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## **DOL Pronouncements regarding Missing Participants and Brokerage Windows**

In the last month the U.S. Department of Labor (“DOL”) has issued two significant regulatory pronouncements. In Field Assistance Bulletin (“FAB”) 2014-01, DOL provides updated guidance on the fiduciary duties that apply to locating and distributing assets attributable to missing participants in a terminating plan. Second, a request for information (“RFI”) provides DOL’s opening volley in what could amount to regulatory action addressing fiduciary and other standards that apply to open brokerage windows offered in participant-directed defined contribution plans. We summarize both pieces of DOL guidance here.

### **I. Field Assistance Bulletin 2014-01, Guidance with Respect to Missing Participants**

On August 14, 2014, the DOL released FAB 2014-01, which provides additional guidance to fiduciaries of terminated defined contribution plans with regard to so-called “missing participants.” Such fiduciaries often find themselves in a quandary because they are required by the Internal Revenue Code to seek affirmative direction regarding the distribution of a terminating plan’s participant accounts, yet they are unable to contact some of the participants from whom direction is sought. Despite plan administrators’ best efforts to locate, notify, and receive appropriate instructions from plan participants concerning the distribution of their account balances, there will be instances where the administrators’ attempts to locate participants will prove unsuccessful. This client alert summarizes recent guidance from the DOL regarding missing participants.

#### **A. Prior Guidance**

In 2004, the DOL released FAB 2004-02 which instructed plan fiduciaries to employ the following methods to locate missing participants in the event of a defined contribution plan termination:

- send notices via certified mail;
- check related plan resources;
- consult the beneficiary of the missing participant; and
- utilize the letter-forwarding services of the Internal Revenue Service or Social Security Administration (“SSA”).

Internet search tools, commercial locator services, and credit reporting agencies were also noted as potential resources. In circumstances where, in order to effectuate a plan termination, plan fiduciaries are required to make distribution elections on behalf of missing participants, such fiduciaries were advised to consider rolling over the benefits into an individual retirement plan, establishing an interest-bearing federally insured bank account in the name of the missing participant, or transferring the account balance to a state

unclaimed property fund. The DOL made clear in FAB 2004-02 that participant account balances can be charged with the expenses of conducting reasonable searches, provided those costs are reasonable and consistent with plan provisions and ERISA. Since the issuance of FAB 2004-02, many plan fiduciaries and their service providers have turned to that FAB for guidance on how to address missing participant issues in active defined contribution plans.

FAB 2014-01 supersedes FAB 2004-02, incorporating modifications to reflect changes that have occurred over the last ten years.

#### B. Searching for Missing Participants: A Fiduciary Endeavor

Although the DOL views the termination of a plan to be a “settlor” function not regulated by ERISA, the DOL has long held the view that steps taken to implement a decision to terminate a plan are fiduciary activities, including steps taken to locate participants and distribute account balances in a terminating plan. ERISA 404(a) requires that plan fiduciaries act prudently and solely in the interest of plan participants and beneficiaries. According to FAB 2014-01, plan fiduciaries must make reasonable efforts to locate missing participants in accordance with their duties of prudence and loyalty.

FAB 2014-01 requires that all of the following resources be exhausted before a plan fiduciary concludes its search for missing participants:

- send notices via certified mail;
- check related plan resources;
- consult the beneficiary of the missing participant; and
- use free electronic search tools (**NEW REQUIREMENT**).

With the proliferation of the Internet, the DOL encourages plan fiduciaries to use the free and effective electronic resources that are at their disposal such as search engines, public record databases, obituaries and social media. The use of IRS and SSA letter forwarding services is no longer required, inasmuch as these programs have been discontinued.

The DOL notes that even if the required methods above do not prove successful, the duties of prudence and loyalty may require additional search methods to be employed, such as commercial locator services, credit reporting agencies, information brokers, and investigation databases. In determining whether to conduct additional searches, the DOL notes that the size of the account balance as well as the costs of further search efforts must be considered.

#### C. Account Distribution Alternatives

If search efforts fail, plan fiduciaries will be forced to determine the appropriate distribution of missing participant account balances. It is important that plan fiduciaries recognize that their fiduciary obligations encompass this decision-making process. In FAB 2014-01, the DOL reiterates its preference for rollovers into individual retirement plans, and notes that in 2006 the DOL released final regulations that provide safe harbor relief from ERISA’s fiduciary requirements with respect to rollovers from terminating defined contribution plans.<sup>1</sup> As in the prior Bulletin, the DOL states that establishing a federally insured bank account in the name of the missing participant or transferring the account balance to a state unclaimed property fund are viable secondary options if the fiduciary is either unable to

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<sup>1</sup> 29 C.F.R. §2550.404a-3 (2006)

locate an individual retirement plan provider or determines for another compelling reason not to utilize an individual retirement plan. Fiduciaries are encouraged to consider bank fees and interest payments as well as the availability of searchable databases with state unclaimed property funds when deciding between these two alternatives. As described in both FABs 2004-02 and 2014-01, plan fiduciaries are strongly advised not to use 100% income tax withholding, which involves transferring account balances to the IRS to be used as an offset against the missing participant's purported tax liability. The DOL stated its view that, after consultation with the IRS on this approach, it has determined that using this method would result in a fiduciary breach.

