

**MEMO# 18065**

October 4, 2004

## **DOL ISSUES GUIDANCE ON MISSING PARTICIPANTS**

[18065] October 4, 2004 TO: PENSION MEMBERS No. 50-04 PENSION OPERATIONS ADVISORY COMMITTEE No. 66-04 RE: DOL ISSUES GUIDANCE ON MISSING PARTICIPANTS

The Department of Labor has released attached Field Assistance Bulletin (“FAB”) 2004- 02, which provides guidance for fiduciaries on locating missing participants when terminating a defined contribution plan. Background When a defined contribution plan is terminated, all plan assets must be distributed as soon as administratively feasible after the date of plan termination.<sup>1</sup> Prior to any distribution, the plan administrator must contact all plan participants for affirmative directions regarding distribution of their account balances.<sup>2</sup> The plan administrator has an obligation to comply with ERISA’s fiduciary requirements when taking action to find missing participants and choosing a distribution option on behalf of a participant that cannot be located. General Search Methods Applicable To All Missing Participants FAB 2004-02 provides that in order to satisfy ERISA’s fiduciary requirements, plan administrators must attempt to find a missing participant using one or more of four required search methods. The administrator cannot distribute a participant’s account balance unless each of the four methods proves ineffective in locating the missing participant. However, a plan fiduciary is not obligated to use all four search methods if one or more of them are successful in locating a missing participant. The four required search methods are: 1. Use of Certified Mail. 2. Check Related Plan Records. The administrator should check other company benefits plans, such as group health plan, to attempt to find more up-to-date information regarding a missing participant. If there are privacy concerns, then the plan fiduciary can request the employer or fiduciary of the related benefits plan to forward a letter to the participant or beneficiary, requesting that the participant or beneficiary contact the plan fiduciary. 3. Check With Designated Plan Beneficiary. The administrator may also attempt to identify and contact the individual(s) that the missing participant has designated as beneficiaries under the plan (e.g., a spouse or children) and obtain updated information regarding a missing participant. If there are privacy concerns, then the plan fiduciary can request that the designated beneficiary contact the plan fiduciary or forward a letter to the missing participant asking the participant to contact the plan fiduciary. 4. Use a Letter-Forwarding Service. The plan administrator may use a letter-forwarding service offered by either the Internal Revenue Service (“IRS”) or the Social Security Administration (“SSA”). Plan fiduciaries must choose one service and use it to attempt to locate the missing participant. The IRS has published guidelines on how to use its letter-forwarding service.<sup>3</sup> The SSA’s service is described on its website at [www.ssa.gov](http://www.ssa.gov). FAB 2004-02 generally requires that the plan fiduciary provide a participant with contact information for claiming the benefit, and recommends that the fiduciary suggest a date by which the participant must respond to the letter. Additional Search Options In addition to

using the four required search methods listed above, a plan fiduciary should consider using internet search tools, commercial locator services and credit reporting agencies to locate a missing participant if the facts and circumstances of a particular situation warrant their use. For example, if the cost of these additional search options will be charged to the participant's account, plan fiduciaries will need to consider the size of the account in relation to the cost of the services when deciding whether the use of one or more additional search methods is appropriate. Distribution Options If after using the required search methods, and additional search methods where appropriate, the plan fiduciary fails to locate a missing participant, then the fiduciary may distribute the missing participant's account balance in accordance with FAB 2002-02. FAB 2004-02 clarifies that plan fiduciaries may not attempt to distribute missing participant account balances by imposing 100% withholding.

1. Individual Retirement Plan Rollovers Establishing an individual retirement plan on behalf of the missing participant is always the preferred distribution option because this option is most likely to preserve assets for retirement purposes. Plan fiduciaries will satisfy ERISA if they comply with the relevant requirements of the safe harbor of section 404(a) of ERISA when selecting individual retirement 3 FAB 2004-02 citing Rev. Proc. 94-22, 1994-1 C.B. 608 and IRS Policy Statement P-1-187. 3 plan providers and initial investments in connection with the rollover of missing participant account balances.
2. Federally Insured Bank Accounts If a plan fiduciary is unable to locate an individual retirement plan provider that is willing to accept a rollover distribution on behalf of a missing participant, the fiduciary may establish an interest-bearing, federally insured bank account in the name of the missing participant. 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 relevant to such selection and interest rate, including associated bank charges. The participant must have an unconditional right to withdraw funds from the account.
3. Escheat to State Unclaimed Property Funds Another available alternative if a plan fiduciary is unable to locate an individual retirement plan provider that is willing to accept a rollover distribution on behalf of a missing participant is the transfer of missing participant account balances to state unclaimed property funds in the state of a participant's last known residence or work location. Such a transfer would constitute a plan distribution that would end both the property owner's status as a plan participant and the property's status as plan assets under ERISA. Such a transfer must comply with state law requirements. In deciding between transferring a missing participant's account balance to a federally insured bank account or to a state unclaimed property fund, a plan fiduciary should evaluate any interest accrual and fees associated with a bank account against the availability of the state unclaimed property fund's searchable database that may facilitate the potential for recovery.

PATRIOT Act Concerns Fiduciaries with concerns about legal impediments that might hinder the establishment of individual retirement plans or bank accounts on behalf of missing participants, including possible conflicts with the customer identification and verification requirements of the USA PATRIOT Act, may review "FAQs: Final CIP Rule."<sup>4</sup> In general, the CIP compliance program should be implemented at the time the former participant or beneficiary first contacts the institution to assert ownership or control over the account. CIP compliance will not be required at the time a plan fiduciary establishes an account and transfers funds to a bank or other financial institution for purposes of distribution of benefits to a separated employee.

Lisa Robinson Assistant Counsel Attachment (in .pdf format) Note: Not all recipients receive the attachment. To obtain a copy of the attachment, please visit our members website (<http://members.ici.org>) and search for memo 18065, or call the ICI Library at (202) 326-8304 and request the attachment for memo 18065.

<sup>4</sup> Go to <http://www.occ.treas.gov/10.pdf> or <http://www.fincen.gov/finalciprule.pdf>.

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