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August 18, 2014

DOL Issues Updated Guidance on Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans

[28318]

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TO: PENSION MEMBERS No. 34-14

BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 36-14

TRANSFER AGENT ADVISORY COMMITTEE No. 53-14

OPERATIONS MEMBERS No. 13-14 RE: DOL ISSUES UPDATED GUIDANCE ON FIDUCIARY DUTIES AND MISSING PARTICIPANTS IN TERMINATED DEFINED CONTRIBUTION PLANS

On August 14, 2014, the Department of Labor (“Department”) issued Field Assistance Bulletin (“FAB”) 2014-01, which provides guidance to plan fiduciaries of terminated defined contribution plans in locating missing participants and properly distributing missing participants’ account balances. [\[1\]](#) FAB 2014-01 is intended to replace FAB 2004-02, [\[2\]](#) which also provided guidance to plan fiduciaries of terminated defined contribution plans on locating missing participants and distributing account balances. According to the Department, FAB 2014-01 reflects important changes that have occurred since the publication of FAB 2004-02. These changes include (1) the discontinuance of both the IRS’s and the Social Security Administration’s (SSA) letter-forwarding services to locate missing retirement plan participants; (2) the expansion and improvement of internet technologies; and (3) the Department’s issuance of final regulations on the termination of abandoned plans and the distribution of benefits to missing participants, which includes an enforcement safe harbor for distributing missing participant benefits to individual retirement plans. [\[3\]](#)

In FAB 2014-01, the Department reconfirms its prior position that it generally views the decision to terminate a plan as a settlor decision rather than a fiduciary decision. The Department also notes, however, that ERISA’s fiduciary responsibilities govern the steps taken to implement this settlor function, including steps to locate missing participants and the choice of a distribution option for missing participants’ account balances.

Required Search Methods

FAB 2014-01 provides that fiduciaries are, at a minimum, required to take all of the following steps to locate missing participants of terminated defined contribution plans before abandoning efforts to find a missing participant and obtain distribution instructions.

1. **Use of Certified Mail.** The plan fiduciary must use certified mail to attempt to locate the missing participant. According to the Department, certified mail is an easy and inexpensive way to find out whether a participant can be located.
2. **Check Related Plan Records.** To the extent the missing participant may participate in a related plan, the Department states that 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 requesting that the missing participant or beneficiary contact the searching plan fiduciary.
3. **Check with Designated Plan Beneficiary.** The plan fiduciary must try to identify and contact any individual that the missing participant has designated as a beneficiary to find updated contact information for the missing participant. 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.** The Department's 2004 guidance required the use of either the IRS or SSA letter-forwarding service. As noted above, however, since the time of the Department's issuance of its 2004 guidance, both IRS and SSA have discontinued their letter-forwarding services for locating missing retirement plan participants. The Department states in FAB 2014-01 that this prior search requirement is now replaced with a requirement that plan fiduciaries make reasonable use of free internet search tools, such as internet search engines, public record databases, obituaries, and social media. [\[4\]](#)

Additional Search Steps

FAB 2014-01 provides that, if a plan administrator follows the required search steps, but does not find the missing participant, ERISA requires the plan fiduciary to consider if additional search steps (such as the use of internet search tools, commercial locator services, credit reporting agencies, information brokers, investigative databases, and analogous services that may involve charges) are necessary. In making such a determination, a plan fiduciary should consider the size of the participant's account balance and the cost of further search efforts.

Distribution Options

In FAB 2014-01 the Department acknowledges that there will be circumstances when, despite the use of the search steps described above, a plan fiduciary of a terminated defined contribution plan will be unable to locate a missing participant. In such cases, the plan fiduciary is required to select an appropriate distribution option. In this respect, the Department states that 100 percent income tax withholding is not an acceptable distribution option. FAB 2014-01 includes the same distribution options as were included in FAB 2004-02 – a preferred distribution option and two alternative distribution options.

