

# AMERICAN BENEFITS COUNCIL

YOUR ADVOCATE FOR EMPLOYER-SPONSORED BENEFITS SINCE 1967



October 2, 2017

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Employee Benefits Security Administration  
Department of Labor  
200 Constitution Ave, NW, Suite N-5677  
Washington, D.C. 20210

## **Re: Unresponsive and Missing Participant Guidance for Ongoing Retirement Plans**

Dear Deputy Assistant Secretary Hauser:

We understand from numerous reports from plan sponsors that the Department of Labor's regional offices have been taking aggressive positions regarding how plan sponsors deal with terminated vested retirement plan participants, particularly those participants who are unresponsive or missing. As described in more detail below, these positions have been inconsistent across agents, reflect legal positions the Department has never announced, and in some cases, are contrary to existing Treasury Department regulations. The purpose of this letter is to **request that the Department engage in a rulemaking process to issue comprehensive guidance on plan fiduciary responsibilities with respect to unresponsive and missing participants and cease taking ad hoc enforcement positions until the Department provides actual guidance.** We would like to discuss this issue in person with you, and will be reaching out to schedule a meeting to do so.

The American Benefits Council (the "Council") is a national nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large multistate U.S. employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

## UNRESPONSIVE AND MISSING PARTICIPANT OVERVIEW

Because of changing workforce demographics and the rise of automatic enrollment, an employer's responsibility for dealing with retirement benefits and accounts left behind by former employees has become even more demanding. During career transitions, employees often do not consider how their immediate change in employment will affect their long-term retirement goals. Many employees do not roll over a benefit under a former employer's plan into their new employer's plan. And, many workers neglect to update their contact information on file with a former employer, even if they have a defined benefit plan benefit or defined contribution plan account.

In addition to missing participants, there are many participants who the employer does not believe is missing (that is, the contact information appears to be correct) but the participant simply fails to respond to attempts to contact him or her. In fact, many distribution checks go uncashed even though the employer knows that the participant has not moved. These unresponsive participants present related but slightly different challenges than participants who cannot be located.

Employers must deal with defined benefit pension benefits and 401(k) accounts left behind by former employees who are unresponsive or for whom the employer has no reasonable way of notifying the participant about the status of their benefit. This "unresponsive and missing participant" problem ultimately prevents many American workers from receiving valuable retirement benefits owed to them when they need it most.

The Council's plan sponsor members fully appreciate their fiduciary responsibilities and are serious about their efforts to locate missing participants that are owed a benefit from an employer sponsored retirement plan. Based on existing guidance, and working with service providers, our plan sponsor members have developed reasonable policies and procedures to handle unresponsive or missing participants and devote significant resources to locating former employees who may have forgotten about retirement benefits owed to them. Our members have, through their efforts, successfully located countless missing or previously unresponsive participants and reunited them with valuable retirement benefits.

We want to stress that the issues for defined benefit plans and defined contribution plans with respect to missing participants are not identical. Missing participants with small accounts in defined contribution plans have become a greater problem because of the increased use of automatic enrollment. But defined benefit plans also face their own unique challenges when dealing with missing and unresponsive participants. Defined benefit plans may not distribute benefits to participants for many years after termination of employment and may distribute benefits over very long periods of time. Also, defined benefit plans often do not have

beneficiary information until the benefit commences, so contacting a beneficiary is often not possible. It is important that the Department of Labor address both types of plans – particularly if audits will continue for both types of plan – and in doing so, be very sensitive to their differences.

## RECENT DOL AUDITS

Unfortunately, when attempting to reunite unresponsive and missing participants with benefits owed to them, our members face significant uncertainty due to the lack of guidance on missing participants published by the federal regulators with authority over the private retirement system – the Department of Labor (the “Department” or “DOL”), the Internal Revenue Service (“IRS”), and the Pension Benefit Guaranty Corporation (“PBGC”). Not only is there very little guidance that is publicly available for affected employers, there is also apparently a lack of clear and consistent internal guidance for DOL auditors examining employer-sponsored retirement plans. As a result, our members have recently encountered inconsistent and alarming positions regarding unresponsive and missing participant procedures when DOL auditors have conducted routine examinations. A sampling of the most troubling encounters with DOL auditors includes:

- DOL auditors have asserted that a plan administrator’s failure to locate a missing participant is a breach of fiduciary duty, even when the plan’s procedures have been followed.
- DOL auditors have asserted that it is a prohibited transaction for a plan to forfeit amounts previously owed to unresponsive or missing participants (in defined contribution plans to pay for reasonable plan expenses or reduce employer contributions, or in defined benefit plans to reduce funding obligations), when such amounts have been forfeited back to a plan subject to reinstatement upon the participant’s return or claim for benefits, even when these steps are specifically provided under the plan document.
- DOL auditors have threatened to refer plan sponsors to DOL’s Office of the Solicitor if the plan fails to take a specific action. In some instances, the actions suggested are impermissible under other regulatory regimes.
- DOL auditors have asserted that “reasonable search steps” require plan sponsors *to perform a search for missing participants every year, to use a different search method every year, or to contact current and former employees who may have worked for the employer at the same time as a missing participant*. DOL auditors have also informed plan sponsors that they must “do whatever it takes” to locate missing participants or to get participants to respond.
- DOL auditors have asserted that a plan should not just search every year, but to keep searching for the same missing participant indefinitely, despite the fact that conducting unlimited searches for the same participant is not an efficient use of plan resources.

- DOL auditors have sent communications to missing participants alerting them that their former employer is under government investigation for a possible breach of fiduciary duty. We have heard that in some cases DOL auditors have requested personal information on participants and then handed that information over to a third party to send out letters.

Based on these recent experiences and the general lack of straightforward and consistent guidance for employers tasked with handling unresponsive or missing participants, we are writing to urge DOL to revisit its current positions on unresponsive or missing participants and to request information from plan sponsors and service providers to assist in the development of guidance that will help employers operate their plans more efficiently. The inconsistent and ad hoc positions being communicated by regional offices to our members during audit have created substantial uncertainty and must be addressed. The need for additional guidance is especially called for in the context of unresponsive or missing participants in ongoing retirement plans.<sup>1</sup>

As explained further below, we specifically encourage DOL, after collecting information and input from plan sponsors and service providers, to issue guidance that addresses the following three questions:

- What search steps does DOL consider reasonable when ongoing plan fiduciaries are searching for missing participants *after a participant has experienced a distribution event*?
- What actions can an ongoing plan fiduciary take consistent with its fiduciary obligations under ERISA when amounts must be distributed from the participant's account and the participant or beneficiary cannot be located, refuses to respond, or does not negotiate a check distributed to the participant or beneficiary?
- What search steps does DOL consider reasonable when ongoing plan fiduciaries are searching for unresponsive or missing participants *before a participant experiences a distribution event*?

## CURRENT STATE OF DOL GUIDANCE

DOL has not issued any generally applicable guidance announcing its positions with respect to ongoing retirement plan fiduciaries who must deal with unresponsive or missing participants, except in the case of automatic rollovers of more than \$1,000

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<sup>1</sup> There is also a current lack of guidance on the status and treatment of uncashed checks. While related, that issue is separate from the missing participant issues discussed in this letter as not all uncashed checks are for participants that are missing. Indeed, many participants fail to negotiate payments they have requested or received via mail to an address they have *confirmed* prior to the distribution. The guidance project should also request information from plan sponsors and service providers on, for example, when a participant has requested a distribution and the check is uncashed after additional communications.

and less than \$5,000. This lack of guidance is somewhat surprising given how frequently plan sponsors must deal with participants who are unresponsive or cannot be located. For example, there is no general guidance explaining what DOL considers to be reasonable search steps for missing participants in an ongoing plan or how plan fiduciaries should handle amounts owed to unresponsive or missing participants in an ongoing plan when all, or a portion, of the participant's account must be distributed from the plan or has already been distributed but the participant has failed to negotiate the payment.

**FAB 2014-01:** Because there is no generally applicable guidance for missing participants in ongoing retirement plans, our members typically turn to Field Assistance Bulletin ("FAB") 2014-01 – which is only directly applicable to terminated defined contribution plans – as the leading authority for dealing with missing participants in ongoing defined benefit and defined contribution plans. For purposes of this letter, FAB 2014-01 has two major takeaways:

- A. Reasonable Search Steps: A plan fiduciary for a terminating defined contribution plan must take steps that are reasonable under the circumstances to search for missing participants or beneficiaries. When considering whether a plan fiduciary's search steps are reasonable, FAB 2014-01 generally applies a two-step analysis:

Step 1: When searching for *any* missing participant during a plan termination, FAB 2014-01 explains that every plan fiduciary must, at a minimum: (1) send a notice to the missing participant's last known address via certified mail; (2) check related plan and employer records for more up-to-date information; (3) check with any individual that the missing participant has designated as a beneficiary for more up-to-date information; and (4) make reasonable use of Internet search tools that *do not charge a fee* (e.g., search engines, public record databases, obituaries, and social media).

