DOL Field Assistance Bulletin 2014-01: Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans

The DOL recently issued Field Assistance Bulletin 2014-01 which details procedures fiduciaries should take to find missing participants and properly distribute account balances.

The Bulletin suggests that fiduciaries use certified mail, check related plan and employment records, ask the designated plan beneficiary, and search the Internet to find missing participants. Fiduciaries should consider more expensive approaches … when the account balance is large enough to justify an additional plan expense and other efforts have failed. Options are also included to use when the plan is terminating and a distribution needs to be made, even when a participant cannot be located. The preferred method is to distribute missing participant benefits into an individual retirement plan such as an IRA or annuity, and fiduciary judgment must be exercised, although there is a safe harbor regulation for plan fiduciaries who follow this course. Other distribution options include putting the money into a federally insured bank account in the name of the missing participant or turning the money over to state unclaimed property funds.

Below is the field assistance bulletin.

Issue

How can the fiduciaries of terminated defined contribution plans fulfill their obligations under ERISA to locate missing participants and properly distribute the participants' account balances?

Background

Under the Internal Revenue Code, a plan administrator must distribute all of a plan's assets as soon as administratively feasible after plan termination.[1] Before making a distribution, the plan administrator has a responsibility to contact the plan's participants for directions on how to distribute their account balances.[2] This requirement extends to all participants, regardless of their length of service or the size of their account balances.[3] Sometimes, however,

participants fail to respond to the notices (or mail sent to their addresses is returned), creating a practical dilemma for the plan administrator who has a fiduciary obligation to search for missing participants and distribute their benefits.[4] This Field Assistance Bulletin (Bulletin) broadly refers to these unresponsive participants as missing participants. The Bulletin's aim is to help fiduciaries properly discharge their obligations to these missing participants.[5]

This Bulletin replaces Field Assistance Bulletin 2004-02 (FAB 2004-02) and reflects important changes that have occurred in the ten years since the publication of FAB 2004-02. In particular, both the Internal Revenue Service (IRS) and the Social Security Administration (SSA) have discontinued their letter-forwarding services for locating missing plan participants in the years since the initial publication of FAB 2004-02.[6] At the same time, however, Internet search technologies have expanded and improved, and the Department has codified its enforcement safe harbor for distributing missing participant benefits to individual retirement plans. This Bulletin takes these important changes into account, and also reflects some suggestions from the 2013 ERISA Advisory Council, which made a broad set of recommendations for retirement plans and lost or missing participants and beneficiaries.

Analysis

Under the requirements of section 404(a) of ERISA, a fiduciary must act prudently and solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. Also, under section 404(a)(1)(D) of ERISA, fiduciaries are required to act in accordance with the documents and instruments governing the plan insofar as such

documents and instruments are consistent with the provisions of Titles I and IV of ERISA. Section 402(b)(4) of ERISA provides that every employee benefit plan shall specify the basis on which the plan makes benefit payments. Section 403(a) of ERISA generally requires that a trustee must hold the assets of a plan in trust. In the case of plan terminations, fiduciaries must also ensure that the allocation of any previously unallocated funds is made in accordance with the provisions of section 403(d) of ERISA.

Under Title I of ERISA, we generally view the decision to terminate a plan as a "settlor" decision rather than a fiduciary decision. However, the fiduciary responsibility provisions of ERISA govern the steps taken to implement this "settlor" decision, including steps to locate missing participants.[7] A plan fiduciary's choice of a distribution option for a missing participant's account balance also is a fiduciary decision subject to the general fiduciary responsibility provisions of ERISA.[8]

