

Client Alert

DOL Issues Guidance for Locating Missing Participants in Terminated 401(k) Plans

On September 30, 2004, the U.S. Department of Labor (“DOL”) issued long-awaited guidance on locating participants in terminated defined contribution plans, such as terminated 401(k) plans. The guidance, titled Field Assistance Bulletin No. 2004-02, requires plan fiduciaries to make certain efforts to locate missing participants. If those efforts fail, only then may a plan fiduciary distribute the account balance of a missing participant into an individual retirement plan or other arrangement. Note that the guidance applies only to already terminated defined contribution plans and does not apply to ongoing defined contribution plans or to defined benefit plans.

Mandatory Search Methods

In order to satisfy its fiduciary obligations under ERISA, a plan fiduciary must make efforts to locate a missing participant before it can conclude that that participant cannot be located. The guidance sets forth four search methods that must *always* be used:

1. Sending a letter via certified mail to the participant’s last known address.
2. Checking employer records and plan-related documents for alternate addresses for the participant. Fiduciaries must request that employers and administrators review their files for such addresses.
3. Contacting the participant’s designated plan beneficiary for information on the whereabouts of the participant.
4. Using the Internal Revenue Services’ or the Social Security Administration’s letter-forwarding service.

The guidance makes clear that reasonable expenses attendant to locating a missing participant may be charged to a participant’s account, provided that such charge is consistent with the plan document and prior DOL guidance on charging expenses to participants’ accounts (see DOL Field Assistance Bulletin No. 2003-03).

Other Search Methods

In addition to these mandatory search methods, a plan fiduciary may be required to use other search techniques, such as Internet searches, commercial locator services, and credit reporting agencies. The cost of these additional methods must be weighed against a participant’s account balance to determine whether using the additional methods would be prudent.

Permitted Distributions if a Participant Cannot Be Located

If, after satisfying its fiduciary duty to locate a participant, a plan fiduciary determines that a participant cannot be located, then the plan fiduciary may roll over that participant’s account balance into an individual retirement account or annuity. The plan fiduciary has an additional duty

to properly select the investment option into which the rollover will be made and the trustee or custodian who will then oversee the funds. In making these decisions, the guidance allows plan fiduciaries to rely upon the recent DOL automatic rollover safe harbor regulations (see 29 C.F.R. § 2550.404a-2).

The guidance also states that if a plan fiduciary is unable to find an individual retirement plan willing to take the rollover, then it may transfer the funds into a federally insured bank account or into the unclaimed property fund of the state of the missing participant's last known address (also referred to as escheating the funds).

The guidance specifically disapproves of the use of 100% income tax withholdings as a method of distributing funds from a defined contribution plan.

Finally, the DOL's guidance discusses compliance with the customer identification and verification provisions of the recently enacted USA Patriot Act. Specifically, the DOL states that it has been advised by federal regulators that banks and financial institutions would not need to comply with these new provisions with respect to an account established for a missing participant until the missing participant or beneficiary first contacts the bank or financial institution. As a result, compliance with the new customer and verification provisions should not be a barrier to preventing distribution of a missing participant's account into an individual retirement plan or federally insured bank account.

* * * * *

October 21, 2004

For Additional Information

This client alert can be found, together with other recent Chadbourne & Parke LLP client alerts, on our website at www.chadbourne.com/publications/sub_Publications.html. Our client alerts are for general informational purposes and should not be regarded as legal advice. If you have any questions regarding the public release of SEC comment and response letters, please contact any of the following:

New York

Edward P. Smith	+1 (212) 408-5371	esmith@chadbourne.com
Marjorie M. Glover	+1 (212) 408-1016	mglover@chadbourne.com
Sarah C. Richards	+1 (212) 408-5426	srichards@chadbourne.com
David Gallai	+1 (212) 408-1033	dgallai@chadbourne.com

Chadbourne & Parke LLP

New York

30 Rockefeller Plaza
New York, New York 10112
Telephone: +1 (212) 408-5100
Facsimile: +1 (212) 541-5369

Washington, D.C.

1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: +1 (202) 974-5600
Facsimile: +1 (202) 974-5602

Los Angeles

350 South Grand Avenue, Suite 3300
Los Angeles, CA 90071
Telephone: +1 (213) 892-1000
Facsimile: +1 (213) 622-9865

Houston

1100 Louisiana, Suite 3500
Houston, TX 77002
Telephone: +1 (713) 571-5900
Facsimile: +1 (713) 571-5970

London

Chadbourne & Parke
(a multinational partnership)
Regis House
45 King William Street
London EC4R 9AN
Telephone: +44 (0) 20 7337-8000
Facsimile: +44 (0) 20 7337-8001

Moscow

52/5 Kosmodamianskaya Naberezhnaya
Moscow 115054, Russian Federation
Telephone: +7 (095) 974-2424
Facsimile: +7 (095) 974-2425

Warsaw

(through a Polish partnership)
ul. Emilii Plater 53
00-113 Warsaw, Poland
Telephone: +48 (22) 520-5000
Facsimile: +48 (22) 520-5001

Kyiv

11 Mykhailivska Street, 4th Floor
Kyiv 01001, Ukraine
Telephone: +380 (44) 230-2534
Facsimile: +380 (44) 230-2535

Beijing

Beijing Kerry Centre
1 Guang Hua Road
Chao Yang District
Beijing 100020, China
Telephone: +86 (10) 8529-8892
Facsimile: +86 (10) 8529-8866

If you would like additional copies of this client alert, please contact Phillipa Yule, Director of Marketing and Creative Services, at +1 (212) 408-5240 or e-mail: pyule@chadbourne.com.