

# IRS Provides Guidance on Searching for Missing 403(b) Participants

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On February 23<sup>rd</sup>, the IRS issued a memorandum to its examiners instructing them not to challenge a 403(b) plan for failing to satisfy the required minimum distribution (“RMD”) rules with respect to missing participants or beneficiaries if the plan sponsor has taken certain specific steps to find them.

Generally, the RMD rules require that a 403(b) participant must begin taking minimum distributions by the April 1<sup>st</sup> following the year the participant reaches age 70 ½ or, if the plan allows, the April 1<sup>st</sup> following the year that the participant retires, if later. Questions frequently arise regarding whether the IRS may challenge a plan for failing to timely commence benefit payments to participants that the plan is unable to locate.

## Steps Required by the IRS Memorandum

In the memorandum, the IRS instructs its examiners not to challenge a 403(b) plan for failing to satisfy the RMD requirements with respect to missing participants or beneficiaries if the 403(b) plan sponsor has taken each of the following steps:

1. searched the records of the plan, related plans, and the sponsor, as well as publicly available records or directories, for alternative contact information;
2. used at least one of the following search methods:
  - a commercial locator service;
  - a credit reporting agency; or
  - a proprietary internet search tool for locating individuals; and
3. attempted to contact the participant or beneficiary at the last known mailing address using United States Postal Service (USPS) certified mail and also attempting to contact the individual through “appropriate means” using any additional addresses or contact information (including e-mail addresses and phone numbers).

The memorandum makes clear that all three steps must be completed to avoid a challenge from an IRS examiner that the 403(b) plan has violated the RMD requirements for a failure to commence or make a distribution to a participant or beneficiary whose payment is due but cannot be located.

403(b) plan sponsors should carefully document all steps that they take to locate missing participants

or beneficiaries.

## Department of Labor Requirements

Many 403(b) plan sponsors will appreciate this memorandum from the IRS. However, sponsors of 403(b) plans that are subject to ERISA should recognize that the DOL may require that 403(b) plan sponsors take additional steps to find missing participants. In 2014, the DOL issued Field Assistance Bulletin 2014-1, which included several of the steps included in the IRS memorandum as well as additional steps for finding missing participants and beneficiaries, such as contacting a missing participant's designated beneficiary and using free electronic search tools (examples given by the DOL include Internet search engines, public record databases, obituaries, and social media). Proskauer has previously written about Field Assistance Bulletin 2004-1 [here](#). According to the DOL, if a plan sponsor follows the required search steps, but does not find the missing individual, the duties of prudence and loyalty require consideration of whether additional search steps (such as paying for various locator services) are appropriate under the particular facts and circumstances.

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