Consistent with their obligations of prudence and loyalty, plan fiduciaries must make reasonable efforts to locate missing participants or beneficiaries, so that they can implement directions on plan distributions from the participants or beneficiaries. However, after a plan fiduciary reasonably determines, in accordance with this guidance, that a participant or beneficiary cannot be located, the fiduciary may distribute the missing participant's or beneficiary's benefits in the manner described below. Once a plan fiduciary properly distributes the entire benefit to which a missing participant is entitled, the distribution ends the individual's status as a participant covered under the plan and the distributed assets are no longer plan assets under ERISA. However, if the distributed benefit is reduced due to a fiduciary breach, the individual would still have standing to file suit against the breaching fiduciary under

section 502(a)(2) of ERISA.[9]

A plan fiduciary may charge missing participants' accounts reasonable expenses for efforts to find them. The amount charged to a participant's account must be reasonable and the method of allocating the expense must be consistent with the terms of the plan and the plan fiduciary's duties under ERISA.[10] Plan fiduciaries must be able to demonstrate compliance with ERISA's fiduciary standards for all decisions made to locate missing participants and distribute benefits on their behalf. If audited, plan fiduciaries could demonstrate compliance using paper or electronic records.

Search Steps

When a plan sponsor terminates a defined contribution plan, one of the plan fiduciary's most important responsibilities is to notify participants that the plan is being terminated and that benefits will be distributed. Most of the time, routine methods of delivering notice to participants, such as first class mail or electronic notification, will be adequate. But if the participant does not respond with the information necessary for the distribution, or the plan fiduciary reasonably believes that a participant has not informed the plan of a new address, the fiduciary needs to take steps to locate the participant or a beneficiary.

Some search steps involve so little cost and such high potential for success that a fiduciary should always take them before abandoning efforts to find a missing participant, regardless of the size of the participant's account balance. The failure to take such steps would violate the fiduciary obligations of prudence and loyalty, as set forth in section 404(a) of ERISA.

However, other more expensive approaches may be required when the account balance is large enough to justify an additional

plan expense and other efforts have failed. In the period since the Department issued FAB 2004-02, both the IRS and the SSA have announced that their letter-forwarding services are no longer available to plan fiduciaries that are searching for missing participants or beneficiaries. On the other hand, free or low cost Internet search services and tools have become much more broadly available and accepted since the Department issued FAB 2004-02. In many cases, these tools may now be more effective at locating missing participants than either the IRS or SSA letter-forwarding services.

Accordingly, this Bulletin eliminates the requirement in FAB 2004-02 to use the discontinued IRS letter-forwarding service or the SSA letter-forwarding service. In their place, the required search steps have been expanded to include the use of electronic search tools that do not charge a fee.

Required Search Steps

At a minimum, fiduciaries should take all of the following steps before abandoning efforts to find a missing participant and obtain distribution instructions. The activities are numbered for ease of reference, not to suggest that fiduciaries must act in any particular order.

1. **Use Certified Mail**. Certified mail is an easy way to find out, at little cost, whether the participant can be located in order to distribute benefits. The Department provided a model notice that could be used for such mailings as part of a regulatory safe harbor (discussed below), but its use is not required and other notices could satisfy the safe harbor.[11]
2. **Check Related Plan and Employer Records**. While the records of the terminated plan may not contain current address information, it is possible that the employer or another of the employer's plans, such as a group health plan, may have more up-to-date information. For this

reason, plan fiduciaries of the terminated plan must ask both the employer and administrator(s) of related plans to search their records for a more current address for the missing participant. If there are privacy concerns, the plan fiduciary engaged in the search can request that the employer or other plan fiduciary contact or forward a letter for the terminated plan to the missing participant or beneficiary. The letter would request that the missing participant or beneficiary contact the searching plan fiduciary.

3. **Check With Designated Plan Beneficiary**. In searching the terminated plan's records or the records of related plans, plan fiduciaries must try to identify and contact any individual that the missing participant has designated as a beneficiary (e.g., spouse, children, etc.) to find updated contact information for the missing participant. Again, if there are privacy concerns, the plan fiduciary can request that the designated beneficiary contact or forward a letter for the terminated plan to the missing participant or beneficiary.
4. **Use Free Electronic Search Tools**. Plan fiduciaries must make reasonable use of Internet search tools that do not charge a fee to search for a missing participant or beneficiary. Such online services include Internet search engines, public record databases (such as those for licenses, mortgages and real estate taxes), obituaries and social media.

