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Disposition of Account Balances for Missing Participants



June 24, 2002

Alan D. Lebowitz, Deputy Assistant Secretary
United States Department of Labor
Pension and Welfare Benefits Administration
200 Constitution Ave., NW, Room N-5677
Washington, DC 20210

Re: Disposition of Account Balances for Missing Participants

Dear Mr. Lebowitz:

The American Society of Pension Actuaries (ASPPA) offers these comments regarding the disposition of account balances for missing participants in defined contribution plans. ASPPA is a national organization of more than 5,000 members who provide actuarial, consulting, administrative, legal and other services to qualified plans.

ASPPA provided similar comments to the IRS by letter to Carol Gold on December 7, 2001. However, the fiduciary issues raised by distributing assets, as discussed herein, are primarily within the purview of the Department of Labor (DOL) and need to be addressed by the DOL. ASPPA believes that guidance from the DOL concerning the proper disposition of account balances for missing participants, particularly in the context of terminating defined contribution plans, is urgently needed for the following reasons:

1. Due to the lack of clear guidance on the fiduciary issues raised by distributing assets of missing participants, many plan sponsors and their advisors utilize various procedures to resolve the account balances of missing participants including, but not limited to:
 - a. Forfeiting the entire account balance once it is determined that the individual cannot be located (although in the case of a terminating plan there is no mechanism for reinstatement of the benefit);
 - b. Withholding 100% of the individual's account balance and remitting the withholding to the IRS; and
 - c. Creating an individual retirement account (IRA) and rolling the individual's account balance into the IRA without notifying the individual or obtaining the individual's consent.
2. The legislative proposal to give the Pension Benefit Guaranty Corporation jurisdiction to receive account balances of missing participants in defined contribution plans was not included as part of the Economic Growth And Tax Relief Reconciliation Act of 2001 (EGTRRA), and it is now unclear whether such a legislative solution will ever be adopted.
3. Additional questions regarding the handling of missing participants' accounts are being raised due to the enactment of EGTRRA Section 657(a), which requires account balances greater than \$1,000, but less than \$5,000, to be directly rolled over to an IRA.

ASPPA believes that the DOL should now issue guidance enabling plan administrators to make distributions to missing participants efficiently, and with assurance that the distribution is made consistent with ERISA's fiduciary duties.

Proposal For DOL To Build Upon The Guidance Contained in Revenue Ruling 2000-

36

After analyzing current practices and guidance with regard to the disposition of missing participants' account balances contained in Revenue Ruling 2000-36, ASPPA requests that the DOL also issue guidance to specifically address the situation of missing participants (*i.e.*, participants who cannot be located after reasonable, good faith, and prudent attempts by the plan administrators). This guidance should:

1. Permit defined contribution plan sponsors to amend their plans and related distribution procedures to include a safe harbor that provides that the account balances of missing participants can be rolled over to IRAs without the notification of such participants, or such participants' consent. This guidance should provide for the following:

- a. The plan administrators must have made, and must document, reasonable and prudent, but unsuccessful, efforts to locate the participants;
- b. The selection of an IRA trustee, custodian or issuer, and IRA investment must be done in accordance with the administrator's fiduciary duties (consistent with footnote 1 to Revenue Ruling 2000-36);
- c. The placement of the assets in interest bearing money markets or similar investments will be deemed prudent from a fiduciary aspect; and
- d. The plan administrator must provide written notice to the Internal Revenue Service (IRS) and/or the PWBA identifying the affected participants, the participants' social security numbers, the location and account number of the rollover IRAs, and the amounts rolled over to the IRAs (in this regard, it may make sense to modify Schedule SSA to Form 5500 to serve this purpose). The purpose of requiring the plan administrator to provide such written notification is to enable the IRS and/or the PWBA to establish a registry of such missing participants and the related rollover accounts should they deem such a registry desirable and feasible.

Since the above points would serve to remove the missing participant's account balance from the plan, the DOL would need to state that it is exercising its authority under ERISA Section 204(g)(2) to provide relief from the anti-cutback rule of that section.

The DOL's guidance should also include a practical mechanism for dealing with small account balances of missing participants. In keeping with guidance set forth by the IRS in Revenue Procedure 2001-17, which concerns the obligation of plan sponsors to make corrections under the Employee Plans Compliance Resolutions System (EPCRS), it is reasonable and practical that plan administrators who have made a reasonable and good faith (albeit unsuccessful) effort to locate a missing participant be permitted to forfeit the account balance of the missing participant when it is below a certain *de minimis* amount.

It is common for financial institutions to refuse to open IRA rollover accounts of less than \$1,000. Coincidentally, this is the same amount below which involuntary cashouts may be paid to participants rather than rolled over to an IRA under the terms of EGTRRA. By adopting \$1,000 as a minimum, plan sponsors and plan administrators can apply the same dollar thresholds (\$1-\$1,000, \$1,000 - \$5,000 and \$5,000 +) to all participants for whom distributions are being processed, regardless of whether the participants can be located. Therefore, we suggest that the DOL establish a *de minimis* amount of up to \$1,000 for permitted forfeitures of a missing participant's account. We note that the plan would have an obligation to restore the account should the missing participant or the participant's beneficiaries come forward to claim it in the future. It is also possible that the plan sponsor (or its successor) would have a legal obligation under Title I to pay such amounts from its general assets should the participant or the participant's beneficiaries ever make a claim for the benefit which cannot be satisfied from the plan. Clarification of this issue is requested.

This proposal offers the following benefits:

1. It avoids the outright permanent forfeiture of lost participants' accounts;
2. It segregates lost participants' account balances and establishes a prudent tax-deferred vehicle in which the account balances can continue to grow and be maintained by an independent financial institution; and
3. It provides a mechanism and means for participants, or participants' beneficiaries to potentially locate and make claim to the rollover account.

Finally, the DOL's guidance should confirm that the good faith use of a government sponsored locator program or its commercial equivalent is deemed to constitute a reasonable and prudent attempt to find a participant prior to classification as a lost participant.

ASPPA believes the DOL should work closely with the IRS to address the lost participant issue and to provide guidance as soon as possible. If the DOL would like to enter into a dialogue with ASPPA to discuss this proposal further, as well as various other options and alternatives, please let us know.

ASPPA intends to separately provide suggestions regarding the process of rolling over, in accordance with EGTRRA provisions, assets from a qualified retirement plan to an IRA when a participant has failed to elect a rollover.

These comments were prepared principally by Michael Finch, member of the ASPPA DOL subcommittee and Todd Berghuis, JD, with the assistance of the Government Affairs Committee co-chairs, Administration Relations chair, IRS subcommittee, Reporting and Disclosure subcommittee, and Actuarial/PBGC subcommittee.

Please contact us if you have any comments or questions regarding our comments.

Sincerely,

Frederic Singerman, Esq., APM, Chair
DOL Subcommittee

Bruce Ashton, Esq., APM, Co-Chair
Government Affairs Committee

Jeffery C. Chang, Esq., APM, Chair
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