Step 2: If none of the search methods described in Step 1 are successful, FAB 2014-01 requires plan fiduciaries to consider if additional search steps are appropriate. Plan fiduciaries are instructed to "consider the size of the participant's account balance and the cost of further search efforts in deciding if any additional search steps are appropriate." Additional search steps could include the use of internet search tools, commercial locator services, credit reporting agencies, information brokers, investigation databases, and analogous services that may involve charges.

- B. Distribution Options: If a plan fiduciary for a terminating defined contribution plan cannot locate a missing participant after conducting a reasonable search, the plan fiduciary may, consistent with its fiduciary obligations, transfer benefits

owed to a missing participant to an: (a) individual retirement account; (b) interest-bearing federally insured bank account; or (c) state unclaimed property fund. DOL believes that the best method for distributing any remaining benefits is a rollover to an IRA.

Although FAB 2014-01 is helpful for terminating defined contribution plan fiduciaries, it does not, by design, cover many issues that are unique to plan fiduciaries dealing with unresponsive or missing participants in ongoing plans and it is not applicable to defined benefit plans. And while sending a benefit of an unresponsive or missing participant to a state unclaimed property fund is allowed in a terminated plan, DOL has taken the position that ERISA preempts state unclaimed property laws for ongoing plans.<sup>2</sup>

***DOL Safe Harbor Regulation for Automatic Rollovers:*** DOL has also issued a safe harbor for ongoing plan fiduciaries when they are making a mandatory “cash out” distribution to a participant that is missing or unresponsive. Under the Internal Revenue Code (“the Code”), a plan may automatically “cash out” a participant who terminates employment if the value of the participant’s benefit does not exceed \$5,000. If the cash out amount exceeds \$1,000 and the participant does not elect otherwise, the Code requires the plan to roll over any cashed out amounts into an IRA established in the participant’s name. Pursuant to DOL’s safe harbor regulation for these automatic rollovers, the plan fiduciary’s selection of the IRA provider and the selection of investments for the participant’s IRA will be deemed to satisfy the fiduciary’s obligations under ERISA, if the safe-harbor’s condition are satisfied. The safe harbor generally requires the plan’s fiduciary to provide certain disclosures and to direct any mandatory distributions into certain investments specified by the regulation.

In connection with the issuance of the safe harbor, however, DOL specifically declined to address whether the safe harbor could be used for distributions of amounts above \$5,000 and the safe harbor is only available for distributions that can be rolled over to an IRA.

***Request for Guidance:*** Because FAB 2014-01 and DOL’s safe harbor regulation for automatic rollovers only have limited application for ongoing plan fiduciaries, DOL should issue guidance that specifically addresses how ongoing plan fiduciaries should generally deal with unresponsive or missing participants.<sup>3</sup> In developing such guidance, DOL must subject any proposed standards to a notice and comment

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<sup>2</sup> See Advisory Opinion 94-41A (Dec. 7, 1994).

<sup>3</sup> We acknowledge that the Department also has a safe harbor regulation for fiduciaries dealing with missing participants who must receive a distribution from a terminated individual account plan. See Labor Regulation § 2550.404a-3. However, for purposes of this letter, the relevant portions of that guidance discussing appropriate search steps and appropriate destination accounts for benefits owed to missing participants are otherwise covered by FAB 2014-01 and DOL’s automatic rollover safe harbor.

rulemaking process consistent with the Administrative Procedures Act. Our members have decades of experience working to reunite missing participants with benefits owed to them and wish to be a partner with DOL as it works to develop comprehensive standards on this matter. We also believe that this guidance may, in some places, need to depart from FAB 2014-01, particularly where it involves expensive procedures that could be repeated for many years. Further, the landscape has evolved since 2014 and appropriate consideration is necessary on privacy and fraud concerns related to potential steps that a plan fiduciary may be required to take. The three areas discussed below in Sections I-III are the areas where guidance is needed the most.

## RECOMMENDED GUIDANCE

### I. Reasonable Search Steps for Ongoing Plan Fiduciaries Following a Distribution Event

DOL should issue guidance that parallels (but departs where appropriate) its guidance on “reasonable search steps” for missing participants in a terminating defined contribution plan, as described in FAB 2014-01, for ongoing plan fiduciaries searching for missing participants following a distribution event.<sup>4</sup> Most ongoing plan fiduciaries already look to FAB 2014-01 as the primary authority for determining whether the plan has conducted reasonable search efforts when all, or a portion, of a participant’s account balance must be distributed from a plan, although many depart from it as appropriate. This approach would be consistent with a recommendation made by the 2013 ERISA Advisory Council Report on Locating Missing and Lost Participants, which recommended DOL to “[i]ssue guidance addressing plan fiduciary obligations to locate missing and nonresponsive participants and beneficiaries in active and frozen defined contribution plans that parallels the guidance for terminated plans in FAB 2004-02 [subsequently updated by FAB 2014-01].”

