



AMERICAN BENEFITS
COUNCIL

January 6, 2021

Submitted Electronically to: www.regulations.gov

Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC 20005

**RE: Submission of Information Collection for OMB Review; Comment Request;
Missing Participants**

Dear Sir or Madam:

On behalf of the American Benefits Council (“the Council”), we are submitting these comments with respect to the above-referenced Submission of Information Collection for OMB Review; Comment Request; Missing Participants, published in the Federal Register on December 8, 2020.¹

In this request for the extension of approval from the Office of Management and Budget (OMB) of the collection of information on missing participants, the Pension Benefit Guaranty Corporation (PBGC) stated that it intends to modify its collection of information to require plans to provide additional information about missing participants in order to properly withhold taxes when such participants are located and their benefits are claimed and paid. Our comments relate to this portion of the request for public comment. Specifically, we are requesting that the PBGC address an apparent conflict between Internal Revenue Service (IRS) guidance and PBGC guidance relating to the withholding rules in the context of the termination of a defined benefit plan where missing participants do not cash their checks.

¹ See 85 Fed. Reg. 79047 (Dec. 8, 2020).

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

PBGC GUIDANCE

Under Section 4050(a)(1) of ERISA, “when a Title IV [defined benefit] plan terminates and there are benefits owed to a plan participant who cannot be located, the plan administrator must either purchase an annuity for the missing participant or transfer the value of the participant's benefit to the PBGC.”² There is also a missing participant program for terminated defined contributions plans, although this program is optional.

Section 3405 of the Internal Revenue Code provides federal income tax withholding rules with respect to designated distributions.³ Section 3405(d)(2) provides that generally, a plan administrator must withhold and be liable for payment of the tax required to be withheld under Section 3405. Under Section 3405(c), a plan administrator is required to withhold 20 percent for federal income tax at the time a distribution that is eligible for rollover is made from a pension plan to a participant, if the distribution is not rolled over. An FAQ page on missing participants on the PBGC’s website⁴ and a 2003 information letter from the IRS to the PBGC entitled IRS Letter on Recovery of Erroneous Withholding⁵ (the “2003 Information Letter”) states that where a plan pays the IRS the 20 percent tax withholding on a distribution to a participant who turns out to be a missing participant and does not receive the distribution, the plan administrator may not reduce the amount paid to the PBGC by the amount of tax withheld. The plan

² See *IRS Letter on Missing Participants Program*, PENSION BENEFIT GUARANTY CORP. (Feb. 26, 1997), <https://www.pbgc.gov/prac/terminations/missing-participants/irs-letter-on-missing-participants-program>.

³ See Internal Revenue Code § 3405(e)(1).

⁴ See *Missing Participant FAQs*, PENSION BENEFIT GUARANTY CORP., <https://www.pbgc.gov/prac/terminations/missing-participants/missing-participants-faqs> (last visited Dec. 18, 2020).

⁵ See *IRS Letter on Recovery of Erroneous Withholding*, PENSION BENEFIT GUARANTY CORP. (May 15, 2003), <https://www.pbgc.gov/prac/terminations/missing-participants/irs-letter-on-recovery-of-erroneous-withholding>. The PBGC Missing Participant FAQ page provides a link to this letter.

administrator must pay the full value of the missing participant's benefit, without any reduction for the 20 percent tax withholding, to the PBGC's Missing Participants Program.

According to the PBGC webpage and the 2003 Information Letter, the plan may seek a refund of the amount of the federal income tax it erroneously withheld. The 2003 Information Letter states that a plan may obtain a refund of such amount by filing a Form 843, Claim for Refund and Request for Abatement, and Form 941c, Supporting Statement to Correct Information. However, the 2003 Information Letter points out that a “payor may make an adjustment only within 3 years of the return due date or the date the return was filed, whichever is later.” Many participants are missing for a number of years despite efforts to locate the individual; by the time the plan terminates, in many cases it is not possible to seek a refund, even if that were allowed by the IRS.

