



Plan Sponsor Council of America
Part of the American Retirement Association

June 25, 2018

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Re: Recommendations for Missing Participant Guidance

Dear Madam and Sirs:

The Plan Sponsor Council of America (PSCA) previously sent you a letter in April 2017 requesting additional guidance from the Internal Revenue Service (IRS) and Department of Labor (DOL) addressing various Internal Revenue Code (Code) and Employee Retirement Income Security Act (ERISA) compliance issues that arise when there is a missing or nonresponsive participant. Because this topic is affected by both DOL and IRS guidance, we submitted this letter to both of your agencies in a single form. Additionally, PSCA has signed onto a letter to DOL regarding this issue sent by a group of concerned trade organizations. In light of recent reports of DOL enforcement activity with respect to how plan sponsors handle missing participants and the recent Government Accountability Office (GAO) report calling for additional guidance on plan sponsors' obligations to search for and locate missing participants, we write to you again.

PSCA is a diverse, collaborative community of engaged retirement savings plan sponsors, working together on behalf of millions of employees to solve real problems, create positive change, and expand on the success of the employer-sponsored retirement savings system. With members representing employers of all sizes and from all industries, PSCA is improving American retirement security by creating a forum for comprehensive dialogue and serving as a resource to policymakers, the media, and other stakeholders.

Although the DOL and IRS have, separately, issued guidance regarding the proper steps for plan sponsors to take to locate missing participants for certain plans, there is no guidance on missing participants that provides comprehensive, consistent guidance to plan sponsors. As such, plan sponsors, especially small plan sponsors, are left to cobble together, and attempt to harmonize, the guidance issued by the two agencies. In our April letter to you, we proposed a sample safe harbor program¹ that would provide plan sponsors with clear steps to meet their fiduciary obligations and preserve their plan qualification:

Step One: Plan sponsor follows the standard process for affected participants or beneficiaries.

Step Two: If the participant's mail is returned undelivered or his or her check is uncashed for 90 days, the plan sponsor may initiate a safe harbor approach.

Step Three: The plan sponsor checks the participant's files and contacts his or her designated beneficiary for updated participant information.

Step Four: If still unresolved, the plan sponsor performs internet searches to locate the participant or beneficiary (e.g., www.legacy.com).

Step Five: If still unresolved, the plan sponsor may, at its option, hire a third party locator company to obtain current contact information (e.g., www.employeeLocator.com, www.peoplelookup.com, www.intelius.com).

Step Six: If still unresolved, the plan sponsor may, at its option, enroll in PBGC's Missing Participant Program, to the extent available.

Step Seven: If still unresolved, the plan sponsor uses the IRS letter forwarding service, if it is reinstated.

Step Eight: Plan sponsor reports the distribution on Form 1099-R.

Step Nine: The plan sponsor restores the net uncashed check to the participant's account in accordance with the plan's forfeiture provisions (if any), rolls the money into a default IRA in accordance with Code section 401(a)(31)(B) (regardless of the amount), or pays the money to the PBGC (if step 6 is used).

Step Ten: If the participant later makes a claim for the benefit, the participant receives the net payment from the IRA, the PBGC (if step 6 is taken), or from the plan (either from the forfeiture account or the participant's account), and the distribution is reported on Form 1099-R with Box

¹ While we understand that the IRS letter forwarding service has been discontinued for this purpose, we request its reinstatement at the agency's earliest convenience due to its valuable role in locating missing participants.

2a blank and the taxable amount not determined checked (as the participant might have tax basis from the initial distribution if the amount was taken into taxable income previously).

Since our letter, there have been numerous reports of aggressive DOL enforcement activity -- and sometimes inconsistent positions taken by DOL auditors -- regarding how plan sponsors are handling missing participants. We have heard concerns from our plan sponsor members that they have been or may be subjected to enforcement actions even though the DOL and IRS have not issued comprehensive guidance on missing participants that provides a clear roadmap for compliance.

In its January 2018 report, GAO recognized that guidance such as the safe harbor proposed above is critically needed to address the missing participant issue. The GAO's first recommendation was for DOL to issue guidance "on the obligations under ERISA of sponsors of ongoing plans to prevent, search for, and pay costs associated with locating missing participants." In a response letter commenting on the GAO report, the Employee Benefits Security Administration (EBSA) replied, "EBSA agrees that additional guidance may be helpful to aid plan sponsors and plan fiduciaries of ongoing plans in meeting their existing fiduciary obligations to search for missing participants and pay benefits." GAO also recommended the IRS reinstate its letter forwarding service in its January report, saying "by reinstating the letter forwarding program for plan participants in a cost-effective manner, IRS can help support the retirement security of separated plan participants and plan sponsor efforts to meet their obligations under the IRC and ERISA." While IRS reported that its limited staffing and resources impact the feasibility of reinstating the program, we believe the program can be reinstated in a manner that meets the needs of both the IRS and plan sponsors.

As your agencies work to develop guidance, we recommend to you again our safe harbor approach and urge you to contact us if we can be of any assistance. PSCA remains committed to assisting the responsible agencies and the plan sponsor community navigate these issues.

* * *

Thank you for your time and consideration. Please call David Levine (202-861-5436), Brigen Winters (202-861-6618) or me (212-556-2162) if you have any questions.

Sincerely,



Kenneth Raskin
President
Plan Sponsor Council of America

cc: Mr. Kyle N. Brown
Mr. Joe Canary
Ms. Mabel Capolongo
Mr. Stephen B. Tackney