1. **Preferred Distribution Option - Individual Retirement Plan Rollovers.** FAB 2014-01

provides that a rollover into an individual retirement plan (an individual retirement account or annuity) is the preferred distribution option because such a distribution is more likely to preserve funds for retirement. The Department notes that a distribution which is implemented by a trustee-to-trustee rollover will avoid immediate taxation, funds in the individual retirement plan will continue to grow tax-free, and income taxes do not need to be paid until funds are withdrawn. The Department states that, 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 regulatory safe harbor included in the Department's final abandoned plan regulations.

2. Alternative Distribution Options. If a plan fiduciary cannot find an individual retirement plan provider to accept a direct rollover for a missing participant, or determines not to make a rollover distribution for some other compelling reason based on facts and circumstances, the fiduciary may consider two alternative distribution options:
 - A. Federally Insured Bank Account. The plan fiduciary may open an interest-bearing federally insured bank account in the name of the missing participant or beneficiary. The participant or beneficiary must have an unconditional right to withdrawal 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.
 - B. State Unclaimed Property Funds. The plan fiduciary may also consider transferring/escheating a missing participant's account balance to a state unclaimed property fund in the state of the participant's last known residence or work location. The Department notes that it understands that states often provide searchable internet databases that list the names of property owners and sometimes pay minimal interest on unclaimed property funds.

The Department states that, prior to making a decision to open a federally insured bank account or escheat the missing participant's account balance to a state unclaimed property fund, a plan fiduciary must prudently conclude that such a distribution is appropriate despite the potential adverse tax consequences to the plan participant, which may reduce the amount of money available for retirement. [\[5\]](#) Further, the Department states that 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.

Finally, the Department notes that Congress in 2006 directed the Pension Benefit Guaranty Corporation (PBGC) to expand its defined benefit missing participants program to include distributions from terminated defined contribution plans and, although PBGC has requested information from the public on the expansion, it has not yet proposed a regulation. [\[6\]](#) The Department states that the ability to transfer missing participants' benefits from a terminated defined contribution plan to a PBGC administered program will change the decisional environment fiduciaries face when choosing among distribution options. The Department intends to reevaluate its guidance after PBGC publishes final regulations permitting a distribution to its missing participants program.

USA PATRIOT Act Concerns

Consistent with its guidance in FAB 2004-02, in FAB 2014-01, the Department states that fiduciaries with concerns about legal issues associated with possible conflicts with the

customer identification and verification requirements of the USA PATRIOT Act should consult joint agency guidance addressing this issue. [7] The Department notes that Treasury staff and other federal functional regulatory staff have informed the Department that the PATRIOT Act requires that banks and other financial institutions apply their customer identification and verification compliance program only at the time a former participant or beneficiary first contacts the institution to claim ownership or exercise control over the account. Therefore, according to the Department, compliance is not 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.

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endnotes

[1] FAB 2014-01 is available here: www.dol.gov/ebsa/pdf/fab2014-1.pdf.

[2] FAB 2004-02 is available here: <http://www.dol.gov/ebsa/regs/fab2004-2.html>. For the Institute's summary of FAB 2004-02, see [Memorandum](#) to Pension Members No. 50-04, Pension Operations Advisory Committee No. 66-04 [18065], dated October 4, 2004.

[3] For the Institute's summary of the Department's final regulations and class exemption regarding the termination of abandoned plans and the fiduciary safe harbor for distributing missing participant benefits, see [Memorandum](#) to Pension Members No. 30-06 [20005], dated May 4, 2006.

[4] The Department notes that these tools may, in many cases, now be more effective in locating missing participants than either the IRS or SSA letter-forwarding services.

[5] The Department notes that, unlike tax-free rollovers into an individual retirement plan, the funds transferred to a bank account or state unclaimed property fund are generally subject to income taxation, mandatory income tax withholding, and a possible additional tax for premature distributions. Further, any interest that accrues after the transfer would generally be subject to taxation upon accrual.

[6] For the Institute's response to PBGC's Request for Information, see [Memorandum](#) to Pension Members No. 39-13, Operations Committee No. 38-13, Bank, Trust and Retirement Advisory Committee No. 23-13, Transfer Agent Advisory Committee No. 62-13 [27481], dated August 21, 2013.

[7] The joint agency guidance is available here: <https://www.fdic.gov/news/news/financial/2004/fil0404a.html>.