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Lost and Found: Reuniting Missing Participants and Lost Pensions

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CHAPTER 6

Lost and Found: Reuniting Missing Participants and Lost Pensions

KATHRYN L. MOORE*

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(Rel. 2021-9/2021 Pub.1646)

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§ 6.01 INTRODUCTION

In the United States, the problem of missing participants and lost pensions is huge. Although there is no precise estimate of the size of the problem, the PBGC reports that more than 80,000 workers have unclaimed pensions worth more than $300 million[1] and Terry Dunne of Millennium Trust Company has made "an educated guess based on government and industry data that more than 900,000 workers lose track of 401k-style, defined-contribution plans each year."[2] Anecdotally, Kyle Garrett posted on July 8, 2020, that in his 15 years at the Pension Rights Center, the most frequent question he has received from callers is, "I worked for a company for a number of years and now that company is gone and I can't find my retirement plan. What can I do?"[3] To further illustrate the potential size of the problem, the General Accountability Office (GAO)

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[1] PBGC, *State-by-State Pension Plan Information* (last updated March 3, 2021), available at https://www.pbgc.gov/about/budget-performance-and-planning/statebystate.

[2] Janet Berry Johnson, *Find Lost 401k: How to Find Out If You Have Lost or Forgotten Retirement Accounts* (Aug. 11, 2017), available at https://www.newretirement.com/retirement/find-lost-401k-find-lost-money-unclaimed-retirement-benefits/. Cf. Lucas Goodman, Anita Mukherjee & Shanti Ramnath, *Abandoned Retirement Savings* 1 (June 10, 2021), available at https://ssrn.com/abstract=3864530 (estimating that 2.7% of IRA owners who were 70 ½ years old in 2017 had an abandoned account with a total value of $790 million and cumulatively IRA balances of $1.79 billion were abandoned between 2003 and 2008).

[3] Kyle Garrett, *Legislation offers hope for finding lost pensions*, Pension Rights Center Perspectives Blog (July 8, 2020, updated Feb. 12, 2021), available at http://www.pensionrights.org/blog/legislation-offers-hope-finding-lost-pensions.

reported that from 2004 through 2013, separated employees left more than 16 million accounts of $5,000 or less in workplace plans with an aggregate value of $8.5 billion.[4]

The problem of missing participants and lost pensions is not new. Indeed, the first law review article on the subject was written almost two decades ago.[5] Nevertheless, policymakers and commentators have devoted increasing attention to the issue in recent years. For example, the Advisory Committee on Tax Exempt and Government Entities addressed the issue in its 2018 Report of Recommendations,[6] the Advisory Council on Employee Welfare and Pension Benefits issued reports to the Secretary of Labor on the subject in 2013[7] and 2019,[8] and the GAO published three reports on the subject between 2014 and 2019.[9] The three principal federal agencies regulating employee benefits, the Department of Labor (DOL), the Department of Treasury, and the Pension Benefit Guaranty Corporation (PBGC), have all been studying the problem and issuing

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[4] GAO, *401(k) Plans: Greater Protections Needed for Forced Transfers and Inactive Accounts*, GAO-15-73 (Nov. 21, 2014). This is not to suggest that the problem of lost pensions and missing participants is limited to separated accounts of $5,000 or less, or that all assets left in separated accounts of less than $5,000 end up as lost pensions.

According to a survey of 1,000 participants who had terminated employment and left behind at least one 401(k) plan by Boston Research Technologies in collaboration with Retirement Clearinghouse, one out of every 5 job change relocations results in a missing participant. Ted Godbout, *Can Automation Help Solve the Missing Participant Problem?* (April 13, 2018), available at https://www.asppa.org/news/browse-topics/can-automation-solve-the-missing-participant-problem; Retirement Clearing House, *The Mobile Workforce's Missing Participant Problem: A Study by Boston Research Technologies and Retirement Clearinghouse* (March 2018) [Hereinafter RCH Mobile Workforce].

Capitalize, a "free" independent platform that manages the rollover process, estimates that as of May 2021, workers have left behind an estimated $1.35 trillion in 24.3 million 401(k) accounts with an average balance of $55,400. Capitalize, *The true cost of forgotten 401(k) accounts* 5 (May 2021), available at https://hicapitalize.com/resources/the-true-cost-of-forgotten-401ks/. Although Capitalize describes these accounts as "forgotten," they are not necessarily forgotten or lost. The estimate is simply of total assets employees have left in a former employer's 401(k) account.

[5] Ellen A. Bruce & John Turner, *Lost Pension Money: Who is Responsible? Who Benefits*?, 37 John Marshall L Rev 695 (2004).

[6] Advisory Committee of Tax Exempt Entities, 2018 Report of Recommendations 21–36.

[7] Advisory Council on Employee Welfare and Pension Benefit Plans Report to the Honorable Thomas E. Perez, United States Secretary of Labor, *Locating Lost and Missing Participants* (Nov. 2013).

[8] Advisory Council on Employee Welfare and Pension Benefit Plans Report to the Honorable Eugene Scalia, United States Secretary of Labor, *Voluntary Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Programs* (Nov. 2019) [hereinafter 2019 ERISA Advisory Council Report].

[9] GAO, *Retirement Accounts: Federal Action Needed to Clarify Tax Treatment of Unclaimed 401(k) Plan Savings Transferred to States*, GAO-19-88 (Jan. 2019); GAO, *Workplace Retirement Accounts: Better Guidance and Information Could Help Plan Participants at Home and Abroad Manage Their Retirement Savings*, GAO-18-19 (Jan. 2018); GAO-15-73, *supra* note 3.

guidance in recent years, and members of Congress have also proposed legislation to address the problem. Moreover, the DOL has identified missing participants as an enforcement priority.[10]

In 2019, Susan Harthill, Elizabeth Goldberg and Oluwaseun (Shay) Familoni of Morgan, Lewis & Bockius published an article on this pressing subject in this Review,[11] and Anna-Marie Tabor, Director of the Pension Action Center at the University of Massachusetts Boston, has an article on the subject forthcoming in the Dickinson Law Review.[12] The 2019 Harthill, Goldberg, and Familoni article focused on the fiduciary issues raised by missing participants, particularly with respect to defined benefit plans, while the Tabor article focuses on 401(k) plan participants. This article takes a broader look at the problem of missing participants and lost pensions.

This article begins by providing a broad overview of the problem of missing participants and lost pensions. It then discusses recent regulatory guidance that has been issued by the DOL and the IRS. Finally, it turns to potential solutions to this distressing concern. Specifically, it first considers three potential solutions that focus on communication and improving the chance of participants finding out about their lost pensions: (1) reinstating the IRS letter forwarding program; (2) improving social security notifications; and (3) instituting a national registry for lost pensions. It then analyzes three potential solutions that focus on the use of retirement funds: (1) forfeiture to state unclaimed property funds; (2) forced transfers to IRAs and auto-portability; and (3) transfers to a central fund.

§ 6.02 THE PROBLEM OF MISSING PARTICIPANTS AND LOST PENSIONS

The problem of missing participants and lost pensions is not a singular monolithic problem. Rather, it can be considered as three separate, but often overlapping, problems: (1) lost pensions, (2) missing participants, and (3) uncashed checks.

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[10] See GAO, *Employee Benefit Security Administration: Enforcement Efforts to Protect Participants' Rights in Employer-Sponsored Retirement and Health Benefit Plans*, GAO-21-376 10 (May 2021) (noting that "EBSA's operating plan and guidance recommend that regional offices focus on identifying whether plans keep track of missing vested retirement plan participants, to facilitate appropriate distribution of participants' account balances"); DOL EBSA, *Missing Participants—Best Practices for Pension Plans* 1 (Jan. 12, 2021) (stating that EBSA has undertaken a nationwide compliance initiative to help retirement plans focus on practices to maintain complete and accurate census information, communicate with participants and beneficiaries about their eligibility for benefits, and implement effective policies and procedures to locate missing participants and beneficiaries.") [hereinafter *Best Practices Guidance*].

[11] Susan Harthill, Elizabeth Goldberg and Oluwaseun (Shay) Familoni, *Missing and Unresponsive Participants in ERISA Plans: Current Challenges and Recommendations*, 2019 NYU Rev. of Employee Benefits & Exec. Comp. Chapter 3.

[12] Anna-Marie Tabor, *Retirement Lost: Enhancing the Durability of the 401(k) Account*, 126 The Dickinson L. Rev. (forthcoming 2021).

"Lost pensions" considers the problem from the perspective of the plan participant. An individual has a lost pension if she knows that she is entitled to a pension benefit but cannot find the plan and thus cannot claim the benefit. Frequently, an individual will realize she has a lost pension when she first claims Social Security benefits and receives a notice of Potential Retirement Benefit Information from the Social Security Administration (SSA).[13] The SSA will send an individual such a notice if, at some point in the past, a pension plan administrator filed a statement that the individual had vested benefits, separated from service with the employer sponsoring the plan, and did not receive the vested benefits at the time of separation.[14] Not everyone who receives an SSA Potential Retirement Benefit Information notice has a lost pension. If the individual kept track of the pension plan and has current contact information for the plan, the pension is not likely to be lost.[15] In addition, if the individual's benefits from the plan were distributed to the participant after separation of service but before receipt of the notice, the pension is not lost. On the other hand, if the individual receives a notice, has not received a distribution from the plan, and does not know how to contact the plan to ask for a distribution, then the plan is likely to be "lost" to the participant.

Lost pensions often arise in the context of mergers and acquisitions (M&A).[16] Plans may be combined and their names changed as a result of M&A activity. Indeed, a single plan may undergo multiple consolidations and name changes. The problem may also arise if a plan changes its recordkeeper and the new recordkeeper only receives summary information about terminated participants.[17]

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[13] 42 USC 1131; 42 CFR 422.122. For additional discussion of the SSA notice, see §§ 6.03[1] & 6.05[1][b], *infra*.

[14] IRC § 6057. The statement is initially filed with the Secretary of the Treasury and then transmitted to the Commissioner of Social Security. IRC § 6057(b) & (d).

[15] According to a survey of 1,000 participants who left behind assets in a 401(k) plan, "the strongest predictor of the account not being lost was the respondent's knowledge of how to contact the company holding the account—accounts held by respondents who reported being able to do this were almost 7 times less likely to be lost." *RCH Mobile Workforce*, *supra* note 4.

[16] Ed McCarthy, *Updating Guidance on Missing Participants: Plans have both fiduciary requirements and practical obligations to make timely delivery of vested benefits*, Wealth Management Co. (May 11, 2011), available at https://www.wealthmanagement.com/retirement-planning/updated-guidance-managing-missing-participants. *See also* GAO-15-73, *supra* note 4, at 26 (noting that "[p]articipants and beneficiaries can lose track of former employers' plans when the employers change location or name, merge with another company, spin-off a division of the company, or go out of business").

[17] Anna-Marie Tabor provides a detailed description of a commonplace scenario giving rise to a "lost pension." "Patricia Participant" works for "First Company" for several years and leaves a small balance in her 401(k) account, administered by "American Investment Company," when she terminates employment with First Company. First Company, which merges with "Second Company," merges the First Company 401(k) plan into the Second Company 401(k) plan. Second Company's 401(k) plan is administered by "Boston Investment Company." Patricia Participant provides her forwarding address to First Company but

The term "missing participants" views the problem from the standpoint of the plan. An individual is considered to be a missing participant if the plan is required to make a distribution to the individual[18] and the individual cannot be located.[19] Plans may lose track of participants when a participant moves to a new home or changes his email address and neglects to notify the plan of his new contact information. Like lost pensions, the problem of missing participants may also arise following mergers and acquisitions and/or changes in plan recordkeepers.[20] Sometimes, the term missing participants incorporates "nonresponsive participants," that is, participants who receive but do not respond to notices from the plan.[21] Sometimes the term nonresponsive participants is used separately from the term missing participants.[22] Nonresponsive

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not to the plan administrator and, due to an administrative error, First Company does not provide her contact information to the plan administrator. Patricia Participant is not notified about the merger or the fact that the plan has a new administrator. Years later, Second Company spins off the division in which Patricia worked to Third Company. Second Company, which remained the sponsor of the 401(k) plan in which she participated, transfers her account balance of less than $5,000 in a forced-transfer to Transfer IRA Company. Meanwhile Second Company switches its administrator from Boston Investment to Colorado Investment. Years later, Patricia wants to begin taking distributions from her retirement account. She remembers she left an account balance in the First Company plan. She calls American Investment Company, the original administrator of her plan. They have no record of her. They suggest she call her employer, First Company, which she cannot do as it merged with Second Company. She calls Second Company. They have no record of her because she never worked for Second Company. They suggest she contact the current administrator, Colorado Investment, and Third Company. Neither Third Company nor Investment Company have any record of her or her account. Only an exceptionally knowledgeable and helpful individual at Second Company could let Patricia know about the mergers and ultimate forced-transfer of her account. Tabor, *supra* note 12.