Additional Search Steps

If a plan administrator follows the required search steps, but does not find the missing participant or beneficiary, the duties of prudence and loyalty require the fiduciary to consider if additional search steps are appropriate. A plan fiduciary should consider the size of a participant's account balance and the cost of further search efforts in deciding if

any additional search steps are appropriate. As a result, the specific additional steps that a plan fiduciary takes to locate a missing participant may vary depending on the facts and circumstances. Possible additional search steps include the use of Internet search tools, commercial locator services, credit reporting agencies, information brokers, investigation databases and analogous services that may involve charges.

Distribution Options

There will be circumstances when, despite their use of the search steps described above, the fiduciaries of terminated defined contribution plans will be unable to locate missing participants or obtain distribution directions. In such cases, the plan fiduciaries will have no choice but to select an appropriate distribution option to complete the plan's termination.[12] The guidance below sets forth fiduciary considerations for various distribution options from terminated defined contribution plans.

Individual Retirement Plan Rollovers – Preferred Distribution Option

Section 404(a) of ERISA requires plan fiduciaries to consider distributing missing participant benefits into individual retirement plans (i.e., an individual retirement account or annuity).[13] An individual retirement plan is more likely to preserve funds for retirement than any other option. A distribution that qualifies as an eligible rollover distribution from a qualified plan, which is handled by a trustee to trustee transfer into an individual retirement plan, will avoid immediate taxation.[14] An eligible direct rollover results in the deferral of income tax, avoids 20 percent mandatory withholding, and avoids any 10 percent additional tax for early distributions that might otherwise apply based on the participant's age and related

facts.[15] Funds in the individual retirement plan continue to grow tax-free and income taxes do not need to be paid until funds are withdrawn.

As we noted in other guidance, the choice of an individual retirement plan requires the exercise of fiduciary judgment with respect to the choice of an individual retirement plan trustee, custodian or issuer to receive the distribution, as well as the choice of an initial investment in the individual retirement plan.[16] The Department published a safe harbor regulation for plan fiduciaries to satisfy their fiduciary responsibilities under section 404(a) of ERISA when making certain mandatory rollover distributions to individual retirement plans.[17] In general, this automatic rollover safe harbor applies to distributions of $5,000 or less for participants who leave an employer's workforce without electing to receive a taxable cash distribution or directly roll over assets into an individual retirement plan or another qualified plan.

In FAB 2004-02, we said the circumstances giving rise to relief under the automatic rollover safe harbor regulation are like those faced by fiduciaries of terminated defined contribution plans. As a result, FAB 2004-02 provided a similar enforcement safe harbor in the context of terminated defined contribution plans. In 2006, the Department strengthened this enforcement policy by publishing the safe harbor in a final regulation.[18] This regulatory safe harbor covers distributions from a terminated defined contribution plan on behalf of a missing participant or beneficiary into an individual retirement plan or inherited individual retirement plan. When they comply with the conditions of the safe harbor, fiduciaries satisfy their ERISA 404(a) duties in the distribution of benefits, the selection of an individual retirement plan provider and the investment of the distributed funds. The conditions include choosing investment products

designed to preserve principal and whose fees and expenses are not excessive when compared to other individual retirement plans offered by the provider. In the Department's view, in most cases, the best approach in selecting among individual retirement plans will be to distribute the missing participant's account balance into an individual retirement plan in accordance with the Department's regulatory safe harbor for terminated defined contribution plans.

