

June 25, 2018

Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW
Washington, D.C. 20210

Re: Missing and Unresponsive Participants and Beneficiaries

Dear Assistant Secretary Rutledge:

On behalf of the undersigned organizations, we thank you for the meeting we had with your senior staff on May 16 regarding the issue of missing and unresponsive participants and beneficiaries. While we were sorry you could not attend, we had a productive dialogue with staff from the Department of Labor's Employee Benefits Security Administration (EBSA).

We write to reiterate our commitment to working with you to ensure participants and beneficiaries receive the benefits to which they are entitled. To that end, each of the undersigned organizations are continuing to collect information from their members that can inform EBSA's thinking as it develops workable guidance to plan fiduciaries and their service providers. We hope to share that input with you either on an individual or group basis soon. In the meantime, we offer some comments in follow up to the meeting.

- **It is critical that regulators coordinate on guidance.** The problem of missing and unresponsive participants and beneficiaries results in issues under the jurisdiction of EBSA, the Pension Benefit Guaranty Corporation (PBGC), and the Internal Revenue Service (IRS). To the greatest extent possible, compliance with guidance of one regulator should be sufficient. We strongly encourage direct consultation among the agencies before any guidance is issued. For example, the IRS has issued guidelines for its auditors with respect to a plan's inability to distribute required minimum distributions, and plan fiduciaries have no idea if this guidance reflects input from EBSA or if following it is sufficient for compliance with ERISA's prudence obligations.¹ In fact, since our meeting, the IRS released further guidance, in this case regarding escheatment of IRAs of missing individuals, which has left employers unsure about the extent to which escheatment might be appropriate for employment-based retirement plans because the guidance does not mention input from EBSA.²
- **The proper steps that should be taken to deal with missing and unresponsive participants are context dependent.** We understand that EBSA's efforts have focused on defined benefit pension plans and those participants that have terminated employment

¹ <https://www.irs.gov/pub/foia/ig/spder/tege-04-1017-0033.pdf>.

² Revenue Ruling 2018-17.

and attained the plan's normal retirement age. There are, of course, other circumstances in which a participant is missing or unresponsive. In many cases, in both defined benefit and defined contribution plans a benefit is not due and a lack of contact with a terminated vested participant is not cause for alarm. Any guidance issued should recognize the difference between lack of contact between the plan and a participant prior to a distribution event, versus a participant who cannot be found, or is unresponsive, subsequent to a distribution event.

- **ERISA requires prudence in plan administration.** ERISA requires that plan fiduciaries act for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. In administering a plan, a plan fiduciary must balance a variety of obligations and costs including those associated with finding missing and unresponsive participants. In this regard, plan participants should maintain some responsibility for ensuring that the plan has updated contact and beneficiary information.
- **Some participants and beneficiaries will simply not be found, and plans need workable solutions with respect to their benefit.** No amount of effort will locate every former employee and force every participant to cash benefit checks.³ Plans need workable solutions to deal with these benefits and need to know when EBSA would agree that reasonable efforts have been made. This includes the ability to follow Treasury Regulation 1.411(a)-4(b)(6), which permits a plan document to provide that the plan may forfeit amounts owed to missing participants back to the plan, as long as the benefits are reinstated upon the participant's return and claim for benefits. Other plans will be able to send smaller balances to an IRA provider pursuant to Code section 401(a)(31)(B) and the Department of Labor's safe harbor regulations (2550.404a-2 and 2550.404a-3), or may wish to escheat the benefit to the state. Unfortunately, except in the case of terminated defined contribution plans, EBSA has provided no guidance on these options or when it is appropriate to deploy them.
- **More transparency and consistency in audit guidelines would help manage expectations and speed the regional offices' review of plan procedures.** In our meeting, we reported the frustration our members have expressed to us regarding some of the audits that have been undertaken that focus on this issue. We pointed out that many of these issues could be avoided if EBSA were more transparent about its approach, both before and during the audit. We have a few suggestions in this regard.
 - EBSA's enforcement manual provides substantive information to both the regional offices and the regulated community regarding frequent areas of focus. For example, Chapter 48, Section 13 provides specific guidelines on fiduciary violations involving gifts and gratuities. No fiduciary should be surprised when an audit focused on whether these guidelines have been met. We suggest EBSA add

³ The IRS announced it owes taxpayers as much as \$1.1 billion in unclaimed tax refunds for 2014 alone. <https://www.irs.gov/newsroom/irs-refunds-worth-one-point-one-billion-dollars-waiting-to-be-claimed-by-those-who-have-not-filed-2014-federal-income-tax-returns>.

guidelines to the enforcement manual regarding missing participant audit issues, as it has with other targeted enforcement programs, such as ERISA section 510 violations and disqualified persons under ERISA section 411.

- The enforcement manual provides model letters that investigators should use. While we understand a letter has been developed to contact missing or unresponsive participants, it has not yet been added to the manual or otherwise been released.
- Investigators routinely impose deadlines on plan fiduciaries to collect information. We strongly encourage that regional offices explain their own timing for reviewing and closing the audit; this need not be binding, but plans should be kept informed.
- Unlike other audits, this issue is not fundamentally adversarial – plans want to pay benefits that are due just like EBSA does. We encourage an approach that recognizes this shared goal.
- **Input and comment from the regulated community is critical.** We view our meeting with your staff on May 16 as an important step in what we hope is an ongoing and productive dialogue with you. While we would encourage you to ensure no guidance is published that is not the subject of notice and comment, if a formal rulemaking is not possible then interaction with the regulated community will be necessary.

Thank you for your attention and we look forward to continued dialogue and collaboration.

American Benefits Council
American Council of Life Insurers
Committee on Investment of Employee Benefit Assets
The ERISA Industry Committee
Investment Company Institute
Plan Sponsor Council of America
The Society for Human Resource Management
Securities Industry and Financial Markets Association
The SPARK Institute
U.S. Chamber of Commerce

cc: Joe Canary, Director, Office of Regulations and Interpretations, EBSA
Timothy D. Hauser, Deputy Assistant Secretary for Program Operations, EBSA
Jeanne Klinefelter Wilson, Deputy Assistant Secretary for Policy, EBSA