[18] Pension plans may be required to make distributions under IRC § 401(a)(14) (requiring that distributions generally begin when the plan participant reaches the normal retirement age under the plan) and/or under IRC § 401(a)(9) (requiring that distributions generally begin no later than April 1 of the calendar year following the year in which the participant reaches age 72). Terminating plans must distribute all benefits in a timely manner. Rev Rul 89-87, 1989-27 IRB 5.

[19] Missing participants also include "participants who are flagged as dead but who may actually still be alive (sometimes referred to in DOL investigations as 'zombie' participants)." David Levine, *Missing Participants: What Comes Next?* (June 2, 2021), available at https://www.napa-net.org/news-info/daily-news/missing-participants-what-comes-next.

[20] *See* Compliance Assistance Release No. 2021-01, at 5.

[21] *See, e.g.*, Baker Botts, *IRS Guidance on Missing Plan Participants and Required Minimum Distributions* (Nov. 15, 2017), https://communications.bakerbotts.com/27/360/uploads/memo-for-employee-plans-10-19-17.pdf (using term missing participant to refer to both missing participants and nonresponsive participants); Field Assistance Bulletin 2014-01, at 1 (same).

[22] *See, e.g.*, *Untying the Knot: Making Sense of Guidance on Missing and Nonresponsive Participants (Part 1)*, Keightly & Ashner Client Alert 1 (Feb. 18, 2021), available at https://keightleyashner.com/best-practices-guidance-on-missing-and-nonresponsive-participants-beneficiaries-alternate-payees/ (explaining difference between missing and nonresponsive participants and using terms separately); *Best Practices*

participants; that is, participants who receive correspondence from a plan but affirmatively elect not to respond, may raise different challenges than missing participants who cannot be located.

The term "uncashed checks" refers to distribution checks that are not cashed. Sometimes uncashed checks are a part and parcel of the missing participant phenomenon. For example, distribution checks may go uncashed because they are sent to the wrong address. Or distribution checks may be sent to the correct address, but the recipient does not recognize the sender of the check and thus does not open the envelope containing the check and does not cash the check. Or distribution checks may be uncashed because the participant has died. Separate and apart from the traditional missing participant phenomenon, participants may receive distribution checks and intentionally elect not to cash them. Recipients of these checks, sometimes referred to as nonresponsive or unresponsive participants, may choose not to cash distribution checks because they are for a very small amount of money and not worth the trouble of cashing or because they fear that cashing the check will cause them to lose access to Medicaid or other governmental benefits. Participants may also (erroneously) believe that they can delay the recognition of income by delaying cashing a distribution check.[23] Or participants may choose to delay cashing their checks until they have a bundle of small checks to cash.[24]

The dollar amounts of individual uncashed distribution checks tend to be small. According to a survey by SPARK Institute, a trade association of recordkeepers, 78 percent of uncashed distribution checks from defined contribution plans are for less than $100, 98 percent of uncashed checks are for less than $1,000, and only 0.2 percent are for dollar amounts that exceed $20,000.[25] According to service provider Empower Retirement, 40 percent of uncashed checks are less than $25.[26] Although the dollar amounts of individual checks tend to be small, the dollars add up. According to the

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Guidance, *supra* note 10 (using terms missing and nonresponsive participants separately).

[23] For a discussion of Rev Rul 2019-19, which states that failure to cash a distribution check does not permit the participant to exclude the distribution from income, see § 6.04[1][b], *infra*.

[24] For a discussion of the reasons why distribution checks may be uncashed, see, e.g., 2019 ERISA Advisory Council Report, *supra* note 8, at 11; *Statement of the Pension Rights Center on Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds Before the ERISA Advisory Council* 1 (Aug. 28, 2019) [hereinafter Pension Rights Center Testimony]; *Testimony of George M. Sepsakos and Kevin L. Walsh on Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds before 2019 Advisory Council on Employee Welfare and Pension Benefits Plans* [hereinafter Sepsakos and Walsh Testimony]; Harthill et al., *supra* note 11, at Sec. 3.02[2][c][v].

[25] 2019 ERISA Advisory Council Report, *supra* note 8, at 12.

[26] *Testimony on Behalf of Empower Retirement before the ERISA Advisory Council on Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds and Other Methods of Dealing with Uncashed Checks*, at 1 [hereinafter Empower Testimony].

GAO, 17 states collectively received about $35 million of unclaimed retirement savings in 2016.[27] According to testimony before the 2019 ERISA Advisory Council, about 4.5 percent of all distribution checks go uncashed, and the total value of uncashed checks likely exceeds $100 million per year and the total value of uncashed checks may exceed $500 million cumulatively.[28]

Uncashed checks most commonly arise when a participant receives a distribution that the participant did not request. According to the Pension Research Council, the three principal sources of distributions sent without a participant's consent are: (1) distributions of vested participants who terminate employment with the plan sponsor with account balances of $1,000 or less;[29] (2) required distributions that must begin when the participant reaches the plan's normal retirement age under IRC § 401(a)(14)[30] or in the year after the participant reaches age 72 under IRC § 401(a)(9);[31] and (3) distributions upon plan termination.[32] Spark Institute and Empower Retirement point to trailing funds as a significant source of uncashed checks; trailing funds may include contributions or company matches received after an account has been fully distributed and dividend distributions after full distributions.[33]

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[27] GAO-19-88, *supra* note 9, at 12. The most common sources of this unclaimed property were assets and uncashed checks from employer-sponsored retirement plans, such as 401(k) plans. *Id.*

[28] 2019 ERISA Advisory Council Report, *supra* note 8, at 12.

[29] Vested participants with account balances of less than $5,000 may be cashed out without the participant's consent. IRC § 411(a)(11) If, however, the account balance is between $1,000 and $5,000, the cashed-out employee's account balance must be rolled over into a "forced-transfer" IRA. IRC § 401(a)(31)(B). For a more detailed discussion of forced-transfer IRAs, see § 6.05[2][b], *infra*.

[30] Section 401(a)(14) of the Internal Revenue Code generally requires qualified plans to begin payment of benefit to participants, unless the participant otherwise elects, no later than the 60th day after the close of the plan year in which the participant attains the earlier of age 65 or the plan's normal retirement age. IRC § 401(a)(14)(A). Special rules apply to participants with less than 10 years of service and to participants who remain employed with the plan sponsor after age 65 or the plan's normal retirement age, if earlier. IRC § 401(a)(14)(B)–(C).

[31] The minimum distribution rules generally require that a plan begin to make minimum distributions to plan participants beginning on April 1 of the calendar year following the year in which the participant reaches age 72. If the participant remains actively employed at age 72, the required beginning date is extended until April 1st of the calendar year following the participant's retirement date. IRC § 401(a)(9)(C)(i)(II). For additional discussion of the minimum required distribution rule, see § 6.04[2], *infra*.

[32] Rev Rul 89-87 (holding that in order to terminate, qualified plan must distribute its assets as soon as administratively feasible; plan that does not distribute assets will be considered ongoing plan and must satisfy the requirements of IRC § 401(a) in order to retain qualified status).

[33] Empower Testimony, *supra* note 26, at 1; Michael Hadley, *Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds* 2 (June 26, 2019), [hereinafter SPARK Testimony]. *See also* Sepsakos and Walsh Testimony, *supra* note 24, at 1 (noting that microbalances in defined contribution plans may accumulate as a result of revenue sharing or dividend payments issued to

Lost pensions, missing participants, and uncashed checks give rise to issues under both ERISA and the Internal Revenue Code. The most significant issue under ERISA arises from ERISA's fiduciary duties of loyalty and prudence.[34] The DOL has taken the position that failure to take reasonable steps to locate missing participants constitutes a breach of these duties. The Internal Revenue Code imposes a host of requirements on qualified retirement plans, such as the minimum distribution requirements under IRC § 401(a)(9), and missing participants may cause plans to run afoul of these qualification requirements.

§ 6.03 RECENT GUIDANCE FROM THE DEPARTMENT OF LABOR

[1] Overview

At the time that the Harthill et al. article was published, the DOL had only issued one piece of guidance addressing a plan fiduciary's duties when faced with missing plan participants. That guidance, Field Assistance Bulletin 2014-01, expressly only addressed terminating defined contribution plans. Harthill et al. lamented the lack of clear guidance and advocated for the issuance of "guidance on the steps a prudent and loyal plan administrator should take in searching for a missing participant (and addressing other missing participant challenges, such as record gaps) and communicating with unresponsive participants."[35]

In January 2021, the DOL released "welcome" guidance to plan fiduciaries regarding their fiduciary obligations with respect to missing participants.[36] Specifically, the DOL released three forms of non-regulatory guidance: (1) a list of best practices for locating and tracking participants and beneficiaries: Missing Participants—Best Practices of Pension Plans; (2) a compliance assistance document, Compliance Assistance Release No. 2021-01, that describes the DOL's investigation process for missing participants; and (3) a field assistance bulletin, Field Assistance Bulletin No. 2021-01, that addresses the use of the PBGC's missing participant program for terminating defined contribution plans with missing participants.

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participants after they take their benefit distributions).

[34] ERISA requires that a fiduciary discharge his duties with respect to a plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1)(B).

[35] Harthill et al., *supra* note 11, at Sec. 3.04.

[36] Greenberg Traurig, LLP, *DOL Issues Long-Awaited Guidance on Locating Missing Retirement Plan Participants* (March 2021), available at https://www.gtlaw.com/en/insights/2021/3/dol-issues-long-awaited-guidance-on-locating-missing-retirement-plan-participants. "The guidance is particularly welcome because investigations often ended with DOL telling plan fiduciaries that their methods for locating missing plan participants were not in compliance with [ERISA], even though DOL had not issued guidance yet." *Id.*

The scope of the three forms of non-regulatory guidance varies. The Best Practices Guidance is the broadest and applies to both defined benefit and defined contribution plans. The Compliance Release describes the DOL's Terminated Vested Participants Program which, at least currently, only investigates defined benefit plans. Finally, the Field Assistance Bulletin sets forth an enforcement policy with respect to terminating defined contribution plans.

This section begins by describing the DOL's enforcement activity with respect to missing participants prior to the January 2021 guidance. It then discusses each of the three forms of guidance.

[2] DOL Enforcement Activity Prior to January 2021

In 2015, the Philadelphia regional office of the Employee Benefit Security Administration (EBSA) of the DOL began investigating lost pensions and missing participants when it noticed that it received a flurry of phone calls each month on the day that Social Security benefit payments were distributed. Individuals called to say that they had received statements indicating that they might have a pension, but they were not receiving pension benefits.[37]

The EBSA Philadelphia office began looking at defined benefit plan Forms 5500 to identify employers with a high number of terminated vested participants who had not received a lump sum distribution and were not receiving benefits. When asked for the names and addresses of these participants, the plan sponsors told the DOL officials that the participants were "missing." The DOL, however found that "a lot of participants" responded when the Philadelphia office sent them a certified letter to their last-known address.[38] The Philadelphia office also found that plan sponsors had faulty data such as missing social security numbers, incorrect birthdates, and retirees' names identified as John or Jane Doe. For example, one plan had about 100 individuals listed with a birthdate of January 1, 1990.[39]

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[37] *Owed a Pension? Labor Dept. Broadens Effort to Locate Workers* (Dec. 22, 2017), available at https://news.bloomberglaw.com/business-and-practice/owed-a-pension-labor-dept-broadens-effort-to-locate-workers [hereinafter *Owed a Pension?*]. For additional discussion of the Social Security Administration notice, see § 6.02, *supra*, and § 6.05[1][b], *infra*.

[38] Stephen Miller, *DOL Is Stepping Up 'Missing Participant' Retirement Plan Audits: Plan sponsors should document efforts to find former employees owed benefits* (updated Dec. 22, 2017), available at https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/missing-participant-audits.aspx [hereinafter *Stepping Up*].

