (ii) in the case of section II(c)(1)(i) above, provides the Department with a copy of the executed contract between the QTA and a plan fiduciary or the plan sponsor that authorized such services.

## III. Conditions for Distributions

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

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

(1) If the participant or beneficiary fails to make an election within the 30-day period referenced in the QTA Regulation, the QTA will directly distribute 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 distribution described in the QTA Regulation.

(e) Except in the case of a QTA providing a bank or savings account pursuant to section I(b)(1)(iii) of the exemption, the distribution proceeds are invested in an Eligible Investment Product(s), as defined in section V(c) of this 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 distribution described in the 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 must be able, within a reasonable period of time after his or her request and without penalty to the principal amount of the investment, to transfer his or her account balance to a different investment offered by the QTA or its affiliate, or to a different financial institution not related to the QTA or its affiliate.

(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 distribution made pursuant to the 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 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 due to circumstances beyond the control of the QTA, the records necessary to enable the persons described in paragraph (b) to determine whether the conditions of the exemption have been met are lost or destroyed, 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 QTA Regulation and this 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 17th day of April, 2006.

**Ivan L. Strasfeld,**

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

[FR Doc. 06-3815 Filed 4-20-06; 8:45 am]

**BILLING CODE 4150-29-P**