CONFLICTING IRS GUIDANCE

Since the 2003 Information Letter, there has been a formal and informal guidance that suggests it no longer represents the view of the IRS, or may not represent the views of the IRS in all missing participant situations. Generally, the IRS position is that “withholding ... cannot be corrected after the close of a tax year unless the issue constitutes an administrative error ... or as the result of an Examination. This is true even if income tax ... was erroneously withheld.”⁶ The 2003 Information Letter suggests that a refund of the withheld amount would be allowed (subject to the three-year limitation) because this would be an administrative error.⁷

On September 3, 2019, the IRS issued Revenue Ruling 2019-19,⁸ which addressed three issues related to a failure to cash a distribution check from a qualified retirement plan. One of the issues was whether a participant’s failure to cash the distribution check she received alters the employer’s obligation with respect to withholding under Section 3405. Under the facts of Rev. Rul. 2019-19, an employer is the plan administrator of a qualified retirement plan under Section 401(a) that does not include a qualified Roth contribution program under Section 402A(b). The employer makes a required distribution, a designated distribution within the meaning of Section 3405(e)(1), by withholding tax as required under Section 3405(d)(2) and mailing a check for the remainder to the individual. The individual receives the check but does not cash it.

⁶ I.R.M. 21.7.2.4.6.3.1 (10-1-05)

⁷ The 2003 Information Letter cites to Internal Revenue Manual Section 21.7.2.4.11.1(2), but we believe this citation should now be Section 21.7.2.4.6.3.1(3).

⁸ Rev. Rul. 2019-19, 2019-36 I.R.B. 674.

Rev. Rul. 2019-19 concluded that the individual’s “failure to cash the distribution check she received does not alter [the employer’s] obligations with respect to withholding of tax, and liability for payment of that tax, under [Section] 3405.” Therefore, under the facts provided, the amount is still taxable when issued, and the taxes were properly withheld by the employer. One might read this guidance to mean that it would be improper to seek a refund of the withheld taxes because the IRS considers those taxes properly withheld.

The IRS came to same conclusion very recently in Revenue Ruling 2020-24,⁹ involving payments to a state unclaimed property fund. The ruling provides that if an amount is paid to a state unclaimed property fund, the plan administrator must withhold from the distribution, and report that withholding on Form 1099-R. The ruling gives no indication that the withheld amount can be later refunded by the plan.

Moreover, we have heard reports that IRS auditors have taken the position during audits of Forms 941 and 945 that it is not possible to receive a refund of withheld amounts solely because the participant failed to cash the check sent to the participant.

Rev. Rul. 2019-19 assumes in its facts that the participant received the distribution check. In the real world, the plan will never know this for certain. Sometimes the check is returned to the plan as undeliverable quickly (in which case the refund of the withholding may be possible), although Rev. Rul. 2019-19 does not address this situation. But in many cases the check simply goes uncashed and the participant is otherwise unresponsive. It is these situations that will be problematic under the PBGC’s termination procedures because the plan very likely cannot seek a refund from the IRS, either because the three-year period has lapsed or because the IRS will not agree that it was an administrative error to withhold the amount.

REQUEST FOR RESOLUTION

Were a plan terminating a defined benefit plan and addressing the issue of checks uncashed by missing participants to follow the PBGC’s guidance, it would remit the full benefit amount to the PBGC and then seek a refund from the IRS of the taxes erroneously withheld. In some cases, this is not possible simply because of the statute of limitations. In contrast, were the same plan to abide by the IRS’s guidance in Rev. Rul. 2019-19, it may not feel comfortable seeking a refund of the withheld taxes because it could be considered improper to do so. Therefore, the PBGC’s guidance and Rev. Rul.

⁹ Rev. Rul. 2020-24, 2020-45 I.R.B. 965.

2019-19 provide seemingly inconsistent guidance to plan administrators, in at least some missing participant situations.

In light of this apparent possible conflict, the Council requests that the PBGC and the IRS address this issue in order to ensure uniformity in agency policy. We are copying the U.S. Department of the Treasury and the IRS, as resolution will require coordination. Clarity on this issue will assist plan administrators that are in the process of terminating a defined benefit plan, or using the voluntary program for defined contribution plans, and need to address withholding issues relating to the uncashed checks of missing participants.

Thank you for considering our request.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan Jacobson
Senior Counsel, Retirement Policy

cc: Gordon Hartogensis, Director, PBGC
Andrew Banducci, Chief Policy Officer, PBGC
Constance Donovan, Participant and Plan Sponsor Advocate, PBGC
Carol Weiser, Benefits Tax Counsel, Department of the Treasury
Rachel Levy, Associate Chief Counsel (Employee Benefits), IRS
Stephen Tackney, Deputy Associate Chief Counsel (Employee Benefits), IRS