[39] In fact, a DOL official reported that one plan had about 100 individuals listed with a birth date of January 1, 1990, which was a "red flag" that should have been noticed. *Owed a Pension?, supra* note 37.

As a result of its missing participant investigations, the Philadelphia office recovered more than $165 million in benefits between October 2016 and August 2017.[40] By the end of 2017, the office had recovered more than $274 million for 4,018 individuals.[41]

The EBSA Chicago office adopted a missing participant regional initiative in fiscal year 2017. Working with the PBGC, the Chicago office recovered almost $6.3 million for 133 participants that year. The program was extended nationally at the end of 2017/beginning of 2018.[42] In 2020, the DOL acknowledged that its missing participant investigations had become a national enforcement initiative[43] and in its 2020 budget justification, it noted that it had recovered $904,200,000 in participant benefits from investigations in 2018.[44] Moreover, it reported that its investigations recovered $1.48 billion in benefit payments for 29,600 former employees in 2020.[45]

Concerned that the DOL had taken "ad hoc enforcement positions" when approaching plan sponsors about missing participants,[46] retirement system stakeholders sought "comprehensive guidance on plan fiduciary responsibilities with respect to unresponsive and missing participants."[47] They were understandably troubled by vague guidance that pension plans "scrub their data" to find missing participants. For example, one DOL official said, "Look at the data that you've got and start looking for the red flags that I described [such as missing Social Security numbers, retirees identified as John or Jane Doe, and large numbers of individuals with the same birthdates]. That is the best

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[40] *Stepping Up*, *supra* note 38.

[41] *Owed a Pension*?, *supra* note 37.

[42] *Id.*; *Stepping Up, supra* note 38.

[43] Groom Law Group, *DOL Issues Missing Participants Guidance* (January 14, 2021), available at https://www.groom.com/resources/dol-issues-missing-participants-guidance/.

[44] Paul A. Green and Reneé Parenti, *Lost Participants and the DOL Audit Process*, Workshop Session I, Option 2, NCCMP Annual Conference Hollywood FL Slide 6 (September 23, 2019), available at https://nccmp.org/wp-content/uploads/2019/09/Presentation-Lost-Participants-and-the-DOL-Audit-Process.pdf.

[45] Jane Smith, *Welcome Labor Department Guidance on Missing Participants* (Feb. 12, 20121), available at www.pensionrights.org/blog/welcome-labor-department-guidance-missing-participants, citing DOL Fact Sheet, EBSA Restores Over $3.1 Billion to Employee Benefit Plans, Participants and Beneficiaries, available at www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.pdf. *See also* DOL News Release, *U.S. Department of Labor Issues Missing Participant Guidance* (Jan. 12, 2021) (stating that "[i]n fiscal year 2020 alone, EBSA's investigators helped missing and nonresponsive participants recover benefits with a present value in excess of $1.4 billion.").

[46] Retirement system stakeholders raised concerns about "the lack of uniformity across the various field offices." Groom Law Group, *DOL Issues Missing Participants Guidance*, *supra* note 43, at 1.

[47] *Owed a Pension?, supra* note 37.

advice I can give anybody."[48] Retirement system stakeholders also raised concerns about the cost and length of missing participant investigations as well as enforcement positions taken without formally issued legally-binding guidance.[49]

In January 2021, the DOL released the three forms of sub-regulatory guidance in response to these concerns.

[3] Missing Participants—Best Practices of Pension Plans

[a] Red flags

In the first sub-regulatory guidance issued in January 2021, a document entitled Missing Participants—Best Practices for Pension Plans, EBSA outlined best practices that plan fiduciaries can follow to ensure that participants and beneficiaries receive their promised benefits at retirement age. The document begins by listing five "red flags" that indicate there may be a problem with missing participants. It then provides guidance with respect to four categories of best practices.

The Best Practices document identifies five red flags:

- More than a small number of missing or nonresponsive participants;
- More than a small number of terminated vested participants who have reached normal retirement age but have not started receiving benefits;
- Missing, inaccurate, or incomplete contact information and census data;
- Absence of sound policies and procedures for handling returned mail; and
- Absence of sound policies and procedures for handling uncashed checks.

This list of red flags indicates that the DOL expects plan administrators to keep track of plan participants, keep a record of mail that has been returned, and account for checks that are not cashed. Plan fiduciaries would be well-advised to ensure that there are regular audits of plan census information to identify any potential problems. Plans that outsource responsibility to a recordkeeper for maintaining and updating census data should (1) review the recordkeeper agreement to ascertain how often the recordkeeper audits census information, and (2) consult with the recordkeeper about steps to take to ensure that the information is accurate and timely. Plan fiduciaries that outsource

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[48] *Id.*

[49] Groom Law Group, *DOL Issues Missing Participants Guidance*, *supra* note 43, at 1. *See also* Levine, *Missing Participants: What Comes Next*?, *supra* note 19 (noting that in investigations, "the DOL has often required that extensive search activities be undertaken, pushed for corrections to be made under IRS correction programs before [sic] cases, in some cases, required nearly all participants be 'found' before an investigation is closed.").

responsibility should also understand how the recordkeeper handles address changes and returned or undeliverable mail.[50] It is not enough for a plan fiduciary simply to contract with a recordkeeper; the plan fiduciary must ensure that the recordkeeper uses appropriate processes.

[b] Best Practices

[i] Maintaining Accurate Census Information for the Plan's Participant Population

The document then describes four categories of best practices "used by well-run plans to connect participants and beneficiaries" with their benefits: (1) maintaining accurate census strategies; (2) implementing effective communication strategies; (3) missing participant searches; and (4) document procedures and actions.

The document identified eight best practices with respect to maintaining accurate census information:

- Contact current and retired participants and beneficiaries periodically to confirm or update their contact information.
- Include reminders in plan communications to update contact information.
- Flag and follow up on undeliverable mail or email and uncashed checks.
- Maintain and monitor an online platform that employees may use to update their contact information and incorporate the updates into the plan's census information.
- Provide prompts to confirm contact information upon login to online platforms.
- Regularly request updates of beneficiary contact information.
- Regularly audit census information and correct errors.
- In the case of an acquisition or merger or change of recordkeeper, take steps to ensure the appropriate transfer of information and relevant employment records.

In light of this guidance, plan administrators should consider including contact information change requests in most, if not all, of their correspondence with participants, and they should regularly remind plan participants and beneficiaries of the importance of providing current contact information. Plan administrators might want to

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[50] Hillary E. August, *Key Takeaways From The DOL's "Best Practices" Missing Participant Guidance*, Mayer|Brown Benefits & Compensation Blog (April 19, 2021), available at https://www.usbenefits.law/2021/04/key-takeaways-from-the-dols-best-practices-missing-participant-guidance/.

consider enabling participants to include social media contact information, such as Twitter and Instagram handles.[51] If, however, social media is used to contact missing participants, care should be taken to avoid fraud or security breaches.

[ii] Implementing Effective Communication Strategies

The document identified six best practices with respect to effective communication:

- Use plain language and, when appropriate, offer non-English language assistance.
- Clearly and prominently identify the subject matter of communications.
- Encourage contact through websites and toll-free numbers.
- Build into onboarding, enrollment, and exit procedures processes to update or confirm contact information and other information needed to calculate amount and timing of benefits and inform employees of the importance of ensuring contact information remains accurate.
- Communicate how plan can help eligible participants consolidate accounts from prior employer plans or rollover IRAs.
- Clearly mark envelopes and correspondence with the original plan or plan sponsor name for participants who separated from service before the plan or sponsor name changed and indicate that the communication relates to rights to pension benefits.

As noted above, if a plan uses a recordkeeper, the plan fiduciary should review the recordkeeping agreement and discuss changes with the recordkeeper to ensure that many, though not necessarily all, of these practices, are followed.

[iii] Missing Participant Searches[52]

The document identifies 10 best practices with respect to missing participant searches:

- Check related plan and employer records for participant, beneficiary, and next of kin/emergency contact information. If there are privacy

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[51] *Id.*

[52] In Field Assistance Bulletin 2014-01, the DOL outlined search steps that plan administrators should take to locate missing and nonresponsive participants. Technically, the guidance only applies to plan administrators of terminating defined contribution plans, but plan administrators of ongoing plans relied on the guidance in the absence of guidance directed at ongoing plans. FAB 2014-01 identified four search steps: (1) use certified mail; (2) check related plan and employer records; (3) check with designated plan beneficiaries; and (4) use free electronic search tools. The new best practices guidance includes these steps and adds additional steps, such as attempting contact through social media and contacting colleagues of missing participants.

concerns, request that the employer or other plan fiduciary forward a letter from the plan to the missing participant or beneficiary.

- Check with designated plan beneficiaries and employee's emergency contacts for updated contact information. Again, if there are privacy concerns, ask the beneficiary or emergency contact to forward a letter to the missing participant.
- Use free online search engines, public record databases, obituaries, and social media to locate individuals.
- Use commercial locator services, credit-reporting agencies, or proprietary internet search tools to locate individuals.
- Attempt to contact via USPS certified mail or private delivery service with similar tracking features using last known mailing address.
- Attempt to contact via other means of communication, such as email, telephone, text, and social media.
- Use death searches, such as the social security death index, if participants are nonresponsive for a prolonged period of time, and if death is confirmed, redirect communications to beneficiaries.
- Reach out to colleagues of missing participants, such as by contacting employees who worked in the same office or by publishing a list of missing participants on the company's intranet, in emails to current employees, or in communications with retirees currently receiving benefits. For unionized employee, consider reaching out to the union's local office and having a list of missing participants included in communications with union members.
- Register missing participants on public and private pension registries with privacy and cyber security protections, such as the National Registry of Unclaimed Retirement Benefits, and publicize the registry to current employees, union members, and retirees.
- Search regularly using some or all of the above methods.

With respect to the first two best practices regarding missing participant searches, the DOL expressly recognized that there might be privacy concerns and indicated that it might be appropriate for letters to be forwarded to the missing participant or beneficiary by the individual or entity that has the missing participant or beneficiary's contact information rather than sharing that contact information. The DOL did not, however, expressly acknowledge that some of its other best practices, such as using social media and posting lists of missing participants, could raise potential fraud and security

breaches. Commentators have noted that these practices could create problems and acknowledge that plan sponsors may understandably be reluctant to follow these practices.[53]

[iv] Documenting Procedures and Actions

The document identifies three best practices with respect to documenting procedures and actions:

- Keep and adhere to clear written policies and procedures.
- Document key decisions and steps and actions taken to implement the policies.
- Monitor third party recordkeepers to ensure they are performing promised services and work with them to identify and correct any shortcomings in recordkeeping and communication practices, including establishing relevant information held by the employer.

Documentation may be critical in an audit. "As any auditor will tell you, if you didn't document it, you didn't do it!"[54]

[c] Comments Regarding Guidance

Although the guidance is informal, non-binding, and "do[es] not have the force and effect of law,"[55] it makes clear that the DOL expects plan administrators to be proactive in maintaining and retaining contact with plan participants.[56] If only ad hoc steps to find participants are taken after the participants are owed a distribution or if checks are simply mailed to a participant's last known address,[57] the plan fiduciary, in the eyes of the DOL, may not have satisfied its fiduciary duties of prudence and loyalty.

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[53] Levine, *Missing Participants: What Comes Next?*, *supra* note 19 (noting that "[i]f the DOL attempts to require what they have listed, there is likely to be significant pushback from privacy- and security-minded plan sponsors."); Matthew H. Hawes, Elizabeth S. Goldberg, and Natalie R. Wengroff, *DOL Guidance on Missing Participants Is No Longer Missing*, Morgan Lewis Lawflash (Jan. 19, 2021), available at https://www.morganlewis.com/pubs/2021/01/dol-guidance-on-missing-participants-is-no-longer-missing ("noting that the use of social media to conduct missing participant searches may be difficult for service providers and may raise concerns around identity theft. As such, there may be challenges in implementing such searches with appropriate safeguards.").

[54] Berwyn Staff, *Missing Participant Field Assistance Bulletin* (Feb. 25, 2021), available at https://www.berwyngroup.com/resources/new-dol-guidance/.

[55] Best Practices Guidance, *supra* note 10, at 4.

[56] *Id.* at 1.

[57] *Id.* at 1.

