January 2021

DOL Releases Temporary Non-Enforcement Policy and Best Practices for Missing Participants

On January 12, 2021, the Department of Labor (DOL) released Field Assistance Bulletin (FAB) 2021-01, announcing its temporary non-enforcement policy for use of the Pension Benefit Guaranty Corporation (PBGC)'s Defined Contribution Missing Participants Program (Program), applicable to fiduciaries of terminating defined contribution plans and qualified termination administrators (QTA) of abandoned individual account plans. This guidance applies to 401(a), 401(k) and 403(b) defined contribution plans that are subject to ERISA.

DOL Reg. Section 2550.404a-3 provides a safe harbor for ERISA fiduciaries to use for making distributions on behalf of missing participants from terminated or abandoned plans, such as rolling over distributions to an IRA or in some cases, making a distribution to certain bank accounts or to a state unclaimed property fund. In 2017, the PBGC established a Program to hold retirement benefits for missing participants and beneficiaries in defined contribution plans subject to ERISA terminating on or after January 1, 2018.

Pending further guidance, the DOL announced in FAB 2021-01 that the DOL will not pursue violations of fiduciary duties under ERISA Section 404(a) in connection with transfers of account balances of missing or non-responsive participants or beneficiaries to the PBGC's Missing Participants Program, as long as the plan fiduciary or QTA complies with the FAB's guidance and "has acted in accordance with a good faith, reasonable interpretation of section 404 of ERISA with respect to matters not specifically addressed" in the FAB (including IRS guidance that would permit a conditional forfeiture of a missing participant's account balance that would be restored to such a participant making a claim for benefits). The FAB further makes this relief available for checks uncashed for certain specified periods, and provides that the fees required for the PBGC Program can be paid from the account being transferred if the plan does not provide otherwise.

However, the DOL cautions that it may still pursue violations in cases where an ERISA plan fiduciary did not perform a diligent search to locate participants and beneficiaries prior to transfer, consistent with fiduciary obligations under ERISA Section 404 or 406, or failed "to maintain plan and employer records" under ERISA Sections 107 (relating to retention of records), 209 (recordkeeping and reporting requirements) or 404 (fiduciary duties).

To assist ERISA plans, the DOL also released on January 12, 2021 a "best practices" document listing "red flags" seen in DOL investigations of ERISA plans regarding missing or unresponsive participants. The best practices consist of protocols to maintain accurate census information for the plan's participant population, implement effective communication strategies, conduct missing participant searches, and document procedures and actions to be most effective. Examples include following up on undeliverable mail and email, ensuring appropriate transfer of information for business transactions such as a change in record keeper, processes to confirm or update contact information upon change in employment status, and checking records of other plans maintained by the employer to locate missing participants and beneficiaries.

The DOL notes that these best practices are intended to identify steps that have proven effective at minimizing and mitigating the problem of missing or nonresponsive participants, but do not have the force and effect of law.

The DOL acknowledges that not all of the best practices are appropriate for every plan. Plan fiduciaries are advised to evaluate which practices are the best fit for the plan's demographics and will produce cost-effective results, while also weighing the size of the benefit in relation to the cost of search efforts.

Voya continues to monitor regulatory developments impacting retirement plans.