In 2006, Congress directed the Pension Benefit Guaranty Corporation (PBGC) to expand its defined benefit missing participants program to include distributions from terminated defined contribution plans. The PBGC has requested information from the public on the expansion, but as of this Bulletin's date, it has not proposed a regulation.[19] We recognize that the ability to transfer missing participants' benefits from a terminated defined contribution plan to a PBGC administered missing participants program will change the decisional environment fiduciaries face when choosing among distribution options. The Department intends to reevaluate this guidance after the PBGC publishes final regulations permitting a distribution to its missing participants program.

Alternative Distribution Options

If a plan fiduciary cannot find an individual retirement plan provider to accept a direct rollover distribution for a missing participant or determines not to make a rollover distribution for some other compelling reason based on the particular facts and circumstances, the fiduciary may consider two other options. These two options are: 1) opening an interest-bearing federally insured bank account in the name of the missing participant or beneficiary, or 2) transferring the account balance to a state unclaimed property fund. Before making such a decision, however, the fiduciary must prudently conclude that such a distribution is appropriate despite the potential considerable adverse tax consequences to the plan

participant. Unlike tax-free rollovers into an individual retirement plan, the funds transferred to a bank account or state unclaimed property fund generally are subject to income taxation, mandatory income tax withholding and a possible additional tax for premature distributions.[20] Moreover, any interest that accrues after the transfer generally would be subject to income taxation upon accrual.[21] These tax consequences reduce the amount of money available for retirement. A prudent and loyal fiduciary would not voluntarily subject a missing participant's funds to such negative consequences in the absence of compelling offsetting considerations. In fact, in most cases, a fiduciary would violate ERISA section 404(a)'s obligations of prudence and loyalty by causing such negative consequences rather than making an individual retirement plan rollover distribution.

Federally Insured Bank Accounts. Plan fiduciaries may consider establishing an interest-bearing federally insured bank account in the name of a missing participant, as long as the participant would have an unconditional right to withdraw funds from the account. In selecting a bank and accepting an initial interest rate, with or without a guarantee period, a plan fiduciary must give appropriate consideration to all available information about the bank and interest rate, including any bank charges.

State Unclaimed Property Funds. Plan fiduciaries may also consider transferring/escheating missing participants' account balances to state unclaimed property funds in the state of each participant's last known residence or work location. We understand that some states accept such distributions on behalf of missing participants. We also understand that states often provide searchable Internet databases that list the names of property owners and sometimes pay minimal interest on unclaimed property funds. Any transfers to state unclaimed property funds must comply with state law requirements.

In Advisory Opinion 94-41A, the Department concluded that, if a state unclaimed property statute were applied to require an ongoing plan to pay to the state amounts held by the plan for terminated employees, section 514(a) of ERISA would preempt the application of that state statute.[22] However, the principles set forth in that Advisory Opinion would not prevent the fiduciary of a terminated plan from voluntarily deciding to escheat missing participants' account balances under a state's unclaimed property statute to complete the plan termination process.[23]

Additionally, in deciding between distribution into a federally insured bank account and distribution into a state unclaimed property fund, the plan fiduciary should consider the features of each option. For a bank account, these include any bank fees, such as charges for establishing or maintaining the account, along with any interest payable on the account's funds. For a state unclaimed property fund, a fiduciary should look at the availability of a searchable database maintained by the state, which may help participants find their retirement funds, and any interest payable by the state.

Unacceptable Distribution Option

100% Income Tax Withholding Is Not An Option. We know that some plan fiduciaries believe that using 100% income tax withholding for missing participant benefits is an acceptable way to deal with these benefits. Withholding 100% of a missing participant's benefits would in effect transfer the benefits to the IRS. We reviewed this matter with IRS staff at the time we issued FAB 2004-02. We concluded at that time, and continue to believe, that using this option is not in the best interest of participants and beneficiaries and would violate ERISA's fiduciary requirements. We do not believe that 100% withholding would necessarily result in a crediting of the withheld amount against the missing participants'

income tax liabilities (for example, the amount withheld may exceed a missing participant's income tax liabilities). This means that missing participants might not receive the full benefit to which they are entitled. Accordingly, plan fiduciaries should not use withholding as a way to distribute benefits to plan participants and beneficiaries.