The DOL recognizes that not every practice identified in its guidance is appropriate for every plan.[58] It counsels plan fiduciaries to consider which of the practices is likely to yield the best results in a cost effective manner for the plan's population.[59] Moreover, the Best Practices Guidance does not answer every question related to missing participants nor is it likely to entirely eliminate the problem of missing participants.[60] Nevertheless, the guidance is helpful and plan administrators would be well-advised to create and follow policies to avoid, identify, and locate missing participants, and document the steps that they have taken to implement the policies. If a plan is audited and the plan fiduciary can point to documentation that shows that many of the best practices have been implemented, that should go a long way in demonstrating that any missing participants are not due to a breach of fiduciary duty.

[4] Compliance Assistance Release No. 2021-01

As noted above, the DOL began investigating defined benefit plans for missing participants in its Philadelphia office in 2015 and expanded the program, referred to as the terminated vested participant project (TVPP), nationally in 2018.[61] In its second January 2021 piece of sub-regulatory guidance, the DOL issued Compliance Assistance Release No. 2021-01 to enable consistent investigative and case-closing practices among the regional offices conducting TVPP audits and to promote voluntary compliance by plan fiduciaries.[62]

In the release, the DOL identified three key objectives. The first objective is to ensure that defined benefit plans maintain adequate census and other records to determine (1) the names and addresses of participants and beneficiaries entitled to benefits under the plan; (2) the amount of benefits to which they are entitled; and (3) when the participants and beneficiaries are entitled to begin receiving benefits. The second objective is to

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[58] *Id.* at 2.

[59] *Id.* at 2.

[60] "For example, the DOL guidance does not materially address how plans should handle participants that are the least likely to be locatable and/or still due a benefit, such as participants that are very old, long missing, long deceased or have material data gaps (such as incorrect social security numbers)." Hawes, et al., *DOL Guidance on Missing Participants is No Longer Missing*, *supra* note 53.

[61] The TVPP is one of three components of the Protecting Benefits Distribution (PBD) National Project that examines the payment of retirement benefits. The other two components are (1) custodial abandoned plans and (2) distressed plan sponsor. DOL EBSA, *Enforcement, National Enforcement Projects EBSA*, available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement (last visited June 11, 2021). *See also* George M. Sepsakos and Stephen M. Saxon, *Guide to Dealing with DOL Investigations of Retirement Plans*, Practical Law W-019-3442 3 (2019) (discussing PBD project and noting that project began in the EBSA Philadelphia regional office with the Philadelphia office examining plans with a high number of terminated vested participants who had not received a lump sum distribution and were not receiving benefits).

[62] Compliance Assistance Release No. 2021-01, at 1.

ensure that plans have procedures for advising terminated vested participants of their eligibility to receive benefits as they approach normal retirement age and when they must begin minimum required distributions under IRC § 401(a)(9). The third objective is to ensure that plans carry out appropriate search procedures for terminated participants and beneficiaries with inaccurate or incomplete census information.[63]

The release then identified five principal classes of records and documents that the DOL requests in the TVPP:

- Plan documents, including summary plan descriptions and relevant amendments;
- Census records of participants;
- Actuarial reports;
- Plan's procedures for communicating with terminated vested participants, spouses, and other designated beneficiaries; and
- Information with respect to the plan's methods of addressing missing participant situations when they arise.[64]

The DOL noted that other types of documents or information might be requested depending on the specific facts and circumstances. If the DOL generally limits its requests to the listed documents, investigations may be efficient. On the other hand, if requesting additional information becomes the norm rather than exception, investigations may continue to be time-consuming.[65]

Acknowledging that investigations are case-specific, the release nevertheless identified five types of errors the investigators generally look for:

- Systemic errors in plan recordkeeping and administration;
- Inadequate procedures for identifying and locating missing participants and beneficiaries;
- Inadequate procedures for contacting terminated vested participants who are reaching normal retirement age;
- Inadequate procedures for contacting terminated vested participants or their beneficiaries, if deceased, who have not yet begun to receive benefits and are at or near the age at which required minimum distributions must commence; and

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[63] *Id.*

[64] *Id.* at 2–3.

[65] *See* Levine, *Missing Participants, What Comes Next?, supra* note 19.

- Inadequate procedures regarding uncashed distribution checks.[66]

The release noted that "red flags" may lead the DOL to believe a plan has problems. The red flags identified in the release are similar to the red flags described in the Best Practices Guidance.[67] In addition, the release noted that the failure to follow many of the best practices identified in Best Practices Guidance contribute to the terminated vested participant problem.[68]

The release concludes by instructing investigators to promptly inform responsible fiduciaries of the agency's finding and invite the fiduciaries to discuss how to remedy any problems. The release promotes informal, voluntary compliance rather than formal citations of fiduciary violations. Specifically, it concludes that the DOL "will generally recite those corrective steps, without citing the individual plan fiduciaries for specific violations of ERISA when closing out a case."[69] In the past, DOL has cited individual fiduciaries "even in circumstances where there were no facts that even approached 'substantial errors.' "[70]

[5] Field Assistance Bulletin 2021-01

In its third piece of sub-regulatory guidance issued in January 2021, Field Assistance Bulletin (FAB) 2021-01, the DOL announced a temporary enforcement policy that authorizes terminating defined contribution plans to use the PBGC Defined Contribution Missing Participant Program for missing and nonresponsive participants.[71]

The ERISA regulations establish a safe harbor for plan fiduciaries making distributions from terminated defined contribution plans with respect to missing or nonresponsive participants.[72] Subject to certain notice requirements[73] and other conditions,[74] the safe harbor provides that fiduciaries that transfer the benefits of missing and nonresponsive participants to an IRA, certain bank accounts, or state unclaimed

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[66] Compliance Assistance Release No. 2021-01, at 4.

[67] Compare Compliance Assistance Release No. 2021-01, at 4–5 with Best Practices Guidance, *supra* note 10, at 1. For a description of the red flags identified in the Best Practices Guidance, see § 6.03[2][a] *supra*.

[68] Compliance Assistance Release No. 2021-01, at 4–5.

[69] *Id.* at 5.

[70] Hawes et al., *DOL Guidance on Missing Participants is No Longer Missing*, *supra* note 53.

[71] The policy also applies to abandoned individual account plans. FAB 2021-01, at 1.

[72] 29 CFR § 2550.404a-3.

[73] 26 CFR § 2550.404a-3(e).

[74] 29 CFR § 2550.404a-3(d).

property funds[75] have satisfied their ERISA § 404(a) fiduciary obligations with respect to distributing benefits, selecting a transferee, and investing funds in connection with the distribution.[76] The regulatory safe harbor does not currently cover distributions to the PBGC Defined Contribution Missing Participant Program.

In 2018, the PBGC expanded its missing participant program to establish a voluntary program for terminated defined contribution plans.[77] Under the program, a fiduciary can transfer missing participants' accounts to the PBGC after conducting a diligent search[78] for a one-time administrative fee of $35 for accounts of more than $250.[79] In FAB 2021-01, the DOL noted that the PBGC cites the following benefits of its program:

- Any size benefits can be transferred;
- The PBGC conducts periodic searches which increases the likelihood of connecting missing participants with their benefits;
- There are no ongoing maintenance fees or distribution charges to reduce benefits;
- Amounts that are transferred earn interest; and
- Lifetime income options are offered for transferred account balances that exceed $5,000.[80]

When it was developing the missing participant program, the PBGC consulted with the DOL, and the DOL advised the PBGC that the DOL intended to review and potentially revise its regulations to coordinate with the PBGC's program, including extending the safe harbor to include transfers to the PBGC program.[81] Although the DOL has not yet amended its safe harbor regulation to include transfers to the PBGC missing participant program, in FAB 2021-01, the DOL announced a temporary enforcement policy pursuant to which the DOL will not pursue violations under ERISA § 404(a) with respect to transfers of a missing or non-responsive participant's or

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[75] 29 CFR § 2550.404a-3(d). In some instances, distributions to inherited individual retirement plans are permitted. 29 CFR § 2550.404a-3(d)(1)(iii).

[76] 29 CFR § 2550.404a-3(c).

[77] PBGC, *Missing Participants*, 82 Fed Reg 60800 (Dec. 22, 2017) (adding 29 CFR Part 4050 Subpart B, 4050.201-.207). The PBGC's missing participant program was created by the Retirement Protection Act of 1994, and initially only applied to terminated single-employer defined benefit plans. *Id.* The Pension Protection Act of 2006 expanded the scope of the program to include most defined contribution plans. *Id.*

[78] 29 CFR § 4050.204.

[79] PBGC, *Missing Participant Filing Instructions for Defined Contribution Plans Terminating on or after January 1, 2018*, at 3.

[80] FAB 2021-01, at 2.

[81] 82 Fed Reg, at 60801.

beneficiary's account balance to the PBGC missing participant program.[82] The Bulletin clarified that the temporary enforcement policy does not preclude the DOL from pursuing ERISA violations for failure to diligently search for participants and beneficiaries prior to the transfer of their account balances to the PBGC or from pursuing ERISA violations for failure to maintain plan and employer records.[83]

The DOL cited the economic disruption caused by the COVID-19 emergency in support of its temporary enforcement policy. It explained that "it is even more important in the wake of the pandemic to facilitate the transfer of missing participants' account balances to the PBGC . . . to increase the likelihood that missing participants can locate and access their benefits."[84]

§ 6.04 IRS GUIDANCE

[1] Guidance Related to Withholding, Inclusion, and Reporting Requirements: Revenue Ruling 2019-19 and Revenue Ruling 2020-24

[a] Withholding Requirements

Although the Harthill et al. article focused on ERISA,[85] missing participants also raise issues under the Internal Revenue Code. In 2018, the GAO recommended that the IRS review the withholding requirements with respect to missing participants and uncashed checks.[86] In 2019 and 2020, the IRS issued revenue rulings addressing those requirements as well as inclusion and reporting requirements. In addition, over the last few years, the IRS has released guidance related to missing participants and the IRC § 401(a)(9) mandatory distribution requirement and the 60-day rollover requirement.

This section discusses that guidance.

In Revenue Ruling 2019-19, the IRS addressed three issues with respect to a distribution made to a plan participant who did not cash the distribution check: (1) inclusion in the participant's income; (2) the plan administrator's withholding obligation; and (3) the plan sponsor's reporting obligation. In Revenue Ruling 2020-24, the IRS addressed the withholding and reporting requirements with respect to benefits paid to a state unclaimed property fund.

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[82] FAB 2021-01, at 2. In order to qualify for this protection, the fiduciary must comply with guidance set forth in the memorandum and act in accordance with a good faith, reasonable interpretation of ERISA § 404(a) with respect to matters not specifically addressed in the memorandum. *Id.*

[83] *Id.* at 3.

[84] *Id.* at 2.

[85] For example, the article's discussion of "the legal framework" is limited to a discussion of ERISA. Harthill et al., *supra* note 11, at Sec. 3.03.

[86] GAO-18-19, *supra* note 9, at 53 (Recommendation 2).

This section begins by discussing the withholding requirements. It then addresses inclusion. Finally, it discusses the reporting obligations.

Section 3405 of the Internal Revenue Code requires plan administrators to withhold taxes from retirement plan distributions.[87] Under our current self-reporting system, however, the IRS does not credit federal tax withholding to a taxpayer's current tax liability unless the taxpayer makes a claim for the credit.[88] Generally, a taxpayer has up to 3 years to claim a credit for withheld taxes.[89]

If a plan distributes a check to a missing participant and the participant does not cash the check, it is highly unlikely the participant will claim a credit for the tax withheld from the distribution. In its 2018 report, the GAO questioned whether withholding should be required in instances when it was reasonable to believe that plan participants would not receive the distribution.[90]

In Revenue Ruling 2019-19, the IRS declared that a participant's failure to cash a distribution check did not change the plan administrator's obligation to withhold taxes from the distribution.[91] In Revenue Ruling 2020-24, the IRS similarly declared that payment of benefits to an unclaimed property fund did not change a plan administrator's withholding requirements.

[b] Inclusion

One of the principal benefits of traditional qualified retirement plans is that contributions to qualified plans are not includible in the participant's income when made.[92] All good things, however, must come to an end, and section 402(a) of the Internal Revenue Code provides that as a general rule any amount distributed from a qualified plan is taxable to the recipient under IRC § 72 in the year distributed.[93] Under

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[87] IRC § 3405(d)(2). The payor, rather than the plan administrator is required to withhold taxes if the plan administrator directs the payor to withhold the tax and provides the payor with the withholding information. *Id.*

[88] GAO-18-19, *supra* note 9, at 24 (stating that "IRS officials told us that the agency does not routinely credit federal tax withholding to a taxpayer's current federal tax liability unless the taxpayer has made a claim.").