In the case of ongoing plan fiduciaries that must make a distribution to an unresponsive or missing participant, we believe that the two-step analysis for considering “reasonable search steps,” as described in FAB 2014-01 is a reasonable starting point as it provides an analytical framework that is reasonable, flexible, and has a proven track record of reuniting participants with benefits owed to them. Additional search steps would not be appropriate in this context. Further considerations should also be contemplated given the differences between a terminating plan and one that is ongoing.

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<sup>4</sup> For purposes of this letter, a “distribution event” includes any event that requires a plan to distribute amounts from a plan. This includes, but is not limited to, pension benefits at normal retirement age, required minimum distributions, automatic cash outs, and distributions that are required as a result of a participant’s death.

When considering “reasonable search steps” in this context, there is a critical need for DOL to be sensitive to the individual privacy and information security aspects of its guidance. Any “reasonable search steps” endorsed by DOL must not expose unresponsive or missing participants to any additional risks of identity theft or fraud. When fiduciaries share sensitive information about participants with third party locator services or attempt to use information in their possession to locate missing participants, personal information about the unresponsive or missing participants may purposefully or inadvertently be shared in a way that can expose participants to an increased risk of identity theft or fraud. DOL’s guidance must be mindful of those risks and be drafted to minimize such risks.

As discussed above, guidance for ongoing plan fiduciaries is necessary because they are regularly being confronted with inconsistent and ad hoc positions from DOL auditors during routine examinations. Those positions have, in certain circumstances, asserted that ongoing plan fiduciaries must take search steps that are not contemplated by, or are inconsistent with, the “reasonable search steps” described in FAB 2014-01 for terminating defined contribution plan fiduciaries. For example, our members have told us that auditors have said that “reasonable search steps” in an ongoing retirement plan require the plan’s fiduciary to perform a search for missing participants *every year*, to use a *different search method every year*, or to *contact current and former employees who may have worked for the employer at the same time as a missing participant*. Even worse, some DOL auditors have told our members that plan sponsors must “*do whatever it takes*” to locate missing participants and a failure to find a participant (or to get the participant to respond) is a breach of fiduciary duty. None of those positions are described or contemplated by FAB 2014-01, and in the absence of any specific DOL guidance for ongoing retirement plans that should be issued after appropriate notice and comment, fiduciaries should not be told by DOL representatives that they must conduct searches in a manner that goes beyond the standards set forth in FAB 2014-01.

## **II. Procedures for Ongoing Plan Fiduciaries Following a Distribution Event**

DOL should also issue guidance describing the unresponsive or missing participant solutions that are consistent with an ongoing plan fiduciary’s obligations when *a distribution must be made from a missing participant’s plan benefit or account*. DOL’s current participant guidance is inadequate for ongoing plan fiduciaries when distributions must be made from a plan for two primary reasons. First, it is not directly applicable to ongoing plan fiduciaries, except in the case of automatic rollover distributions. Second, because DOL’s current guidance was not designed for ongoing plans, it fails to expressly recognize unresponsive or missing participant solutions that are unique to the circumstances faced by ongoing plan fiduciaries.

While DOL’s current missing participant guidance for terminating plans is a good starting point for developing comprehensive guidance for ongoing plan fiduciaries, DOL should collect information to assist in issuing general unresponsive or



missing participant guidance that is not only applicable to ongoing plan fiduciaries, but also expands upon the solutions already endorsed by DOL in order to account for the practical differences between ongoing and terminating plans, as well as between defined benefit and defined contribution plans. At the very least, such guidance should extend the missing participant framework discussed in FAB 2014-01 to ongoing plans, modified as required to reflect the differences, while also: (1) making it clear that “forfeiture and reinstatement” procedures are consistent with an ongoing plan fiduciary’s obligations under ERISA; (2) extending the existing safe harbor for automatic rollover distributions to all amounts that must be distributed from a plan when those amounts can be rolled over or transferred to an IRA; and (3) making it clear that it is consistent with an ongoing plan fiduciary’s duties under ERISA to transfer amounts that must be distributed from an unresponsive or missing participant’s account into a taxable account when such amounts cannot be rolled over or transferred to an IRA. Each of these recommendations is discussed in greater detail below.

