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IRS Issues Memo on Missing Participant Search Standards

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On October 19th, the IRS released a memorandum titled "Missing Participants and Beneficiaries and Required Minimum Distributions" (the " Memo") to its plan auditors that provides guidelines for when a plan's efforts to locate missing participants and beneficiaries should be challenged on audit. As noted below, plans must keep in mind that the Memo addresses only IRS audit standards. The Department of Labor (the "DOL") has its own positions on missing participants and beneficiaries, which can be more demanding.

Background. Locating missing participants and beneficiaries can be challenging, particularly for participants who may not have had any contact with the plan sponsor in years, or beneficiaries, who often have never had any connection with the plan sponsor and may not even be aware of their benefits. Plans must take reasonable efforts to locate missing participants and beneficiaries to avoid having a qualification failure from failing to comply with the required minimum distribution ("RMD") rules. Further, plans need to ensure that their efforts are consistent with general fiduciary principles. These principles can be implicated outside of the RMD context, such as when plan terms require a benefit to commence at a participant's normal retirement age.

Steps Required by the Memo. The Memo provides that if each of the following steps is satisfied, the IRS will not challenge on audit a failure to comply with the RMD rules:

1. The plan has searched its records, those of related plans, and publicly-available records or directories for alternative contact information.
2. The plan used any of the following search methods:
    1. A commercial locator service,
    2. A credit reporting agency, or
    3. A proprietary internet search tool for locating individuals.
3. The plan attempted to contact the missing participant via United States Postal Service certified mail to the missing participant's last known mailing address.

DOL Position. While the Memo appears to create a "safe harbor" for purposes of IRS audits, plans need to keep in mind that the DOL may require additional steps. The DOL's position, as expressed in Field Assistance Bulletin 2014-01, is that "the fiduciary responsibility provisions of ERISA govern the steps… to locate missing participants." As a result, plans should take into account a missing participant's account

balance and the cost of search methods in deciding what additional steps are appropriate. For example, the DOL could insist on using multiple commercial locator services in some circumstances.

Conclusion. Plans should ensure they are taking all of the steps set forth in the Memo to avoid challenges by the IRS under audit. However, plans should keep in mind that in some cases, additional steps may be appropriate as a matter of general fiduciary principles.