Miscellaneous Issues

Fiduciaries have expressed concerns about legal issues that might prevent them from establishing individual retirement plans or bank accounts for missing participants. These issues include perceived conflicts with the customer identification and verification provisions (CIP) of the USA PATRIOT Act (Act).[24] The CIP provisions establish standards for financial institutions to verify the identity of customers who open accounts. To deal with this problem, Treasury staff, along with the staff of the other Federal functional regulators,[25] issued helpful guidance for fiduciaries that are establishing an individual retirement plan or federally insured bank account in the name of a missing participant. This guidance was published on the regulators' web sites in a set of questions and answers, "FAQs: Final CIP Rule."[26]

The regulators have told the Department how they interpret the Act's CIP requirements for an account (including an individual retirement plan or federally insured bank account) established by an employee benefit plan in the name of a former participant (or beneficiary) of such plan. They have determined that the Act requires that banks and other financial institutions apply their CIP compliance program only at the time a former participant or beneficiary first contacts such institution to claim ownership or exercise control over the account. CIP compliance will not be required at the time an employee benefit plan establishes an account and transfers the funds to a bank or other financial institution for

purposes of a distribution of benefits from the plan to a separated employee.

We note that some issues caused by the application of state laws, including those governing signature requirements and escheat are beyond the Department's jurisdiction.

Conclusion

The fiduciary responsibility provisions of ERISA govern actions taken by plan administrators to implement a plan sponsor's decision to terminate a plan. These actions include the search for missing participants, and if search efforts fail, the selection of a distribution option for the benefits of missing participants. In fulfilling their duties of prudence and loyalty to missing participants, there are certain required search steps that involve so little cost and such high potential for success that fiduciaries must always take them, regardless of the size of the account balance. When the required steps fail to find a missing participant, the fiduciary must determine whether to take additional search steps based on the size of a participant's account balance and the cost of further search efforts. This Bulletin discusses both the required and additional search steps in detail above.

Fiduciaries must always consider distributing the accounts of missing participants into individual retirement plans. Rollovers into individual retirement plans are more likely to preserve funds for retirement than any other option. The Department believes the best approach is a rollover into an individual retirement plan using its regulatory safe harbor for distributions from terminated plans. If plan fiduciaries are unable to locate an individual retirement plan provider that will accept a rollover distribution or determine not to make a rollover distribution for some other compelling reason based on the particular facts and circumstances, fiduciaries may consider distributing a missing participant's benefit into a federally insured bank account or a state unclaimed property

fund. This Bulletin discusses the fiduciary considerations for distribution options more fully above.

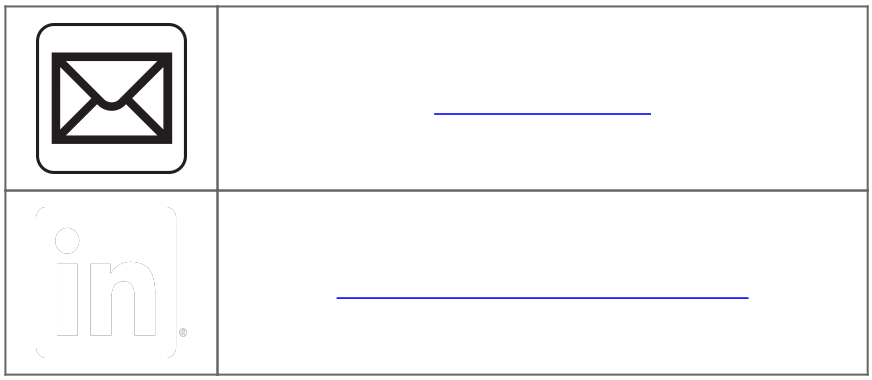
You may direct any questions about the information contained in this Bulletin to the Division of Fiduciary Interpretations, Office of Regulations and Interpretations, (202) 693-8510.



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