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MEMORANDUM FOR: REGIONAL DIRECTORS

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SUBJECT: TERMINATED VESTED PARTICIPANTS PROJECT
DEFINED BENEFIT PENSION PLANS

I. Introduction

The purpose of this memorandum is to ensure consistent investigative processes and case-closing practices among the Employee Benefits Security Administration's Regional Offices conducting Terminated Vested Participants Project (TVPP) audits and to facilitate voluntary compliance efforts by plan fiduciaries.

II. Background

The TVPP has three key objectives for defined benefit pension plans. First, to ensure these plans maintain adequate census and other records necessary to determine (a) the identity and address of participants and beneficiaries due benefits under the plan, (b) the amount of benefits due under the plan, and (c) when participants and beneficiaries are eligible to commence benefits. Second, to ensure these plans have appropriate procedures for advising participants with vested accrued benefits ("terminated vested participants" or "TVPs") of their eligibility to apply for benefits as they near normal retirement age and the date they must start required minimum distributions (RMDs) under federal tax law. Third, to ensure these plans implement appropriate search procedures for terminated participants and beneficiaries for whom they have incorrect or incomplete information.

When plan participants and beneficiaries are "missing" or unresponsive to plan communications, and do not timely receive their benefits, their benefits and retirement security are at risk. Without their retirement benefits, participants and beneficiaries may have to live on substantially less income than they need to meet their physical and health needs. Even if they ultimately

receive their benefits, they may face significant and unnecessary RMD related excise taxes.¹ Plans may be unable to communicate with terminated participants who are owed benefits, or their designated beneficiaries, because of inadequate recordkeeping practices, ineffective processes for communicating with terminated participants and beneficiaries², and faulty procedures for searching for participants and beneficiaries for whom they have incorrect or incomplete contact information. Such fiduciary failures can result in financial injury to the plan's participants, spouses, and other designated beneficiaries who fail to make benefit claims or otherwise start receiving their retirement benefits.

III. Investigations

A. *Opening the Investigation*

TVPP investigations of defined benefit plans focus on plans that appear to have systemic issues with plan administration, particularly issues related to keeping track of terminated vested participants and beneficiaries, and timely distributing benefits. For example, a plan administrator may report a large number of retired or terminated vested participants who are entitled to future benefits (or beneficiaries, in the case of deceased former participants) on the plan's latest Form 5500 filing. Similarly, when a plan sponsor faces bankruptcy or is involved in a merger or acquisition, there is an increased risk of systemic issues resulting in the loss of participant data. EBSA opens cases in such instances to help plans meet their obligation to locate missing participants and beneficiaries and pay them their benefits when due. Participants also contact EBSA for assistance if they believe they are entitled to benefits, but their plans have not provided the opportunity to claim them.

B. *Information We Ask For*

When we open an investigation, we seek to determine the scope of any potential problems the plan may have with recordkeeping or administration of benefits for terminated vested participants and beneficiaries. Several classes of records and documents help in this analysis.

- The plan document(s) (including summary plan descriptions) and any relevant amendments tell us what the plan's distribution rules are, and whether they comply with ERISA.
- Participant census records, noting the employment status of each participant and their contact information, help us to understand whether a plan has demographic and contact information sufficient to determine when benefits are due and to communicate with TVPs in a timely fashion.

¹ The Department notes that if such excise taxes result from the fiduciary's violation of ERISA, EBSA may ask the plan's fiduciary to correct the breach by obtaining a waiver of such excise taxes from the Internal Revenue Service (e.g., through Employee Plans Compliance Resolution System) or reimbursing the recipient of the distribution for any such excise taxes and associated expenses.

² The final rule, titled Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA, gives plans a new tool to communicate more effectively with terminated participants and beneficiaries. 85 FR 31884 (May 27, 2020).

- Actuarial reports or other reports prepared by the plan's actuary are useful to understanding the plan's demographics.
- We also examine the plan's procedures for communicating with TVPs, spouses and other designated beneficiaries. To that end, evaluating the plan's policies and practices regarding preparation and distribution of individual benefit statements, and other periodic communications to participants, spouses, or other beneficiaries entitled to benefits, is helpful to understanding whether the plan can effectively communicate information regarding benefit rights and claims procedures to eligible participants, spouses, and designated beneficiaries.
- We also seek information to determine whether the plan takes sufficient steps to address missing participant situations when they occur.³ This includes examining internal procedures and practices for reaching out to unresponsive TVPs or for searching for them (for example, through the plan sponsor's human resources department or in the records of related employee benefit plans), and contracts and experience with third-parties who perform recordkeeping and missing participant search functions for the plan. These documents and information, combined with interviews of the relevant parties, help us to verify what the plan, responsible plan fiduciaries, and relevant service providers do (or do not do) when confronted with TVPs or beneficiaries who are eligible to receive their benefits, but have not made a claim for benefits or otherwise entered pay status.

While these are the principal types of documents and information that EBSA requests in the TVPP, EBSA's document requests may also include other types of documents or information depending on the facts and circumstances in individual cases.

Generally, EBSA will send two letters requesting documents and information: the letter opening the case and a follow-up letter requesting more targeted information. We will ask plans, plan fiduciaries, and plan sponsors voluntarily to produce requested documents by the response date set in the letter. Depending upon the amount and quality of information provided, matters discovered in the course of the investigation, and other factors, additional information requests may be necessary. We also will provide a reasonable opportunity for the letters' recipients to raise concerns about burden and costs associated with complying with a request, consider reasonable suggestions on alternative document productions that will provide the necessary information and grant reasonable requests to extend the response date. However, if such efforts are not successful or result in undue delay of the investigation or implementation of corrective action, EBSA will issue subpoenas to compel production of requested documents.⁴ We also note that some plans and service providers will not voluntarily produce protected personal information of participants and beneficiaries without a subpoena due to privacy and other legal concerns.

