

plans. If plan fiduciaries are unable to locate an individual retirement plan provider that will accept a rollover distribution or determine not to make a rollover distribution for some other compelling reason based on the particular facts and circumstances, fiduciaries may consider distributing a missing participant's benefit into a federally insured bank account or a state unclaimed property fund. This Bulletin discusses the fiduciary considerations for distribution options more fully above.

You may direct any questions about the information contained in this Bulletin to the Division of Fiduciary Interpretations, Office of Regulations and Interpretations, (202) 693-8510.

Footnotes

1. *See* Rev. Rul. 89-87, 1989-27 I.R.B. 5.
2. Under Internal Revenue Code (Code) §402(f), a plan administrator is required, prior to making an eligible rollover distribution, to provide the participant with a written explanation of the Code provisions under which the participant may elect to have the distribution transferred directly to an IRA or another qualified plan, the provision requiring tax withholding if the distribution is not directly transferred and the provisions under which the distribution will not be taxed if the participant transfers the distribution to an IRA or another qualified plan within 60 days of receipt.
3. The notice requirement extends to all participants because all participants vest in their account balances upon termination of the plan. Under Code §411(d)(3), a plan must provide that, upon its termination or complete discontinuance of contributions, benefits accrued to the date of termination or discontinuance of contributions become vested to the extent funded on such date.
4. This guidance applies only in the context of terminated defined contribution plans. (*See* ERISA §3(34)) The Pension Benefit Guaranty Corporation (PBGC) has a missing participants program for searching for and distributing benefits on behalf of missing participants in terminated defined benefit plans. (*See* ERISA §4050, 29 U.S.C. §1350 (1994).) Section 4050 currently applies only to terminated single-employer defined benefit plans covered by Title IV of ERISA.
5. This guidance assumes that the terminated plan does not provide an annuity option and that no other appropriate defined contribution plans are maintained within the sponsoring employer's corporate group to which account balances from the terminated plan could be transferred. These limitations are based on Code provisions that generally prohibit distributions without appropriate consent in such cases. *See* Treas. Reg. 26 C.F.R. §1.411(a)-11(e). The preamble to "Termination of Abandoned Individual Account Plans," section C. "Safe Harbor for Distributions From Terminated Individual Account Plans" (29 C.F.R. §2550.404a-3) paragraph 3 entitled "Miscellaneous," also discusses the consent requirements under Code §411(a)(11). 77 FR 20820, 20829 (April 21, 2006). *See also* Treas. Reg. 26 C.F.R. §1.411(d)-4, Q&A-2(e) for information on when a defined contribution plan is permitted to be amended prior to termination to eliminate annuity options under the plan.

6. Rev. Proc. 2012-35, 2012-37 I.R.B. 341, modified and superseded Rev. Proc. 94-22, 1994-09 I.R.B. 48, in announcing the cessation of the IRS letter-forwarding service for letters from individuals, organizations, plan administrators, sponsors of qualified retirement plans, or qualified termination administrators (QTAs) of abandoned plans under the Department of Labor's Abandoned Plan Program who are attempting to locate missing plan participants and beneficiaries. The Social Security Administration published a Notice completely discontinuing its letter-forwarding service, which stated that the public now has widespread access to the Internet and the ability to locate individuals without relying on its letter-forwarding service. *See* 79 FR 21831 (Apr. 17, 2014).
7. *See* Advisory Opinion 2001-01A (Jan. 18, 2001); *see also* Information Letter to John N. Erlenborn from Dennis M. Kass (Mar. 13, 1986).
8. *See* Rev. Rul. 2000-36, 2000-31 I.R.B. 140, where the Department stated that the selection of an IRA trustee, custodian or issuer and of an IRA investment for purposes of a default rollover pursuant to a plan provision would constitute a fiduciary act under ERISA.
9. *See* *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008), where the Supreme Court held that a participant in a defined contribution plan may make a claim under section 502(a)(2) of ERISA for losses to his or her individual account caused by alleged breaches of fiduciary duty. Section 502(a)(2) of ERISA authorizes participants and beneficiaries alleging fiduciary breaches to sue to obtain "any losses to the plan resulting from each such breach." 29 U.S.C. §1109(a).
10. *See generally* Field Assistance Bulletin 2003-03 (May 19, 2003) for the Department's views with respect to expense allocations in defined contribution plans. *See also* Rev. Rul. 2004-10, 2004-07 I.R.B. 484.
11. *See* Appendix to 29 C.F.R. §2550.404a-3 (2006) (amended 2008).
12. *See supra* note 1.
13. Code §7701(a)(37) defines an "individual retirement plan" to mean an individual retirement account described in Code §408(a) and an individual retirement annuity described in Code §408(b).
14. An "eligible rollover distribution" is, subject to certain limited exceptions, any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust. *See* Code §§402(c)(4) and 402(f)(2)(A).
15. Code §§402(a), 3405(c), and 72(t).
16. *See supra* note 8.
17. *See* 29 C.F.R. §2550.404a-2 (2004). *See also* Class Exemption PTE No. 2004-16 that generally provides relief from ERISA's prohibited transaction provisions for a plan fiduciary's selection of itself as the provider of an individual retirement plan and/or issuer of an investment in connection with automatic rollovers of mandatory cash-out amounts up to \$5,000.
18. *See* 29 C.F.R. §2550.404a-3 (2006) (amended 2008). *See* 73 FR 58459 (Oct. 7, 2008) for an amendment to the safe harbor distribution options in 29 C.F.R. §2550.404a-3 to take into account the expanded definition of eligible rollover distributions under Code §402(c). Code §402(c) was amended by §829 of the Pension Protection Act of 2006, Pub. L. No. 109-280,

120 Stat. 780, 1001-02 (2006), to permit the direct rollover of a deceased participant's benefit from an eligible retirement plan to an individual retirement plan established on behalf of a designated nonspouse beneficiary. *See also* Class Exemption PTE No. 2006-06 that generally provides relief similar to PTE No. 2004-16 to qualified termination administrators (QTAs) for distributions of missing participant accounts regardless of the size of the accounts in the context of abandoned plans.

19. Section 4050 of ERISA (*see supra* note 4) was amended by §410(a) of the Pension Protection Act, Pub. L. No. 109-280, 120 Stat. 780, 934-35 (2006), to permit certain plans, e.g., defined contribution plans not covered by Title IV of ERISA, to elect to transfer missing participants' benefits to the PBGC's missing participants program when a plan terminates. The amendment is not effective until the PBGC publishes final regulations. PBGC published a Request For Information on June 21, 2013 (78 FR 37598).
20. Unless the funds transferred otherwise are not subject to income taxation, such as amounts that have already been taxed or that constitute qualified distributions from a designated Roth account.
21. Unless the interest is subject to special favorable taxation rules, such as rules for interest earned from investments in state bonds or U.S. savings bonds.
22. Advisory Opinion 94-41A (Dec. 7, 1994).
23. Prior Departmental Advisory Opinions addressed distributions from ongoing plans. *See, e.g.,* Advisory Opinion 94-41A (Dec. 7, 1994); Advisory Opinion 79-30A (May 14, 1979); Advisory Opinion 78-32A (Dec. 22, 1978). We note, however, that this memorandum addresses only distributions that complete the termination of defined contribution plans.
24. Pub. L. No. 107-56, 115 Stat. 272 (2001).
25. The term "other Federal functional regulators" refers to the other agencies responsible for administration and regulations under the Act.
26. *See* "FAQs: Final CIP Rule" at: www.fincen.gov/finalciprule.pdf and www.fdic.gov/news/news/financial/2004/FIL0404a.html.