A. Expressly Recognize “Forfeiture and Reinstatement” as a Solution That Is Consistent with an Ongoing Plan Fiduciary’s Obligations Under ERISA

One of the most alarming positions that DOL auditors have communicated to our members during recent exams is a belief that a plan’s “forfeiture and reinstatement” procedures constitute a breach of fiduciary duty and/or a prohibited transaction.<sup>5</sup> This position is wrong and DOL should develop guidance expressly recognizing “forfeiture and reinstatement” procedures as a solution that is consistent with an ongoing plan fiduciary’s obligations under ERISA. This approach would also be consistent with a recommendation made by the 2013 ERISA Advisory Council Report for Locating Missing and Lost Participants.<sup>6</sup>

We appreciate that DOL’s existing missing participant guidance for *terminating* defined contribution plans does not recognize “forfeiture and reinstatement” as an acceptable method for handling amounts that must be distributed to missing participants, and this fact could cause confusion for DOL auditors examining an ongoing plan fiduciary’s procedures. However, it is also apparent that “forfeiture and reinstatement” was not discussed as a distribution method in FAB 2014-01 because that

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<sup>5</sup> To be clear, when we refer to “forfeiture and reinstatement” procedures, we mean plan document provisions and related procedures under which amounts that must be distributed to a missing participant are forfeited back to the plan and applied in accordance with the plan terms applicable to forfeitures. If a missing participant or beneficiary later returns to claim previously forfeited amounts, the employer must contribute to the plan an amount equal to the forfeited benefit to the newly discovered participant or beneficiary.

<sup>6</sup> The 2013 ERISA Advisory Council Report on Locating Missing and Lost Participants specifically recommended DOL to “confirm that a plan may provide that the distribution amount of an uncashed benefit check may be returned to the plan’s forfeiture account if a reasonable effort has been made to reach the participant/beneficiary; provided that the benefit (without earnings) will be restored if and when the participant or beneficiary claims the benefit.”

guidance only applies to terminating defined contribution plans for which “forfeiture and reinstatement” is not possible. In the case of ongoing plans, however, “forfeiture and reinstatement” is an appropriate method for handling amounts that must be distributed to unresponsive or missing participants because it is consistent with existing Treasury regulations and it allows plan assets owed to unresponsive or missing participants and beneficiaries to be used for the benefit of other plan participants and beneficiaries.

***Treasury Regulations Permit “Forfeiture and Reinstatement”:*** The IRS expressly recognizes “forfeiture and reinstatement” as an acceptable method for dealing with missing participants for plan qualification purposes. Specifically, Treasury Regulation § 1.411(a)-4(b)(6) permits plan sponsors to forfeit amounts owed to missing participants into the plan as long as the benefits are reinstated upon the participant’s return and claim for benefits.<sup>7</sup> DOL should expressly harmonize its missing participant guidance with IRS’s missing participant guidance by making it clear that “forfeiture and reinstatement” is a solution that is consistent with an ongoing plan fiduciary’s obligations under ERISA.

***Plan Sponsors Should Be Permitted to Keep Plan Assets in the Plan:*** DOL should also recognize “forfeiture and reinstatement” as an appropriate method for dealing with unresponsive or missing participants because it allows a plan’s assets to be used for the benefit of a plan’s other participants and beneficiaries. If a plan participant or beneficiary never returns to claim amounts that are owed to them, “forfeiture and reinstatement” permits the plan sponsor to direct unclaimed benefits in favor of the plan’s other participants and beneficiaries that are not missing or unresponsive, just as is the case with other forfeitures. This result is particularly appropriate in the context of small benefits and account balances (i.e., less than \$1,000), when there is a lower probability that a missing or unresponsive participant or beneficiary will ever return to claim benefits owed to them. Rather than distributing such small benefits or accounts from the plan, we think that plan sponsors should be given the flexibility to forfeit participant assets back to the plan to be used for administrative expenses or to offset future contributions, subject to reinstatement, if the plan sponsor chooses to do so.<sup>8</sup>

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<sup>7</sup> See Treasury Regulation § 1.411(a)-4(b)(6) (“a right [will not be treated] as forfeitable – [i]n the case of a benefit which is payable, merely because the benefit is forfeitable on account of the inability to find the participant or beneficiary to whom payment is due, provided that the plan provides for reinstatement of the benefit if a claim is made by the participant or beneficiary for the forfeited benefit. In addition, a benefit which is lost by reason of escheat under applicable state law is not treated as a forfeiture.”). Treasury Regulations do not require the plan to credit the former employee’s account with any subsequent gains or losses. See Treasury Regulation § 1.411(a)-7(d)(4)(v).