[89] *Id.* at 25 (stating that "IRS told us that missing participants generally have up to 3 years to become aware of and claim the withheld amounts for them to be credited towards their tax liability.").

[90] *Id.* at 23.

[91] Rev Rul 2019-19, at 2–3.

[92] Contributions to Roth plans, however, are includible in income when made. IRC § 402A(c)(1).

[93] "Eligible rollover distributions" are not includible in income when distributed if the distribution is rolled over with 60 days of receipt. IRC § 402(c).

section 72, distributions from a qualified plan are taxable as ordinary income in the year distributed unless the participant has made nondeductible contributions to the plan.[94]

In Revenue Ruling 2019-19, the IRS declared that a participant who received a distribution from a traditional qualified plan and had not made any nondeductible contributions to the plan was required to include the distribution in income in the year distributed even though the participant did not cash the check. Failure to cash the check did not permit the participant to exclude the distribution from income.[95]

[c] Reporting Obligation

Plan sponsors are required to report distributions from qualified plans to participants whose aggregate distributions total $10 or more.[96] Specifically, a form 1099-R, reporting the total amount of the distribution and the taxable amount of the distribution, must be filed for each individual to whom a plan distribution of $10 or more has been made.

In Rev. Rul. 2019-19, the IRS held that the participant's failure to cash the distribution check did not change the plan sponsor's obligation to report the distribution. In Rev. Rul. 2020-24, the IRS declared that the payment of benefits to an unclaimed property fund does not change the plan sponsor's obligation to report the distribution.

[2] Effect of Missing Participants on Plan Qualification Status under IRC § 401(a)(9): Audit Guidance

The Internal Revenue Code generally requires that qualified plans begin to distribute benefits no later than April 1 of the calendar year following the year in which the participant reaches age 72.[97] Failure to satisfy qualification requirements may cause a plan to be disqualified. There is no express statutory or regulatory exception to the minimum required distribution qualification requirement for missing participants.

In an internal memorandum issued in 2017, IRS examiners were directed not to challenge a plan's qualified status for failure to make minimum distributions to missing participants if the plan had taken specific steps to locate the missing participant.[98] Specifically, the memorandum identified the following steps that a plan must have taken: (1) searched plan and related plan, sponsor, and publicly available records or directories for alternative contact information; (2) used any of the following search

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[94] Distributions attributable to nondeductible contributions are not includible in income. IRC § 72(d).

[95] Rev Rul 2019-19, at 2.

[96] IRC § 6047(d).

[97] IRC § 401(a)(9).

[98] Acting Director, EP Examinations of the TE/GE Division of the Internal Revenue Service, Memorandum for Employee Plans (EP) Examination Employees, at 2 (Oct. 19, 2017), available at https://communications.bakerbotts.com/27/360/uploads/memo-for-employee-plans-10-19-17.pdf.

methods: commercial locator service; credit reporting agency, or proprietary internet search tool for locating individuals; and (3) attempted contact through the US postal service via certified mail to the last known mailing address and through appropriate means for any address or contact information (including email addresses and phone numbers).

[3] Missing Participants and 60-day Rollover Requirements

Under IRC § 402(a), a plan participant is generally required to include a distribution from a traditional qualified plan in income in the year distributed. IRC § 402(a) provides an exception for eligible rollover distributions[99] that are rolled over to an eligible retirement plan[100] within 60 days of receipt.[101] Section 402 permits the Secretary to waive the 60-day rollover requirement "where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement."[102]

In Rev. Proc. 2016-47, the IRS provided for a self-certification procedure pursuant to which a taxpayer could claim eligibility for a waiver of the 60-day rollover requirement for certain specified reasons. Distribution of funds to a state unclaimed property fund was not included in the list of permitted reasons in Rev. Proc. 2016-47.

In Rev. Proc. 2020-46, the IRS modified (and superseded) Rev. Proc. 2016-47 by adding to the list of permissible reasons for which a taxpayer who misses the 60-day rollover deadline may self-certify to the plan administrator that the taxpayer missed the deadline due to the fact that the funds were distributed to a state unclaimed property fund.[103] As long as the taxpayer contributes the rollover as soon as practicable after the taxpayer obtains his unclaimed funds from the state,[104] the plan administrator can rely on the certification to show that the taxpayer meets the requirements for a waiver of the

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[99] An eligible rollover distribution is defined as any distribution from a qualified plan to a participant unless it falls with certain enumerated exceptions. For purposes of missing participants and lost pensions, the most important exceptions are periodic payments and minimum required distributions under IRC § 401(a)(9). For the definition of eligible rollover distribution and all of the exceptions, see IRC § 402(c)(4) & Treas Reg 1.402(c) Q&A 3(b) & 4.

[100] Eligible retirement plans are defined as (1) individual retirement accounts under IRC § 408(a), (2) individual retirement annuities under IRC § 408(b), (3) IRC § 401(a) qualified plans, (4) IRC § 403(a) annuity plans, (5) governmental plans under IRC § 457, and (6) tax-sheltered annuities under IRC § 403(b). IRC § 402(c)(8)(B).

[101] IRC § 402(c)(3)(A).

[102] IRC § 402(c)(3)(B).

[103] Rev Proc 2020-46 Sec. 3.02(2)(l). Among the eleven other permitted reasons are the fact that the distribution, made in the form of a check, was misplaced and never cashed. *Id.* Sec. 3.02(2)(b).

[104] *Id.* Sec. 3.02(3).

60-day rollover requirement.[105] The plan administrator, however, may not rely on the certification in determining whether the contribution meets the other requirements for a valid rollover.[106]

§ 6.05 POTENTIAL SOLUTIONS

[1] Proposals that Focus on Communication and Improving Chances of Participants Finding Out About Lost Pensions

[a] Reinstate IRS Letter-Forwarding Program

Undoubtedly, poor recordkeeping plays a role in the missing participant problem.[107] The DOL's enforcement activity and the Best Practices Guidance it issued in January 2021 should go a long way to encourage plans to improve their recordkeeping practices and eliminate many of the recordkeeping problems that lead to missing participants.

Poor recordkeeping, however, is not the only cause of the missing participant problem. Other causes of the missing participant include the failure of plan participants to provide plan sponsors with updated address information and plan participants choosing not to respond to plan correspondence and/or cash distribution checks.

Commentators and policymakers have proposed a host of potential solutions to the missing participant problem. Some of those solutions focus on communications and improving the chances that plan participants can find their lost pensions. Others address the use of the plan assets; that is, what to do with the retirement savings that plan participants have not claimed.

This section begins by analyzing the proposed solutions that focus on communication and improving the chances of participants finding out about missing participants. The section then turns to the proposals that address the use of retirement funds.

This section considers three proposals that focus on communication with plan participants: (1) reinstatement of the IRS letter forwarding program; (2) improvement in social security notifications; and (3) establishment of a national pension registry.

In 1994, the IRS established a letter-forwarding program pursuant to which it would forward letters that serve a "humane purpose."[108] Humane purpose included letters from plan sponsors or plan administrators trying to locate missing participants.[109] In 2012, the IRS amended the letter-forwarding program to eliminate from the definition of humane purpose letters from plan sponsors and plan administrators trying to locate

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[105] *Id.* Sec. 3.04(2).

[106] *Id.* Sec. 3.04(1).

[107] *See* § 6.03[1], *supra* (discussing DOL's enforcement activity prior to January 2021).

[108] Rev Proc 94-22, modified and superseded by Rev Proc 2012-35.

[109] Rev Proc 94-22, Sec. 3.

missing participants.[110] In support of its change in policy, the IRS noted that several alternative resources for locating missing participants, including the Internet, have become available since the institution of the letter-forwarding program in 1994.[111]

Undoubtedly, the advent of the Internet has made it easier to find lost participants. And there are now private missing participant search services that did not exist in 1994. The IRS letter-forwarding program, however, has at least two significant advantages over a commercial search. First, the IRS letter-forwarding program should be more secure because the IRS already has access to all taxpayers' social security numbers. Private search firms, in contrast do not automatically have access to everyone's social security number and giving a private search firm a missing participant's social security number could compromise that number. Second, individuals are more likely to open mail that they receive from the IRS than correspondence they receive from a private search firm or plan. Indeed, part of the missing participant problem arises from the fact the plan participants do not always respond to correspondence sent from plans.

Although the IRS cited alternative search resources as the reason for the eliminating the letter-forwarding program for missing participants, undoubtedly cost played a role. Indeed, IRS officials advised the GAO that resource constraints led the IRS to cut back on the letter-forwarding program.[112] The IRS did not charge a service for the program if the request involved fewer than 50 recipients.[113] Plan sponsors could, and at least in some instances, did game the system by capping their total requests each year to 49 and shifted the entire search cost to the IRS.[114] Plans and/or plan sponsors, on the other hand, must pay for commercial searches.[115]

The GOA has recommended that the IRS reinstitute its letter-forwarding program for missing participants and charge a reasonable fee for the service.[116] Unfortunately, the IRS has indicated that it is not interested in reinstituting the program.[117]

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[110] Rev Proc 2012-35 Sec. 4.02.

[111] Rev Proc 2012-35 Sec. 2.01.

[112] GAO-18-19, *supra* note 9, at 29.

[113] Rev Proc 94-22, Sec. 4.04. The cost for searches of 50 or more was a flat $1,750 fee per request, plus $.01 per address search, and $.50 per letter forwarded. Rev Proc 94-22 Sec. 4.05.

[114] In fact, a service provider told the GAO that plan sponsors would cap the number the letters they requested in a year to 49 to avoid paying any fee. GAO-18-19, *supra* note 9, at 29 n.78.

[115] The cost ranges widely. One search firm told the GAO that it charged $1.25 per search while the GAO was advised that another firm charged $35 per search using social security numbers. The PBGC estimates the cost of commercial searches to be $40 per search. And plans may be required to search multiple times for a single missing participant. GAO-18-19, *supra* note 19, at 28 & n.76.

[116] *Id.* at 29.

[117] *Id*. at 56.

[b] Improve Social Security Notifications

Every year plan administrators are required to file a Form 8955-SSA reporting the names and social security numbers of vested participants who terminate employment and leave behind vested benefits in their employer's plan.[118] The Form 8955-SSA also requires that plan administrators report the names and social security numbers of plan participants who were previously reported on a Form 8955-SSA but are no longer entitled to deferred vested benefits because the benefits were paid out.[119] Plan administrators generally do a good job with the initial reporting of terminating employees who leave behind vested benefits. Plan administrators, however, are much more lax about reporting the names and social security numbers of individuals who are no longer entitled to a benefit because their benefit was distributed after termination.

Each month, the Social Security Administration checks the name and Social Security number of each new Social Security claimant to see if the claimant was ever listed on a Form 8955-SSA. The Social Security Administration sends out about 90,000 notices to new claimants each month.[120] Not all recipients of the notices are entitled to benefits, however, because the notices are sent to individuals who have already received their benefits. Indeed, one TPA executive told the GAO that only about .1% of notice recipients are actually entitled to benefits.[121]

The GAO has recommended that the IRS work with the Social Security Administration to improve internal controls to increase the likelihood that recipients who receive the notice are actually entitled to benefits.[122] As noted above, Form 8955-SSA requires plan administrators to report individuals who are no longer entitled to receive a benefit because the benefit was already paid out. The IRS, however, does not impose a penalty for failure to report that an individual is no longer entitled to receive a benefit because the benefit was paid out.[123] In fact, the regulations suggest reporting this change is voluntary.[124]

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[118] IRC § 6057; Form 8955-SSA Part III. The plan sponsor must also report the amount of the vested benefit. Form 8955-SSA Part III.

[119] Form 8955-SSA Part III Code D.

[120] GAO-18-19, *supra* note 9, at 29. Cf. GAO-15-73, *supra* note 4, at 31 (stating that about 70,000 notices are generated for new Social Security claimants each month).

[121] GAO-18-19, *supra* note 9, at 31 ("According to the TPA executive, if there are 1,000 names on the list of separated participants with vested benefits in the plan, 999 will have been paid by the time they receive the notice from SSA.").

[122] *Id.* at 33 & 54 (Recommendation 6).

[123] Section 6652(d)(1) of the Internal Revenue Code imposes a penalty for failure to file a registration statement under IRC § 6057(a), which includes all participants required to be included in the statement.

[124] 26 CFR § 301.6057-1(c)(2).

