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Stephanie L. Ward
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Suite N-5669
Washington, DC 20210
Attn: Abandoned Plan Regulation

Re: Comment to 29 CFR Parts 2520, 2550, and 2578
Termination of Abandoned Individual Account Plans
Proposed Rules

Dear Ms. Ward:

The Keane Organization, Inc. provides a broad spectrum of compliance and risk management solutions to financial organizations such as public stock-issuing companies, mutual funds and insurance companies. A segment of our service umbrella includes programs tailored to the specific industry needs of lost or dormant investors and shareholders. Recently, we have been asked by a number of our customers to expand our service offerings into the retirement services arena since those clients have found themselves with retirement accounts for participants and beneficiaries whose statements have been returned as undeliverable, who are deceased or whose distribution checks remain uncashed. Coincidentally, some of our client inquiries have concerned the orphaned or abandoned plan context, which is addressed in the recent Proposed Rules, referenced above.

In reviewing the Proposed Rules, specifically the Overview of Proposed Abandoned Plan Regulation – 29 CFR 2578.1, 4. Winding Up the Affairs of the Plan, there is a discussion surrounding the Qualified Termination Administrator's (QTA) duty to notify each plan participant and beneficiary concerning the termination of the Plan. The proposal points out that,

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

Employee Benefits Security Administration Field Assistance Bulletin (FAB) No. 2004-02, entitled, Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans, outlines an array of acceptable methods a fiduciary can utilize to locate a missing participant or beneficiary to a terminated defined contribution plan account. In addition to the basic search methods discussed that are minimally required to be pursued in locating missing participants and beneficiaries, the FAB indicates that a fiduciary of a terminating plan should also consider the use of, when prudent, Internet search tools, commercial locator services and credit reporting agencies. In the context of abandoned plans we wonder if the proposed guidance, that the QTA may ensure compliance with its fiduciary responsibilities under 404(a)(1) of ERISA to locate and notify the missing participant or beneficiary before distributing benefits by following guidance under FAB No. 2004-02, should be strengthened <u>to require</u> the QTA to follow FAB No. 2004-02 where required notices sent to the participant or beneficiary have been returned to the QTA as undeliverable. In the case of plan abandonment versus plan termination, where the normal line of

communication between the participant and beneficiaries of the plan and the plan itself through the agency of the plan sponsor or employer has been severed, there is even a greater likelihood that benefits distributed on behalf of missing participants and beneficiaries will remain alienated from their rightful owners after the affairs of the plan have been wrapped up. Because of this heightened risk to the participant and beneficiary, we also would appreciate if the Department would comment on whether or not in the situation where the basic search methods described in FAB No. 2004-02 have failed to discover the whereabouts of missing participants or beneficiaries, prudence would require the QTA to use Internet search tools, or engage the services of a commercial locator service and credit reporting agencies before benefits are distributed.

The suggestion that by following guidance under FAB No. 2004-02 a fiduciary perfects its compliance with 401(a)(1) of ERISA also raises a question in our mind in the ongoing defined contribution context, where deliveries of periodic account statements as well as blackout period notices under individual plans become impossible due to inadequate or out-dated participant or beneficiary addresses. In these cases, would a plan administrator also be deemed to have met its ongoing fiduciary duty to locate missing participants or beneficiaries by following guidance under FAB No. 2004-02? If the answer is yes, the Department will have cleared up a long-standing void in guidance regarding the level of diligence required in locating missing participants or beneficiaries when required disclosure materials are returned undeliverable, as we discuss below.

Disclosure obligations mandated by 29 CFR 2520.104b-1 of the Department's regulations provide a number of opportunities for plan administrators to discover that communication with a plan participant or beneficiary has been interrupted. Beyond the initial Summary Plan Disclosure to be furnished to an employee upon joining a plan, 29 CFR 2520.104b-1 requires a plan fiduciary to automatically furnish plan participants with updated Summary Plan Descriptions (SPDs) periodically, Summaries of Material Modification (SMMs) with specified time periods after adoption of changes to a plan, Individual Benefit Statements to all participants, Summary Annual Reports (SARs) on an annual basis and Blackout Period Notices to affected participants and beneficiaries when certain rights and transactions under a plan may be temporarily suspended.

In the fulfillment of these disclosure obligations, where required under ERISA to be furnished either by direct operation of law or on the basis of an individual request, plan administrators must use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries. (29 CFR 2520.104b-1). Where materials must be furnished to participants and beneficiaries receiving benefits under a plan, such disclosures must be sent via a delivery method likely to result in the full distribution of such benefits, i.e., the cashing of a distribution check. And while the delivery of materials and disclosures through electronic media is deemed to satisfy the requirements of paragraph (b)(1) of this particular section, and the standard for delivery is clearly articulated as that which must be reasonably calculated to ensure actual receipt, the regulations provide insufficient guidance to plan administrators of ongoing plans in the event that they receive returned statements or blackout notices as undeliverable to the participant or beneficiary.