<sup>8</sup> We would agree that forfeiture generally should not occur until the plan has taken reasonable search steps to locate the participant or beneficiary.

B. Extend the Existing Automatic Rollover Safe Harbor Regulation to All Amounts That Must Be Distributed from the Plan When Such Amounts Can Be Rolled Over or Transferred to an IRA

DOL should also extend its existing safe harbor regulation for automatic rollovers to all amounts that must be distributed from a plan when such amounts can be rolled over or transferred to an IRA. This would include defined contribution amounts that must be automatically distributed to terminated participants that have reached age 62, or a later normal retirement age specified by the plan, and amounts that are owed to a deceased participant's missing beneficiary. Like other recommendations made in this letter, our recommendation is consistent with the recommendations made by the 2013 ERISA Advisory Council Report on Locating Missing and Lost Participants.<sup>9</sup>

C. Extend DOL's Safe Harbor Regulation for Automatic Rollovers to Distributions Sent to a Taxable Account When Such Distributions Must Be Made from the Plan and Cannot Be Accepted by an IRA

One of the biggest flaws in DOL's existing guidance is the absence of any clear guidance for ongoing plan fiduciaries when the plan must make a distribution to an unresponsive or missing participant that *cannot* be rolled over or transferred to an IRA. In this case, we believe that DOL should make it clear that it is consistent with an ongoing plan fiduciary's obligations under ERISA to transfer amounts that must be distributed from a plan to an unresponsive or missing participant into a taxable account that is modeled on DOL's existing safe harbors for automatic rollover distributions and terminating abandoned plans.

Ongoing plan fiduciaries, unlike terminating plan fiduciaries, must frequently distribute amounts from a participant's account that cannot be rolled over or transferred to an IRA. In a defined benefit plan, this usually occurs when a former employee reaches normal retirement age and should receive an annuity distribution. In a defined contribution plan, this occurs when a missing participant reaches age 70 ½ and the terms of the plan require distributions to be made from the participant's account in order to satisfy the Code's required minimum distribution rules. These payments are not eligible to be rolled over under Code section 402(c)(4).

In these situations, all or part of the participant's benefit cannot stay in the plan and cannot be transferred to an IRA – DOL's preferred solution for terminating plan

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<sup>9</sup> The 2013 ERISA Advisory Council Report on Locating Missing and Lost Participants recommended DOL to: "Extend the automatic rollover provisions in the safe harbor under DOL Regulation section 2550.404a-2 to: (a) Lost Participants, including those who fail to cash benefit checks (regardless of the size of the account) that become payable to the participant upon attainment of the plan's normal retirement age or are otherwise distributable without the participant consent under Code Sec. 411 and the terms of the plan; and (b) Lost beneficiaries (regardless of the size of the account or timing of the distribution)."

distributions and automatic rollovers. To help resolve the uncertainty surrounding these types of distributions, DOL should make it clear that it is consistent with an ongoing plan fiduciary's duties under ERISA to transfer amounts that must be distributed from an unresponsive or missing participant's account into a taxable account when such amounts cannot be rolled over or transferred to an IRA, if the account would meet the safe harbor but for the requirement to be an IRA.<sup>10</sup> This approach is not only consistent with DOL's missing participant guidance for distributions that can be rolled over to an IRA, it is also consistent with a previous version of the DOL's safe harbor for distributions that must be made from terminating defined contribution plans.<sup>11</sup>

### **III. Reasonable Search Steps for Ongoing Plans Prior to a Distribution Event**

DOL should also develop guidance on what are considered "reasonable search steps" for missing participants in an ongoing retirement plan *prior to a distribution event*.

It is not uncommon for ongoing retirement plans to receive "undeliverable" or "bounce back" responses when sending communications to retirement plan participants, including disclosures that are required by ERISA or the Code. In response to a "bounce back" or "undeliverable" notification, plan fiduciaries typically make an effort to obtain updated contact information or to otherwise locate a participant who has not received the necessary disclosures. Those search efforts often include at least one of the search methods described in FAB 2014-01. In the absence of any specifically applicable guidance instructing plan fiduciaries on how they should deal with unresponsive or missing participants in an ongoing plan, the policies and procedures in place for locating missing participants prior to a distribution event are varied across employers.