Improving reporting would not alone solve the problem of lost pensions and missing participants. It would, however, permit plan participants and the DOL to focus their energy on tracking down potential claims that are likely to result in the payment of benefits. It would permit a much efficient use of time and resources than occurs under the current system.

[c] Establish National Pension Registry

Many countries have a national pension registry that permits plan participants to search for lost pensions through a centralized, consolidated online source of information on all of their workforce retirement accounts.[125] The United States, however, does not.[126]

In 2014, the GAO recommended that the DOL convene a taskforce to consider the establishment of a national pension registry.[127] Although the DOL initially agreed to evaluate the possibility of convening a task force, the DOL ultimately did not pursue the idea. In 2020, the GAO renewed this recommendation in its list of priority recommendations for the DOL.[128] Specifically, it recommended that the DOL bring together "federal government stakeholders, industry professionals, plan sponsor representatives, and consumer representations to consider establishing a national pension registry."[129]

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[125] Alicia H. Munnell, *The U.S. needs a pension registry to help people keep track of their savings,* MarketWatch (July 24, 2018), available at https://www.marketwatch.com/story/the-us-needs-a-pension-registry-to-help-people-keep-track-of-their-savings-2018-07-24. For a description of pension registries in the Netherlands, Australia, and Denmark, see GAO-15-73, *supra* note 4, at 75–78. For a description of the United Kingdom's pension registry, see John A. Turner, *Lost Pension Registries in the U.K. and Australia*, Pension Rights Center 3–4 (Feb. 2012), available at http://www.pensionrights.org/sites/default/files/docs/pdf/lost_pension_plan_registries_in_uk_and_australia.pdf.

[126] The PBGC is working on a pension plan registry project that seeks to combine data currently available only through internal PBGC searches to make it easier for plan participants to find terminated plans. PBGC, 2020 Annual Report of the Participant and Plan Sponsor Advocate 5–6 (Dec. 31, 2020). This project is not intended to create a single national registry that combines information on current and terminated plans.

[127] GAO-15-73, *supra* note 4, at 50.

[128] GAO-20-445PR *Priority Recommendations: Department of Labor* 3 (April 14, 2020), available at https://www.gao.gov/assets/gao-20-445pr.pdf.

[129] *Id.*

In addition to the GAO recommendation, bipartisan[130] bills[131] proposing the establishment of a national pension registry have been introduced in every Congress since 2016.[132] Moreover, the comprehensive pension bill introduced in May 2021, Securing a Strong Retirement Act of 2021 (SECURE 2.0), includes a provision establishing a national pension registry.[133]

The proposed legislation[134] would require the establishment of a national online searchable database, known as the "Retirement Savings Lost and Found."[135] The registry would be managed by the Office of Retirement Savings Lost and Found (Office) within the PBGC[136] and would include the following features:

(1) It would allow an individual to search for information that would enable the individual to locate the plan administrator of any plans in which the individual is or was a participant or beneficiary, and would provide contact information for the plan administrator;

(2) It would allow the PBGC to assist the individual in locating any plan in which the individual might be entitled to a benefit; and

(3) It would allow the PBGC to make any necessary changes to contact information on record for the plan administrator based on plan changes due to merger or consolidation of the plan, division of the plan, bankruptcy, termination, change in plan name, change in name or address of the plan administrator, as well as other reasons.[137]

The legislation would require plan administrators to provide the information currently reported on Form 8955-SSA to the PBGC.[138] It would also impose additional reporting requirements with respect to cash outs. Specifically, if a distribution were

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[130] Elizabeth Warren (D-Mass.) and Steve Daines (R-Mont.) introduced bills in the Senate and Suzanne Bonamici (D-Ore.) and Jim Banks (R-Ind.) introduced bills in the House.

[131] The bills have included other provisions, such as a provision permitting mandatory transfers of rollover distributions to be transferred to the Office of the Retirement Savings Lost and Found. This section focuses on the national registry. The new investment option is mentioned in § 6.05[2][c], *infra*.

[132] S 1730, 117th Cong 1st Sess (2021); S 4192, 116th Cong 2d Sess (2020) HR 7439, 116th Cong, 2d Sess (2020); S 2474, 115th Cong 2d (2018); HR 6540, 115th Cong, 2d Session (2018); S 3078, 114th Cong 2d Sess (2016).

[133] S 1770 § 323, 117th Cong 1st Sess (2021).

[134] All three of the bills introduced in spring 2021 are almost identical. This section will only include citations to the provision in SECURE 2.0 because it is the most likely to be enacted.

[135] S. 1770 § 323(a)(1)(A), 117th Cong. 1st Sess.

[136] *Id.* § 323(b)(1) (adding 29 USC § 4051).

[137] *Id.* § 323(a)(1)(A)(i)–(iii).

[138] *Id.* § 323(b)(1) (adding 29 USC § 4051(c) information collection).

rolled over, the plan administrator would be required to provide the name and address of the trustee or issuer of the IRA as well as the account number of the IRA.[139] If benefits were distributed via a deferred annuity contract, the plan administrator would be required to provide the name and address of the annuity contract issuer as well as the contract or certificate number.[140]

A national registry would do much to ease the search process for individuals with lost pensions. Currently, individuals may search for lost pensions through a website entitled "National Registry of Unclaimed Retirement Benefits"[141] that is operated by Pen-Checks, an independent provider of retirement plan distribution services. Although the website is called a "national registry," participation is purely voluntary. A participant will only be able to find a lost pension through the website if the individual's former employer elected to register on the website.[142] The proposed Retirement Savings Lost and Found website, in contrast, would be a comprehensive national website that includes data on all pensions subject to ERISA's vesting standards.[143] AARP, the ERISA Industry Committee (ERIC),[144] the American Benefits Counsel,[145] and the Pension Rights Center[146] have all supported the creation a Retirement Savings Lost and Found national registry. Although bills introducing the registry have gained little traction in the past, the likelihood of such legislation being enacted has increased because SECURE 2.0 includes the registry in its comprehensive pension reform.[147]

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[139] *Id.* § 323(d) (adding IRC § 6057(F)(i)).

[140] S. 1770 § 323(d) (adding IRC § 6057(F)(ii)).

[141] National Registry of Unclaimed Retirement Benefits, at https://www.unclaimedretirementbenefits.com/.

[142] Pamela Perdue, QUALIFIED PENSION & PROFIT-SHARING PLANS ¶ 21.07(2) (2021).

[143] S 1770 § 323(a)(1)(B), 117th Cong 1st Sess. ERISA's vesting standards apply to most pension plans. For a listing of the pension plans excluded from the vesting provisions, see ERISA § 201(2)–(8).

[144] *See* Wolters Kluwer, Pension Plan Guide Iss. No. 2298, at 3 (March 20, 2018) (noting that AARP and ERIC supported the 2018 Retirement Savings Lost and Found Act).

[145] *See* Brian Croce, Senators revisit bill to create retirement account lost-and-found, Pensions & Investments (May 4, 2021) (noting that the Pension Rights Center, American Benefits Council, and ERIC have endorsed the 2021 Retirement Savings Lost and Found Act introduced in the Senate).

[146] In 2018, the Pension Rights Center explained that it supported the creation of a national pension registry but objected to provisions of the 2018 proposed bill that would have imposed limited search obligations on plan administrators of ongoing plans. *See* Jane Smith, *Senate Lost and Found bill would help many retirees but would harm others*, PRC Perspectives Blog (March 19, 2018). The 2021 proposals do not include the limited fiduciary search provisions.

[147] Ted Godbout, *Will This Year's 'Lost-and-Found' Bill Find its Way into Law?*, National Ass'n of Plan Advisers (May 25, 2021), available at https://www.napa-net.org/news-info/daily-news/%E2%80%8Bwill-years-lost-and-found-bill-find-its-way-law.

[2] Proposals that Focus on Use of Funds

[a] Forfeiture to State Unclaimed Property Funds

This section evaluates three proposals that focus on the use of retirement funds to address the missing participant and lost pension problem. Specifically, it considers: (1) forfeiture to state unclaimed property funds; (2) forced transfers to IRAs and auto-portability; and (3) transfer to a default central fund.

Many plans provide that if a participant or beneficiary cannot be located, the participant's benefit is forfeited to the plan, subject to restoration if the participant or beneficiary later claims the benefit.[148] The forfeitures are typically used to pay reasonable plan expenses but may also be used to reduce employer contributions.[149] Plans are not required to credit the former employee's account with any gains or losses subsequent to forfeiture.[150] The Treasury Regulations expressly acknowledge forfeiture-and-reinstatement as an acceptable method for addressing missing participants in qualified plans.[151] In its Best Practices Guidance, the DOL stressed that ERISA's fiduciary duties fully apply to the accounts of missing participants who are treated as "conditionally forfeited" under the Treasury Regulations.[152]

Although many plans forfeit unclaimed benefits to the plan, ERISA-governed plans, particularly large plans,[153] do not commonly forfeit uncashed distribution checks to state unclaimed property funds.[154] Non-ERISA plans, such as governmental and church

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[148] 2019 ERISA Advisory Council Report, *supra* note 8, at 17 (noting that according to a brief survey of American Benefits Council, 49% of its members use the forfeiture-and-reinstatement method).

[149] *Id.* at 16.

[150] Treas Reg § 1.411(a)-7(d)(4)(v).

[151] Treas Reg § 1.411(a)-4(b)(6).

[152] Best Practices Guidance, *supra* note 10, at 2 n.1. According to testimony before the ERISA Advisory Council, the DOL's regional offices have taken the position that forfeitures constitute prohibited transactions because they may confer a benefit on the employer. The 2019 ERISA Advisory Council strongly recommended that the DOL provide guidance on the ongoing viability of forfeiture-and-reinstatement. 2019 ERISA Advisory Council, *supra* note 8, at 16 n.14. The DOL's Best Practices Guidance, as discussed in the text above, suggests that conditional forfeitures are not per se fiduciary violations.

[153] In testimony before the ERISA Advisory Council, the ERISA Industry Committee (ERIC), which represents the large plan market, explained that plan sponsors are hesitant to escheat uncashed checks to the state because they believe that the escheatment statutes are preempted by ERISA. ERIC, Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds, Testimony before the ERISA Advisory Council on Employee Welfare and Pension Benefit Plans 2. Service provider Empower Retirement, in contrast, testified that the vast majority of its small plan clients, 80% of which are subject to ERISA, use escheatment. Empower Testimony, *supra* note 26, at 2.

[154] In a survey by American Benefits Council, only four of 55 plan sponsors reported ever using the escheatment process for retirement benefits. Testimony of Jan M Jacobson on behalf of the American

plans, on the hand, may enter checks into the state escheatment process.[155] In 2019, the ERISA Advisory Council studied the question whether transferring uncashed distribution checks to state unclaimed property programs might advance the goal of reuniting missing and unresponsive participants with their retirement benefits.[156] The Advisory Council concluded that it would and recommended that the DOL issue guidance confirming that a plan may voluntarily elect to transfer funds attributable to uncashed checks to a state unclaimed property program.[157] The Advisory Council also recommended that the DOL establish a safe harbor for transfers to state unclaimed property programs that meet minimum standard requirements but did not offer a specific list of minimum standards.[158] In a recent report, the GAO recommended that the DOL specify the circumstances, if any, under which ongoing retirement plans can transfer uncashed pension checks to state unclaimed property programs.[159] The DOL has reportedly neither agreed nor disagreed with the recommendations it has received from the ERISA Advisory Council and GAO.[160]

The purpose of unclaimed property laws is to reunite missing property with its rightful owner.[161] No two state unclaimed property laws are the same,[162] however, and the effectiveness of state laws in uniting missing property with its rightful owner varies

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Benefits Council for the ERISA Advisory Council Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds 3 (June 26, 2019) [hereinafter ABC Testimony]. Testimony on behalf of SPARK noted that in some instances, terminating ERISA-governed plans may escheat uncashed distribution checks to state unclaimed property funds. SPARK Testimony, *supra* note 33, at 4–5. Field Assistance Bulletin 2014-01 sets forth a safe harbor for terminating defined contribution plans. It generally requires that a missing participant's account balance be rolled over to an IRA if the participant cannot be located after a series of search steps has been taken. If, however, the fiduciary is unable to do a rollover or chooses not to do so for a compelling reason, the safe harbor permits a fiduciary to consider either opening an interest-bearing account in a federally insured bank or transferring the account to a state unclaimed property fund. Field Assistant Bulletin 2014-01, at 5. According to a survey of 401(k) plan service providers, of the $2.25 million transferred to states, $2.19 million was attributable to terminated plans. GAO-19-88, *supra* note 9, at 14.