In addition, the DOL noted that the Pension Benefit Guaranty Corporation ("PBGC") is currently reviewing, as directed by Congress in the Pension Protection Act of 2006, whether and how to expand its missing participant program that currently applies to defined benefit plan participants to participants in defined contribution plans. The DOL notes that after the PBGC publishes final regulations that would permit distributions from terminated defined contribution plans to be made to the PBGC, the DOL intends to reevaluate its guidance regarding preferred distribution methods. We note that the Spring regulatory agenda indicates that the PBGC is expected to issue proposed regulations under its missing participant program in December of this year.

#### D. Significance

FAB 2014-01 provides some helpful guidance that can be applied in the case of a terminating defined contribution plan. Further, while this FAB does not specifically address active plans, we believe that some of its principles, particularly with regard to search methods, may also be applied in the case of non-terminated plans. We suggest that plan fiduciaries review their plan policies for missing participants, and amend them if needed to conform to the DOL's most recent guidance. We also encourage plan administrators to thoroughly document the steps taken to locate and make distributions on behalf of each missing participant. We will continue to monitor this issue and notify you of any significant developments. Please contact us with any questions or concerns.

## **II. Request for Information Regarding Open Brokerage Windows**

On August 21st, the Department of Labor published a RFI regarding standards for self-directed brokerage accounts ("SBA") in ERISA covered plans. DOL expects the information provided in response to its questions will provide the public record necessary to allow it to determine whether, and to what extent, regulatory standards or other guidance are necessary in order to protect the plan participants that utilize SBAs to invest their retirement assets. The RFI contains thirty-nine questions and comments must be submitted by November 19, 2014.

DOL most recently addressed SBAs in its participant disclosure rulemaking effort, which led to a significant amount of controversy in the benefits community. In the participant disclosure rule, DOL defined the term "designated investment alternative" in such a way as to specifically carve out SBAs. That is significant in that an investment alternative that is not a designated investment alternative is not subject to the detailed performance, fee and other disclosures required of a designated investment alternative. However, DOL subsequently issued a series of frequently asked questions ("FAQs") under the participant disclosure rules that provided additional guidance regarding SBAs. FAB 2012-03. Among these FAQs was the now modified and replaced FAQ 30 under which DOL attempted, without notice or comment, to subject some of the investment alternatives purchased through a SBA to ERISA's fiduciary requirements and the regulation's disclosure requirements for designated investment alternatives. Based upon comments it received from the public, DOL subsequently published FAB 2012-03R which modified and replaced FAQ 30 with new FAQ 39 which confirmed that, absent additional guidance, investment alternatives purchased through a SBA are not "designated investment alternatives." In the FAQ, DOL stated that it intended to engage in a discussion with interested parties regarding SBAs. This RFI is part of that discussion.

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The RFI's questions are divided into ten categories with each category containing several questions that ask:

1. What type of arrangement should be considered a SBA
  - a. DOL specifically asks how the term "brokerage window" should be defined as a regulatory or interpretive matter.
2. Questions regarding the plans offering SBAs
3. Questions regarding the types and number of participants using a SBA and how they are using it
  - a. One interesting question in this section asks whether there is evidence that participants are making good or bad decisions when investing through a SBA.
4. How plan fiduciaries select and monitor the provider of the plan's SBA
5. Whether and how plan fiduciaries monitor investments made through their plan's SBA
6. What costs are associated with a SBA
  - a. DOL specifically asked to what extent SBAs are subsidized by plan participants who do not utilize the SBAs.
7. What information is provided to participants regarding the SBA and the investments purchased through the SBA
  - a. One of the questions in this category references the GAO's recent report on managed accounts, asking whether standardized performance and benchmarking information should be required for SBAs
8. What role do investment advisors have regarding SBAs
9. Is there a need for guidance regarding the application of ERISA's fiduciary duties to SBAs
10. What SBA information is communicated to participants in their benefit statements and DOL in the Form 5500 disclosures and is this information sufficient

We expect that DOL will use the public record generated by the RFI to amend, alter or broaden the application of a number of ERISA statutory and regulatory requirements. The most obvious and likely most significant change would be the application of the fiduciary rules to investments purchased through a SBA. DOL may also use the information provided to alter the Form 5500 reporting requirements, impose new benefit statement content requirements, and add additional disclosure obligations under the service provider and participant disclosure regulations.