Our members generally believe that the two-step search analysis described in FAB 2014-01 is a reasonable approach for locating missing participants that are owed a benefit in the context of terminating defined contribution retirement plans. However, when plan fiduciaries are simply trying to locate participants with out-of-date contact information in an ongoing plan, the two-step search described in FAB 2014-01 does not always seem appropriate. For example, it makes sense to pay for a commercial locator service to locate a missing participant with a large account balance when the participant's account will otherwise be distributed as part of a plan termination. The use of such a service does not, however, seem appropriate in the context of an ongoing plan when the participant is not facing a distribution event. Former employees who continue to participate in an employer-sponsored retirement plan may not have supplied updated contact information to their former employer and may have little

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<sup>10</sup> As it did with the existing safe harbor, DOL should coordinate with other regulators to ensure that the opening of a non-IRA account by a plan would not violate any securities, banking or other laws.

<sup>11</sup> See 72 Fed. Reg. 7516, 7517 (Feb. 15, 2007).

desire to “check-in” with the plan, especially if they have set long-term investment strategies and do not intend to take money out of the plan until retirement. It would not seem reasonable for an employer to devote plan resources to locate participants who simply did not receive the plan’s Summary Plan Description or the plan’s Summary Annual Report for a single year, or even a couple years. However, in the absence of any directly applicable guidance, it is unclear what a plan fiduciary’s obligations are in an ongoing plan. Further, we would reasonably expect that a plan fiduciary’s obligations to search for an unresponsive participant in this scenario would not require the same degree of effort or the same commitment of resources as would be required when a distribution is imminent in the context of a plan termination.

Accordingly, we urge DOL to issue guidance clarifying that the search process described in FAB 2014-01 does not apply to fiduciaries searching for missing participants in an ongoing plan prior to a distribution event. Although, we believe that the primary search methods contemplated in FAB 2014-01 (with appropriate modifications for ongoing plans) would be reasonable methods for searching for missing participants in an ongoing plan, we believe that DOL guidance should expressly clarify that the considerations for determining whether a search is reasonable in an ongoing retirement plan are different from those described in FAB 2014-01, which is intended to apply when plan termination and distribution is imminent.

#### **IV. DOL Should Revisit Its Audit Policies and Guidelines to Make Them More Consistent and Reasonable**

In the absence of publicly available and comprehensive guidance, we urge DOL to review its audit policies and guidelines to prevent DOL auditors from communicating inconsistent, ad hoc, and unreasonable positions to our members. We understand that unresponsive or missing participant procedures for large defined benefit plans are a current DOL audit priority and we support DOL in its efforts to ensure that plan sponsors are fulfilling their fiduciary obligations with regard to participants who may be owed a retirement benefit. As DOL carries out this process, however, it must ensure that its representatives are only communicating positions that are contemplated by existing publicly available guidance, and that those positions do not merely reflect an individual auditor’s or regional office’s interpretation of ERISA. Moreover, as DOL continues to focus on vested terminated participants, we urge DOL to train its auditors to conduct their examinations in a more thoughtful and reasonable manner. The following list of issues is offered as our recommendation to improve DOL’s audit policies and guidelines

***It Should Not Be Suggested that a Plan’s Forfeiture and Reinstatement Provisions Result in a Prohibited Transaction:*** As we stated above, one of the most alarming positions that DOL auditors have communicated to our members during recent exams is a belief that a plan’s “forfeiture and reinstatement” procedures constitute a breach of fiduciary duty and/or a prohibited transaction. This position is

flat out wrong and inconsistent with guidance promulgated by the IRS, which has interpretive authority over vesting. DOL's regional offices must stop asserting this position on an ad hoc basis and in the absence of any national guidance specifically addressing this issue.

***Audits Must Provide Employers with Finality When Completed:*** Some of our members that have had their unresponsive or missing participant procedures audited have told us that they have been required to send "follow-up reports" to DOL on their efforts to locate missing participants. Although we understand that DOL can apply wide discretion when conducting its investigations, we also must remind DOL that its investigations can be costly and administratively burdensome for our members. DOL should make every effort to ensure that its investigations do not continue indefinitely and should provide employers with finality when the audit has accomplished its purpose.

***Data Requests Must Be Reasonable:*** We also understand that DOL representatives have required plan sponsors to supply onerous and detailed rosters of unresponsive or missing participants, including specific information about each missing participant's benefit or account and the efforts that the plan fiduciary has taken to locate the missing participant (e.g., name, address, account balance/benefits owed, a description of how the plan dealt with distributions, and a list of uncashed checks). Again, while we recognize DOL's wide discretion when conducting investigations, DOL should be sensitive to the costs and administrative burdens imposed by its investigative techniques. In the absence of any specific recordkeeping requirements for unresponsive or missing participants, many plan sponsors and their service providers do not keep all of the information being requested in a database that is exclusively designed to run reports on these participants. Given this reality, DOL auditors should limit their requests to only the information that is absolutely necessary for determining whether fiduciaries are satisfying their obligations under ERISA based on currently published DOL guidance.