[155] SPARK Testimony, *supra* note 33, at 4.

[156] 2019 ERISA Advisory Council Report, *supra* note 8.

[157] *Id.* at 47.

[158] *Id.* at 48.

[159] GAO-19-88, *supra* note 9, at 38 (Recommendation 3).

[160] Amanda Umpierrez, *Solutions for Missing Participants and Uncashed Checks*, PlanSponsor (Nov. 10, 2020), available at https://www.plansponsor.com/solutions-missing-participants-uncashed-checks/.

[161] Ethan D. Millar, Scott Heyman, and Charolette F. Noel, *Building a Better Unclaimed Property Act*, 73 Bus Law 711, 712 (2018).

[162] *See* Keane, Prepared for American Benefits Council (2019), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2019-berger.pdf (providing overview of unclaimed property law).

widely.[163] According to a 2011 survey by the National Association of Unclaimed Property Administrators (NAUPA), recovery rates for missing account owners in 42 states and the District of Columbia ranged from as little as 2.27% to as high as 88.8%.[164] Moreover, 2018–2019 NAUPA survey data shows that return rates vary depending on the type of information the state has with respect to the property and the amount of the property at issue. Not surprisingly, return rates are higher for property for which the state has the name and address of the property owner than for property for which the name and address are unknown, and return rates are highest for property for which the state has both the Social Security number and in-state address of the owner.[165] Similarly, return rates are higher for property with higher values than for property with lower values.[166]

Clearly, plans should not be required to forfeit unclaimed pension distributions to state unclaimed property programs pursuant to state law. ERISA likely preempts such state laws,[167] and application of the fifty different state unclaimed property laws would prohibit the uniformity in plan administration that ERISA preemption seeks to promote.[168]

Whether plans should be permitted to voluntarily forfeit unclaimed pension distributions to state unclaimed property programs is less clear. Permitting plans to voluntarily forfeit unclaimed distributions to state unclaimed property programs may, in some instances, lead to reuniting plan participants with their benefits.[169] Nevertheless,

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[163] For a discussion of the difficulty of comparing return rates and the different variables involved, see Borden Consulting Group, *Survey of State Return Rates and Comments on Treatment of ERISA Property in Unclaimed Property Audits* 4 (Aug. 26, 2019).

[164] Sepsakos and Walsh Testimony, *supra* note 24, at 5.

[165] G. Allen Mayer, Esq. Chief of Staff, Illinois State Treasurer Michael W. Frerichs On Behalf of the National Association of Unclaimed Property Administrators (NAUPA), Written Statement on Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Programs Before the U.S. Dep't of Labor 2019 Advisory Council on Employee Welfare and Pension Benefit Plans (June 26, 2019) (in 12 month study of 14 states, showing return rates of 49% for all liquid property, 54% for property with names, and 70% for property with social security number and in-state address).

[166] *See* 2019 ERISA Advisory Council Report, *supra* note 8, at 24 (noting that NAUPA testimony shows that return rates are lower for property with value of less than $100 than for property with higher value).

[167] ERISA 514(a). *See* 2019 ERISA Advisory Council, *supra* note 8, at 20 (stating that the DOL "has indicated state unclaimed property laws are preempted by ERISA").

[168] Cf., Gobeille v. Liberty Mut. Ins. Co., 136 S Ct 936, 945 (2016) (finding state reporting requirement preempted by ERISA because it interferes with national uniform administration of plan). For an overview of ERISA preemption, see Kathryn L. Moore, UNDERSTANDING EMPLOYEE BENEFITS LAW 319–28 (2d ed. 2020).

[169] No data is available specifically addressing the states' return rates with respect to pension benefits

it is unlikely to eliminate the problem of uncashed checks and missing participants, and, in many instances, may be little better than forfeiting the benefits to the plan. First, state unclaimed property programs are more successful in returning lost property that exceeds $100 in value than lost property worth less than $100. Most uncashed pension checks are for less than $100.[170] Second, state unclaimed property programs are much more successful in returning lost property when they have the name, social security number, and in-state address of the owner of the property. The problem of missing participants typically arises when the plan does not have the correct name, social security number, and/or address of the participant. Third, when individuals with lost pensions are looking for their benefits, they are more likely to go to their former employer than a state unclaimed property program to locate their lost pensions.[171] Fourth, even if an individual with a lost pension goes to a state unclaimed property program to seek a lost pension, it is not always clear to which state the participant should go. In some instances, the state of the participant's current or former residence might hold the pension distribution while in other instances, the pension distribution might be held by the former employer's state of incorporation.[172]

The fact that unclaimed property law varies state by state is the most significant reason why state unclaimed property programs are not a particularly effective solution to the problem of missing participants, lost pensions, and uncashed checks. The presence of multiple state laws and programs increases the cost and complexity of this proposed solution. Although NAUPA and its member states have expressed willingness to work with pension plans and the DOL to streamline the process,[173] a single repository for unclaimed benefits, as discussed in section ? below, appears to be a superior solution to the problem than voluntary forfeiture to each of the fifty states.

[b] Forced Transfers to IRAs and Auto-Portability

If, upon termination of employment, an employee has an account balance of less than $5,000, the plan may leave the employee's vested interest in the plan or the plan may automatically "cash out" the employee's account without the employee's consent.[174] In

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forfeited to the states. Cf. Empower Testimony, *supra* note 26, at 3 (noting that they have no data on number of accounts restored to original owner after funds escheated to state).

[170] *See* § 6.02 *supra* (discussing SPARK testimony). *See also* Empower Testimony, *supra* note 26, at 2 (noting that 39% of the 152,815 checks it processed using escheatment were for less than $5).

[171] Pension Rights Center Testimony, *supra* note 24, at 4.

[172] *Id.*

[173] NAUPA, Written Statement on Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Programs Before the U.S. Department of Labor 2019 Advisory Council on Employee Welfare and Pension Benefit Plans 4 (Aug. 28, 2019) [hereinafter "NAUPA August Written Statement"].

[174] IRC § 411(a)(11). Rollover contributions and earnings on rollover contributions need not be taken into account in applying the threshold dollar amounts. IRC § 411(a)(11)(D).

order to promote the preservation of retirement savings,[175] Congress amended the Internal Revenue Code in the Economic Growth and Tax Relief Reconciliation Act to require that if the account balance is between $1,000 and $5,000, the cashed-out employee's account balance must be rolled over into a "forced-transfer" IRA for the benefit of the employee.[176] Plans may, but are not required to, transfer account balances of less than $1,000 to a forced-transfer IRA.[177] Under the ERISA regulations, a plan fiduciary will be deemed to have satisfied its fiduciary duties with respect to a forced-transfer IRA if, among other things, the IRA is invested in an investment product that is designed to preserve principal and the investment product seeks to maintain the dollar amount of the investment over time.[178] According to the Plan Sponsor Council of America's 55th Annual Survey, about 50 percent of active 401(k) plans force out plan participants who separate from service and have account balances of between $1,000 and $5,000.[179]

Forced-transfer IRA providers have recommended that automatic rollovers be expanded to include uncashed distribution checks.[180] With respect to this recommendation, it is important first to note that not all uncashed checks qualify for rollover treatment. While uncashed checks representing plan participants' cashed-out balances typically qualify for rollover treatment,[181] uncashed checks that are attributable to periodic payments that begin when the plan participant reaches normal retirement age under the plan and uncashed checks that represent minimum required distributions

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[175] S Fin Comm, Restoring Earnings to Lift Individuals and Empower Families (Relief) Act of 2001: Technical Explanation of Provisions Approved by the Committee on May 15, 2001, S Prt 107-30, at 127 (May 2001) (stating that "[t]he Committee believes that making a direct rollover the default option for involuntary distributions will increase the preservation of retirement savings").

[176] Pub L No 107-16 § 657, 115 Stat 38, 135 (adding IRC § 401(a)(31)(B)). *See also* Treas Reg § 1.401(a)(31)-1 Q&A-1. These IRAs are also sometimes referred to as "default" IRAs or "safe harbor" IRAs.

[177] 29 CFR 2550.404a-2(d).

[178] 29 CFR 2550.404a-2(c)(3)(i)&(ii).

[179] GAO-15-73, *supra* note 4, at 7 n.18.

[180] *See, e.g.*, Millennium Trust Company LLC, ERISA Advisory Council Permissive Transfers of Uncashed Checks from ERISA Plans to State Unclaimed Property Funds (August 28, 2019); PenChecks Trust, PenChecks Position with Respect to Potential Voluntary Transfers of Uncashed Distribution Checks to State Unclaimed Property Funds (discussing need to address tax withholding issue) [hereinafter PenChecks Testimony]. According to a survey by the American Benefits Council, about 25% of plans roll over the benefits of nonresponsive and missing participants into an IRA or annuity. ABC Testimony, *supra* note 154, at 3.

[181] Since taxes would have been withheld from the uncashed distribution check, plans will need to address this issue before transferring funds to a forced-IRA. *See* PenChecks Testimony, *supra* note 180, at 3 (recommending that withheld taxes be restored).

under IRC § 401(a)(9) are not eligible rollover distributions.[182] Second, whether it makes sense to extend forced-transfer IRAs to uncashed eligible rollover distribution checks depends on how successful forced-transfer IRAs are in actually preserving retirement savings and how many participants ultimately find and collect their forced-transfer IRAs.

According to a study by the GAO, the account balances in most forced-transfer IRAs will decrease over time because the fees charged to forced-transfer IRAs are typically higher than the low returns earned by the conservative investments in which forced-transfer IRAs must be invested under the DOL's safe harbor regulations.[183] Indeed, the GAO found that 13 of 19 potential fee/return combinations offered by forced-IRA providers would reduce a forced-transfer IRA's balance to $0 over 30 years.[184] Over a shorter time horizon, the GAO found an average decrease of 25% in a $1,000 account balance over 5 years.[185] In testimony before the 2019 ERISA Advisory Council, "rollover IRA administrators acknowledged that smaller uncashed plan check balances transferred to rollover IRAs would most likely be eliminated through account fees."[186] The GAO has recommended that the DOL address the problem of low returns by amending its regulatory safe harbor for forced-transfer IRAs to expand the permissible investment vehicles for forced-transfer IRAs.[187] The DOL has disagreed with this recommendation.[188]

Data on how frequently individuals collect their forced-transfer IRAs is not readily available.[189] One large forced-transfer IRA provider advised the GAO that about 30% of account holders do nothing with the account during the first year in which it is opened. Another provider reported that almost 70% of accounts opened within the last five years remain open and unclaimed.[190]

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[182] *See* IRC § 402(c)(4)(B) (defining eligible rollover distribution).

[183] GAO-15-73, *supra* note 4, at 9–10.

[184] *Id*. at 10.

[185] *Id*. at 11.

[186] NAUPA August Written Statement, *supra* note 173, at 6 n.10.

[187] GAO-15-73, *supra* note 4, at 50.

[188] *Id*. at 51. Proposed "Retirement Savings Lost and Found" legislation would permit forced-transfer IRAs to be invested in a target date or life cycle fund. *See, e.g.*, S 1770 § 332(b)(3), 117th Cong 1st Sess (2021) (amending ERISA § 404(c)(3) to include "target date or life cycle fund" as permissible investment option for IRC § 401(a)(31) cash-out); S. 1730 § 2(c)(1) (same). For a discussion of the proposed Retirement Savings Lost and Found legislation, see § 6.05[1][c] *supra* and § 6.05[2][c] *infra*.

[189] *See* NAUPA August Written Statement, *supra* note 173, at 6 (noting "that the rollover IRA industry has not provided statistics concerning its success in owner unification"); GAO-15-73, *supra* note 4, at 2–3 (discussing dearth of data on forced-transfer IRAs and explaining how GAO collected data for its study);

[190] GAO-15-73, *supra* note 4, at 16–17.