Compounding this void in direction for undeliverable disclosures and notices is the January 26, 2003 implementation of the civil penalty provision in section 502(c)(7) of ERISA, adopted as part of the Sarbanes-Oxley Act of 2002 (SOA). Section 306(b)(3) of SOA amended section 502(c) of ERISA, adding a new paragraph (7) outlining a civil penalty for a plan administrator's failure or refusal to provide timely notice of a blackout period to participants and beneficiaries. Specifically, section 502(c)(7) provides that the Secretary may assess a civil penalty of up to $100 a day from the date of the plan administrator's failure or refusal to provide notice to each participant or beneficiary in accordance with ERISA section 101(i). In order to calculate the civil penalty to be imposed, a failure or refusal to provide a notice of blackout period with respect to any single participant or beneficiary is treated as a separate

violation under the Act. The severity of the penalty is supported by the notion that failure to provide timely blackout notices deprives affected participants and beneficiaries of the full period of time Congress specified as the minimum period necessary for those individuals to sufficiently consider effects of the blackout period on their investments and financial plans.

Such failures to provide timely blackout notices, and the subsequent civil penalties imposed as a result, could be avoided by placing an affirmative duty on administrators of ongoing plans to identify and correct insufficient, missing and/or outdated address records for participants and beneficiaries. By allowing insufficient, missing or outdated address information to remain on a participant or beneficiary account record, failures to provide timely blackout notices can easily occur, significantly handicapping those same participants and beneficiaries since they are not afforded any notice of the plan restrictions on their rights to take appropriate remedial investment actions in anticipation of the plan restriction.

The context of routine disclosure statements (i.e., SPDs, SMMs, Individual Benefit Statements, SARs) is also one that would benefit from an affirmative duty on administrators of ongoing plans to identify and correct insufficient, missing and/or outdated address records for participants and beneficiaries. Again, by allowing insufficient, missing or outdated address information to persist among participant or beneficiary account records limits the rights of those participants and beneficiaries to information vital to their rights and decision-making abilities concerning their retirement assets. For example, Individual Benefit Statements may contain changes in account numbers, investment options, performance statistics and contact information such as 800 numbers, voice response system and website navigation instructions. In the ongoing plan context, participants and beneficiaries cannot manage or act on their retirement assets if they do not know how those assets are performing or how to effectively communicate with the plan. Therefore, limiting the access to information in the ongoing plan context by failing to exercise diligent affirmative controls to correct insufficient, missing and/or outdated address records for participants and beneficiaries should not be distinguished from an administrator's failure to provide notice of a blackout period which is construed as a violation of ERISA section 502(c)(7), triggering significant financial penalties for plan administrators.

The Department of Labor, through its rulemaking, is communicating an evolving and increasing standard for the maintenance of communication with participants and beneficiaries in terminating and orphaned plans. To the extent that mailings of mandatory, automatic disclosures are returned as undeliverable in ongoing plans, steps outlined in Field Assistance Bulletin No. 2004-02 as the minimum required standard will produce significant positive results. While the need to locate participants and beneficiaries is more pressing when a plan is terminating and participants must make decisions about the disposition of their retirement assets, the goal of preserving retirement savings as expressed in ERISA would be maximized further by applying the same guidelines articulated in Field Assistance Bulletin No. 2004-02 for terminating defined contribution plans to ongoing plans.

In conclusion, we recommend that the Department address the current void in direction regarding the level of diligence required in locating missing participants and beneficiaries in ongoing plans by providing a safe harbor to plan administrators if they follow guidance under FAB No. 2004-02. In their discussion of Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans, FAB No. 2004-02, in the section entitled Search Methods, the Department states that "In our view, some search methods involve such nominal expense and such potential for effectiveness that a plan fiduciary must always use them, regardless of the size of the participant's account balance." In the ongoing plan, to minimize further this expense, we would suggest that the plan administrator would not need to complete a cycle of search for known missing participants but once every two years in compliance with FAB No. 2004-02. In addressing this issue and specifying a certain cycle in which extant missing participants are sought, the Department would better protect the interests of participants and beneficiaries throughout the life of the plan. It also would have greatly simplified the future administration of terminated and

orphaned plans. In fact, based on our own experience in locating lost participants in an ongoing plan setting, the numbers of lost or missing participants and beneficiaries could be reduced by 80-90% in the terminating phase through better diligence while the plan is ongoing.

We respectfully request, therefore, that the Department amend the guidance contained in Proposed Rules, Overview of Proposed Abandoned Plan Regulation – 29 CFR 2578.1, 4. Winding Up the Affairs of the Plan to require the QTA to follow FAB No. 2004-02 where required notices sent to the participant or beneficiary have been returned to the QTA as undeliverable. As previously stated, we also would appreciate if the Department would comment on whether or not in the situation where the basic search methods described in FAB N0. 2004-02 have failed to discover the whereabouts of missing participants or beneficiaries, prudence would require the QTA to use Internet search tools, or engage the services of a commercial locator service and credit reporting agencies before benefits are distributed. Finally, we further request that the Department address the void in guidance regarding the level of diligence required in locating missing participants in the ongoing plan by drafting a rule, or at the very least issue a field assistance bulletin, imposing the same requirements outlined in Field Assistance Bulletin 2004-02 onto plan administrators in the ongoing plan arena and providing a much needed safe harbor in this long ignored and important area.

Thank you for your consideration of this comment and your prompt reply.

Sincerely,

Debbie L. Zumoff
Executive Vice President
and Chief Compliance Officer

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