Moreover, as discussed above, any time a plan shares personal information about an unresponsive or missing participant with a third party – whether the DOL, another governmental agency, or a private locator service – there is an increased risk for identity theft and fraud. We have heard that regional offices have been giving this personal information to a third party locator service to help them find missing participants. DOL must be extremely sensitive to the ways in which its data collection and investigative techniques may increase those risks for missing participants and beneficiaries.

We encourage DOL to adhere to the same recommendations the ERISA Advisory Council's 2016 Report on Cybersecurity Considerations for Benefit Plans made for plan sponsors: "Given the importance of people in a cybersecurity strategy, plan sponsors and fiduciaries should understand exactly who has direct or indirect access to sensitive data and they should endeavor to limit access to data as much as possible. Several

witnesses noted that data access should be granted only to those users who absolutely need the information to perform their jobs. Limiting data access is one of the best ways to reduce cybersecurity risk.”<sup>12</sup>

***Plans Should Not Be Told that They Must Go Beyond the Reasonable Search Steps Described in FAB 2014-01:*** As discussed above, DOL examiners have told our members that their missing participant procedures must use a *different search method every year, contact current and former employees who may have worked for the employer at the same time as a missing participant, and/or “do whatever it takes”* to locating missing participants. These search methods are not discussed in existing DOL guidance and DOL examiners should not be telling plan sponsors that they must take unreasonable measures to locating missing participants.

A Council member told us that during an audit, DOL officials suggested that the plan contact the next of kin to find the missing participant. We have significant security concerns with that approach. While this may be appropriate if the participant has specifically provided the person’s contact information in connection with the pension benefit (and we are not convinced it is appropriate even then), as mentioned earlier, often the plan – particularly a DB plan – will not have this information prior to the annuity commencement date.

Another example highlighting security concerns is the use of phone numbers found by search methods. One Council member reported being told by DOL auditors to call missing participants. Again, we feel there are privacy and security concerns with such an approach, especially if the phone number came from a search rather than from the participant directly.

Finally, we strongly disagree with a policy that a plan should keep searching annually for the same missing participant indefinitely. Conducting unlimited searches for the same participant is not an efficient use of plan resources. Rather, DOL should create guidance on reasonable searches regarding the length of time or number of efforts, balanced against the cost this imposes on the plan and its participants, as an indefinite search is not prudent.

***Auditor’s Contacts with Plan Participants Must Be Sensitive to The Confusion They Can Create:*** We are also aware that DOL examiners are directly attempting to locate participants that plan sponsors have been unable to locate. We understand that in some cases, DOL representatives are sending letters to unresponsive or missing participants that tell the participant that their former employer is under investigation

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<sup>12</sup> Further, in the Cybersecurity Considerations Document that the ERISA Advisory Council recommended DOL release as guidance for plan sponsors, the Council included the following statement: “Transmitting and receiving data that is not needed to execute a task or support the plan puts more data at risk than is necessary, increasing risk.”

for possible fiduciary breaches. If DOL intends to continue soliciting responses from unresponsive or missing participants, it must be sensitive to the confusion that its attempted contacts may have when alerting plan participants that their former employer is under investigation by a federal agency in connection with retirement benefits owed to them. Actions taken by DOL examiners can unnecessarily create confusion and anxiety for participants that are located, and DOL should take actions to prevent this from happening in the future.

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The Council and its members share your goal of ensuring that workers receive the benefits to which they are entitled. Employers want to reunite former employees and beneficiaries with their benefits too. We want to work with you as you develop guidance on fulfilling fiduciary obligations and providing clear and workable options for the distribution of benefits when a participant or beneficiary truly cannot be found or is repeatedly unresponsive. We look forward to discussing this issue with you.

Sincerely,

A handwritten signature in black ink that reads "Lynn D. Dudley". The signature is written in a cursive, flowing style.

Lynn D. Dudley  
Senior Vice President, Global Retirement and  
Compensation Policy

cc: Joe Canary, Director, Office of Regulations and Interpretations, EBSA  
Mabel Capolongo, Director, Office of Enforcement, EBSA  
Robert Neis, Benefits Tax Counsel, Department of the Treasury  
W. Thomas Reeder, Director, PBGC