The Retirement Clearinghouse (RCH) has pioneered a new program, "auto-portability," that addresses the problem of retirement savings languishing in forced-transfer IRAs by automatically rolling over the assets of forced-transfer IRAs into an individual's new employer's plan.[191] Under the auto-portability program, RCH first transfers mandatory cash-outs to a forced-transfer IRA (referred as a "default IRA") which RCH may or may not manage.[192] Then, using "locate, match, and transfer" technology RCH periodically monitors cooperating recordkeepers' systems to determine if the IRA owner has become a participant in a defined contribution plan through a new employer. If so, RCH automatically rolls the assets of the default IRA into the account of the new employer, unless the IRA owner affirmatively elects not to roll the IRA into the new employer's plan within 30 days of receiving notice of the impending roll-in.[193] If RCH does not manage the initial default IRA, the assets of the default IRA are transferred to a conduit RCH IRA before being rolled into the new employer's plan.[194]

On July 31, 2019, the DOL granted RCH a five-year prohibited transaction exemption for its auto-portability program that permits RCH to receive certain fees with respect to its program.[195] Specifically, it permits RCH to receive a one-time communication fee of $6 and a transfer fee with respect to the transfer of assets from a default IRA to the individual new employer's plan.[196] If RCH manages the default IRA, RCH also charges an asset-based sub-transfer fee, a monthly administrative fee for

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[191] Auto-portability follows a long line of innovative mechanisms that "automatize" aspects of private employer-sponsored retirement savings to address risks and improve outcomes in the current system. Automatic enrollment plans were introduced to increase coverage. Automatic escalation was introduced to increase contribution rates. Default investment alternatives were designed to address poor investment choices. All of these "automatic" alternatives draw on lessons from behavioral economics, which combines insights from psychology and economics to offer a better understanding of human behavior than that provided by neo-classical economics' utility maximizing theory. *See* Sendhil Mullainthan & Richard Thaler, *Behavior Economics*, MIT Dep't of Economics Working Paper 00-27 (Sept. 2000) (providing introduction to behavioral economics); Ryan Bubb & Richard H. Piles, *How Behavioral Economics Trims Its Sails and Why*, 127 Harv L Rev 1593, 1607–37 (2014) (critiquing behavioral economics as applied to employer-sponsored pensions).

[192] The program also extends to IRAs established as a result of plan termination. Prohibited Transaction Exemption [PTE] 2019-02 Section III (h)(defining default IRA).

[193] *Id.* at Section I(f)(2)(G), I(f)(3)(C) & I(f)(4)(B).

[194] *Id.* at Section I(g). DOL Advisory Op. 2018-01A, at 3.

[195] PTE 2019-02, 84 Fed Reg 37337-02 (July 31, 2019).

[196] 84 Fed Reg, at 37345. *See* PTE 2019-02 Section III(i) & (p) (defining communication and transfer fees).

administrative services to the IRA, and a distribution fee if the IRA is terminated and the IRA owner cashes out the IRA or transfers it to another qualified plan.[197]

In an advisory opinion issued before the prohibited transaction exemption, the DOL made clear that the decision to participate in the RCH auto-portability program is a fiduciary decision, and plan sponsors or other responsible fiduciaries who choose to participate in the program are subject to ERISA's general fiduciary standards and prohibited transaction provisions in selecting and monitoring the program.[198] The DOL noted that to the extent that the auto-portability program is more expensive than a default IRA program without the auto-portability feature, the plan fiduciary should consider whether the number of successful matches merits the additional expense of the program.[199] The DOL declined to extend the prohibited transaction to "pre-existing" default (forced-transfer) IRAs because "[a]n essential protection of [the] exemption is a Plan fiduciary's independent evaluation of the RCH program and determination that the Program is appropriate for the Plan's participants and beneficiaries."[200]

Undoubtedly, auto-portability has the potential to help plan participants consolidate their retirement savings by transferring forced-transfer IRAs into their new employer's plan.[201] Its effectiveness, however, depends on how many plan sponsors and record-keepers elect to participate in the program. In July 2020, Alight Solutions announced that it would make RCH's auto-portability program available to its 185 DC plan sponsors that serve nearly 5 million employees.[202] While Alight Solution's adoption of

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[197] DOL Adv. Op. 2018-01A, at 2.

[198] DOL Adv. Op. 2018-01A, at 4 (Nov. 15, 2018). The Advisory Opinion explained that the plan sponsor of the former employer's plan is not a fiduciary with respect to the decision to roll assets from the default IRA into the new employer's plan. Instead, absent consent by the default IRA owner, RCH acts as a fiduciary with respect to the decision to transfer the default IRA into the new employer's plan. *Id.* at 5–6.

[199] DOL Adv Op 2018-01A, at 5 n.8.

[200] 84 Fed Reg, at 37339.

[201] *Cf.* Thomas Hawkins, *New Data Proves Effectiveness of 401k Auto-Portability: Three years later and the results are dramatic* (July 6, 2021), available at https://401kspecialistmag.com/new-data-proves-effectiveness-of-401k-auto-portability/ (discussing results of RCH's pilot project in which RCH searched its database of RCH small account safe harbor IRAs and offered the holders of those accounts who worked for a large employer in the hospital industry the option of electing to transfer their RCH IRA to their new employer's plan).

Auto-portability also has the potential to reduce retirement savings leakage resulting from plan participants cashing out their retirement savings when they terminate employment. *See* Jack VanDerhei, *The Impact of Auto Portability on Preserving Retirement Savings Currently Lost to 401(k) Cashout Leakage*, EBRI Issue Brief No 489 22 (Aug. 15, 2019) (projecting that auto-portability for participant balances of less than $5,000 (adjusted for inflation) would result in $1,509 billion in additional retirement savings over 40 years).

[202] NAPA Net Staff, *RCH's Auto-Portability Solution Embraced by Alight National Association of*

the program is a step in the right direction, the RCH program is far from eliciting the universal, or near-universal, coverage it needs to be successful.

It is not clear how many plan sponsors and recordkeepers will ultimately be willing to participate in RCH's auto-portability program.[203] Plan sponsors that want to clear out small balances from their plan may find the program appealing, but the plan sponsors do need not to adopt RCH's auto-portability program to use forced-transfer IRAs to clear out small balances. In addition, some plan sponsors may be reluctant to accept fiduciary responsibility for opting to participate in the auto-portability program. Moreover, it is not clear how many plan sponsors will be open to accepting the automatic roll-ins required to make the program successful. If a plan already accepts roll-ins, there would not be much additional administrative complexity in participating in the program, but plan sponsors may not be willing to pay (or have the plan or its participants pay) a transfer fee that might not otherwise be imposed. If a plan does not already accept roll-ins, it is not clear what would motivate the plan sponsor to amend the plan to accept roll-ins.[204]

A number of countries have implemented, or are considering implementing, a "pot follows the member" law pursuant to which an individual's retirement savings automatically follow them to their new job.[205] The laws are similar in concept to RCH's auto-portability program, but they differ fundamentally from the RCH program in that portability is mandated by law and does not depend on voluntary participation by the private sector.

[c] Transfer to Central Fund

The problem of lost pensions and missing participants arises in part due to the mobility of the US workforce[206] and the multiplicity of vehicles in which employment-

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Plan Advisors (July 15, 2020), available at https://www.napa-net.org/news-info/daily-news/rchs-auto-portability-solution-embraced-alight.

[203] Julia Zuckerman and Joanne Jacobson, *DOL Addresses Small Retirement Account Balance Auto-Portability Program,* 41 Buck FYI Issue No. 95 (Dec. 3, 2018), available at https://buck.com/wp-content/uploads/2018/12/hrc_fyi_us_2018-12-03-1.pdf.

[204] *Id.*

[205] *See* Jonathan Stapleton, *Australia to legislate 'pot follows member' as part of package of reforms to overhaul superannuation system,* Professional Pensions (Oct. 8, 2020), available at https://www.professionalpensions.com/news/4021431/australia-legislate-pot-follows-member-package-reforms-overhaul-superannuation; Angus Peters, *Pot-follows-member agreements: Feasible or fantasy?,* Pension expert (Dec. 4, 2019); (noting that "[l]egislation to ensure that members take pots with them when moving jobs was introduced by the coalition government, but was never enacted amid concerns including the high cost of transfers"), available at https://www.pensions-expert.com/DC-Auto-enrolment/Pot-follows-member-agreements-Feasible-or-fantasy?ct=true; GAO-15-73, *supra* note 4, at 37 (noting that in Switzerland plan participants are required by law to roll their money over to their new plan).

[206] *See, e.g.*, US Bureau of Labor Statistics, *Number of Jobs, Labor Market Experience, and Earnings*

based retirement savings may be held. For example, if an individual terminates employment with a vested benefit in her employer's defined contribution plan, the benefit may remain in the old employer's plan, be transferred to a forced-transfer IRA (or individual retirement annuity), or cashed out without the participant's consent, depending on the size of the benefit and the terms of the plan.[207] If a defined contribution plan terminates, an individual's vested benefit may be cashed out (if the participant can be found), transferred to a forced-transfer IRA (or individual retirement annuity), escheated to the state, transferred to a bank, or transferred to the PBGC's missing participant program, again depending on the size of the benefit and terms of the employer's plan.[208] This multiplicity of potential vehicles holding the retirement savings of job changers can make it difficult to track down an individual's retirement savings.

Some countries mandate a central default fund for the retirement savings of job changers. For example, Switzerland consolidates forced transfers into a single fund, the Substitute Fund. A non-profit foundation administers the Substitute Fund and invests the assets of the fund until participants claim their benefits.[209] Australian law provides for the transfer of accounts that have been inactive for one year to the Australian Tax Office (ATO). The ATO charges no fees on the accounts and pays returns equal to inflation when participants claim their benefits.[210]

Commentators and policymakers have recommended that the United States establish a default central retirement fund under limited circumstances. For example, Jane Smith of the Pension Rights Center has recommended that the benefits of missing participants who cannot be found after a diligent search be required to be transferred to the PBGC's missing participant program.[211] Proposed Lost and Found legislation would create a fund within the PBGC to which the benefits of non-responsive terminating employees with vested account balances of less than $1,000 would be required to be transferred.[212]

Drawing from these examples and proposals, a potential solution to the missing participant and lost pension problem is the creation of a default central fund to which

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Growth: Results from a National Longitudinal Survey Summary, USDL-19-1520 (Aug. 22, 2019) (reporting that individuals born between 1957 and 1964 held an average of 12.3 jobs between the ages of 18 and 52).

[207] IRC § 401(a)(31); 29 CFR § 2550.404a-2(c).

[208] 29 CFR § 2550.404a-3(d); FAB 2021-01.

[209] GAO-15-73, *supra* note 4, at 36–37. Swiss law requires that participants roll their retirement savings into their new employer's plan; the Substitute Fund acts as a back-up if participants fail to roll over their retirement savings into their new employer's plan. *Id.*

[210] *Id.* at 40.

[211] Pension Rights Center Testimony, *supra* note 24, at 4.

[212] *See, e.g.*, S 1730 § 2(b), 117th Cong, 1st Sess (2021).

the retirement savings of all job changers would be required to be transferred. Undoubtedly, this would simplify the search process. Individuals would only need to look to a single central fund (and potentially their current employer) to find all of their retirement savings from past employment.

The creation of such a fund, however, would give rise to a host of questions and potential concerns. For example, who should operate the fund: an existing agency such as the PBGC, a new non-profit organization or a new (or existing) for profit organization? Should the arrangement include a pot follows member law so that retirement savings are automatically transferred to a new employer's plan? How should the funds be invested: solely in special-issue government bonds, like Social Security, or should investments in the capital market be permitted? If investments in the capital market were permitted, what form should they take: passive index funds, active target date funds, or some other form? Would investments in the capital market distort the market? Could politicization of the endeavor be avoided?

A central default fund would undoubtedly streamline the process of searching for lost pensions. How it should be structured and whether it is even feasible is open to question.

§ 6.06 CONCLUSION

Lost pensions and missing participants are a significant problem in our voluntary employment-based retirement system. In January 2021, the DOL released three forms of sub-regulatory guidance that address the problem. In addition, over the last few years, the IRS has released guidance related to missing participants and lost pensions. The agencies' guidance answers some of the open questions in the field, and if followed, the DOL's Best Practices Guidance is likely to reduce the number of missing participants. The recent guidance, however, is unlikely to entirely solve the problem of missing participants and lost pensions.

Policymakers and commentators have offered a host of potential solutions to the problem of missing participants and lost pensions. Some of the proposals focus on improving communication so that participants are more likely to find their missing pensions. Other proposals address the use of the retirement savings funds that have not been collected by participants. The more promising proposals offer a uniform national solution, such as a national pension registry and a default central fund to which job changers' pension benefits would be transferred. The idea of default central fund, however, raises a host of design and political issues that need to be explored.