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DATE:	JANUARY 12, 2021
MEMORANDUM FOR:	MABEL CAPOLONGO, DIRECTOR OF ENFORCEMENT REGIONAL DIRECTORS
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FROM:	JOHN J. CANARY DIRECTOR OF REGULATIONS AND INTERPRETATIONS
SUBJECT:	TEMPORARY ENFORCEMENT POLICY REGARDING THE PARTICIPATION OF TERMINATING DEFINED CONTRIBUTION PLANS IN THE PBGC MISSING PARTICIPANTS PROGRAM

This memorandum announces the Department of Labor's temporary enforcement policy on terminating defined contribution plans' (e.g., 401(k) plans) use of the Pension Benefit Guaranty Corporation's (PBGC) expanded Missing Participants Program. The policy applies to fiduciaries of terminating defined contribution plans and qualified termination administrators (QTA) of abandoned individual account plans (abandoned plans).

BACKGROUND

The Department of Labor's regulation at 29 CFR 2550.404a–3 provides a fiduciary safe harbor for use in making distributions from terminated individual account plans (as defined in section 3(34) of ERISA) and abandoned plans (as described in 29 CFR 2578.1) on behalf of participants and beneficiaries who fail to make an election regarding a form of benefit distribution, including "missing participants." The safe harbor generally requires that distributions be rolled over to an individual retirement account or annuity (IRA), although in limited circumstances fiduciaries may make distributions to certain bank accounts or to a state unclaimed property fund. If the conditions of the safe harbor are met, a fiduciary (including a QTA in the case of an abandoned plan) is deemed to have satisfied the requirements of section 404(a) of ERISA with respect to distributing benefits, selecting a transferee entity, and investing funds in connection with the distribution.

On December 22, 2017, PBGC established the PBGC Defined Contribution Missing Participants Program (Program) to hold retirement benefits for missing participants and beneficiaries in most terminated defined contribution plans and to help those participants and beneficiaries find and receive those benefits.[1] 29 CFR 4050.201 - 207. The PBGC cites multiple benefits of the Program, including:

- benefits of any size can be transferred to the PBGC;
- periodic active searches by the PBGC increases the likelihood of connecting missing participants with their benefits;
- benefits are not diminished by ongoing maintenance fees or distribution charges;
- transferred amounts grow with interest (at the applicable Federal mid-term rate); and
- lifetime income options are available for balance transfers over $5,000.

The Department consulted with the PBGC during the PBGC's development of its Defined Contribution Missing Participants Program. As noted in the preamble to the final rule adopting the Program, the Department intends to look into what changes are needed to its safe harbor regulation so that transfers to the PBGC by terminating individual account plans would be eligible for relief under the safe harbor.[2]

The COVID-19 emergency may result in some disruption of recordkeeping and search activities of employers, plan fiduciaries and service providers who closed their offices, operate under social distancing or work remotely. We expect that the economic disruption caused by the outbreak could result in large numbers of workers losing contact with their employers and plans. Accordingly, it is even more important in the wake of the pandemic to facilitate the transfer of missing participants' account balances to the PBGC upon the termination or abandonment of an individual account plan and, thereby, increase the likelihood that missing participants can locate and access their benefits.

TEMPORARY ENFORCEMENT POLICY

Pending further guidance, the Department will not pursue violations under section 404(a) of ERISA against either responsible plan fiduciaries of terminating defined contribution plans or QTAs of abandoned plans as described in 29 CFR 2578.1 in connection with the transfer of a missing or non-responsive participant's or beneficiary's account balance to the PBGC in accordance with the PBGC's missing participant regulations rather than to an IRA, certain bank accounts, or to a state unclaimed property fund, as specified in 29 CFR 2550.404a-3, if the plan fiduciary or QTA complies with the guidance in this memorandum and has acted in accordance with a good faith, reasonable interpretation of section 404 of ERISA with respect to matters not specifically addressed in this memorandum.[3]

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[1] 82 FR 60800. Until recently, the PBGC Program covered only the PBGC-insured single-employer defined benefit plans as part of the standard termination process. The program was expanded to cover defined contribution plans (e.g., 401(k) plans), and certain other defined benefit plans that terminate on or after January 1, 2018.

[2] 82 FR 60800, 60801.

[3] With regard to the account balance of a missing participant that was conditionally forfeited under a plan provision incorporating Treasury Regulation 26 CFR 1.411(a)-4(b)(6), the preamble to the PBGC's final missing participant regulation states that: "PBGC believes that such a claim to benefits isn't lost on plan termination, and so the final missing participants regulation treats these individuals the same as any other missing participant." 82 FR 60800,

However, this temporary enforcement policy does not preclude the Department from pursuing violations under sections 404 or 406 of ERISA for a failure to diligently search for participants and beneficiaries prior to the transfer of their account balances to the PBGC or from pursuing violations under sections 107, 209 or 404 of ERISA for a failure to maintain plan and employer records. This memorandum expresses a temporary enforcement policy; it does not address the rights or obligations of other parties. To the extent this memorandum conflicts with the distribution guidance of Field Assistance Bulletin 2014-01, this memorandum controls.

Transferring Plans

A plan fiduciary or QTA who chooses to participate in the PBGC Defined Contribution Missing Participants Program must otherwise comply with the requirements of the safe harbor regulation at 29 CFR 2550.404a-3, except that the content of the notice to participants and beneficiaries must be modified to reflect the transfer to the PBGC, rather than to an IRA, bank or savings account, or state unclaimed property fund. Notices to participants and beneficiaries must state clearly that their account balances are being transferred to the "Pension Benefit Guaranty Corporation's Defined Contribution Missing Participants Program," and include the PBGC's website address and customer contact number.

A plan fiduciary or QTA may also transfer to the PBGC the account balances of participants and beneficiaries who elected a lump sum distribution of the entire account under the terms of the plan if that distribution was paid by check and the check remains uncashed after: (1) the "cash-by" date prescribed on the check (or in an accompanying notice) that is at least 45 days after the check's issuance, or (2) the check's stale date if no "cash by" date is prescribed.

PBGC Fee

The PBGC charges a flat fee for certain accounts transferred to the PBGC Defined Contribution Missing Participants Program. A plan fiduciary may pay this fee from the transferred account unless the plan terms prohibit such payment.[4] In the case of an abandoned plan, the Department will not treat a QTA as violating section 404(a)(1)(D) for a failure to comply with plan terms merely because the QTA disregards plan terms that require such expenses to be paid by an employer that is no longer available.

Notifying Plans

Under the PBGC Defined Contribution Missing Participants Program, a plan that does not elect to transfer the account balances of all missing participants to the PBGC may choose to notify the PBGC about the disposition of the account balances of all or some missing participants. The

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60805. Accordingly, with the exception of an abandoned plan, this temporary enforcement policy will not apply to a terminating individual account plan containing a Treasury Regulation 26 CFR 1.411(a)-4(b)(6) conditional forfeiture provision, unless the conditionally forfeited accounts of all missing participants and beneficiaries are fully restored and transferred to the PBGC.

[4] ERISA section 404(a)(1)(D) provides that fiduciaries must administer the plan in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Title I and Title IV of ERISA.

PBGC regulation at 29 CFR 4050.203(a)(2) defines such a plan as a "notifying plan." The Department encourages plan fiduciaries and QTAs who do not elect to transfer account balances to the PBGC to participate in the PBGC Defined Contribution Missing Participants Program by electing the notifying plan option.

FOR FURTHER INFORMATION

Questions concerning this memorandum may be directed to EBSA's Office of Regulations and Interpretations at (202) 693-8500.

The contents of this document do not have the force and effect of law, and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.