³ Plans that rely on the new electronic disclosure rule's provisions requiring prompt action to address inaccurate electronic addresses should find a dramatic reduction in the scope of this problem. *See* 29 CFR 2520.104b-31(f)(4) and final rule preamble discussion at 85 FR 31884, 31889-90.

⁴ Section 502(c)(6) of ERISA permits the Department to assess a civil penalty for each failure to provide documents or information requested by the Department. In 2020, the penalty may be as high as \$159 per day per item requested capped at \$1,594 per request. The Department views each document and data set as a separate request.

C. Errors We Look For

Our review of the plan's records and procedures is designed to determine whether there are systemic issues in the plan's administration of terminated vested participant benefits. All investigations are case-specific, but generally, we look for:

- Systemic errors in plan recordkeeping and administration that create a risk of loss associated with the failure of a terminated vested participant or their beneficiary to enter pay status before death or the imposition of excise taxes on RMD amounts.
- Inadequate procedures for identifying and locating missing participants and beneficiaries.
- Inadequate procedures for contacting TVPs nearing normal retirement age to inform them of their right to commence payment of their benefits.
- Inadequate procedures for contacting TVPs and the beneficiaries of deceased TVPs who are not in pay status at or near the date that they must commence RMDs to inform them of actions the plan will take and what they must do to enter pay status and avoid RMD excise taxes.
- Inadequate procedures for addressing uncashed distribution checks.

“Red flags” often may lead us to believe problems exist. For example, in plan census records, the presence of participants with missing and incomplete data – such as names, dates of birth, and social security numbers – is problematic, as discussed above. Sometimes plans have clearly flawed data, for example, where birthdates are “1/1/1900” or names are placeholder “John Does.” We also review returned mail records. Participant communications (such as annual funding notices) returned to sender, or benefit checks that remain uncashed suggest that the plan lacks sufficient contact information to reach and pay eligible TVPs or beneficiaries. More than a small number of terminated vested participants who are eligible to claim benefits (e.g., participants who have reached normal retirement age or the RMD required beginning date), but have not done so, may warrant additional inquiries.

Certain practices suggest that a plan's procedures for dealing with TVPs are insufficient. Continuing to deliver required communications to a known “bad address” without taking steps to verify the correct address, failing to use simple methods and resources like the USPS Address Correction Service and/or the National Change of Address (NCOA) database to find replacement addresses, can indicate problems. EBSA's experience is that many plan fiduciaries fail to take advantage of or properly use the missing participant search and location services offered or provided by the plan's record keeper or other service providers. Fiduciaries should carefully monitor the performance of retained, third party search firms, and ensure that they are complying with any applicable contractual commitments regarding missing persons.

Benefit notices to TVPs/beneficiaries should clearly explain to the recipient their right to pension benefits. Notices that do not clearly state the vested status of the participant or their spouse, the date of their right to benefits (especially if immediate), or the consequence of excise taxes due to a delay in starting minimum required distributions also contribute to a TVP problem.

We have also noticed other examples of practices that contribute to the TVP problem. For example, letters to terminated vested participants that are not in “plain English.” Similarly, the plan may cover populations of participants who are not fluent in English, but fail to provide language assistance or notify them of the availability of such assistance. Workers may have participated in predecessor plans or worked for companies that had different names than the current plan or employer as a result of mergers or acquisitions, yet the successor plan’s correspondence does not include the name of the predecessor employer or plan.

In our experience, mergers, acquisitions, and company name changes commonly present risks that participants will ignore mail addressed to them from a company for which they believe they never worked. These situations also present risks that the records of predecessor plans will not be fully integrated into the successor plan’s records. For example, we have come across cases where the plan fiduciary deletes missing participants’ names from the plan’s census data and does not maintain the records necessary to reinstate the participant’s benefits when he or she subsequently submits a claim.

D. How Cases Are Closed

After receiving all the requested information, investigators should promptly inform the responsible fiduciaries of the agency’s findings and invite them to discuss how they can remedy the identified problems. For example, when EBSA finds systemic errors in plan records that have hindered TVPs, spouses or other eligible beneficiaries from claiming benefits, our aim is to help the plan find as many adversely affected participants and beneficiaries as possible and help the plan fashion an appropriate remedy for each affected individual. We also will ask the plan to take appropriate corrective actions regarding their policies and practices regarding missing participants.

While an EBSA Voluntary Compliance (VC) letter will address potential ERISA violations, a VC letter, as a general matter, absent especially substantial errors or widespread fiduciary breaches, will not cite individual plan fiduciaries with specific ERISA violations. EBSA will give plan fiduciaries a reasonable amount of time to respond to a VC letter. Upon receipt of a timely response, EBSA will engage in meaningful discussions with plan fiduciaries on legal and factual issues related to the existence of a violation and appropriate correction of problems addressed in the VC letter.

If the responsible plan fiduciaries provide appropriate remedies for affected individuals and correct any flaws in their recordkeeping, communication, search and other relevant policies, EBSA will generally recite those corrective steps, without citing the individual plan fiduciaries for specific violations of ERISA when closing out a case.

<p>The contents of this document do not have the force and effect of law, and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.</p>
