



September 28, 2018

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW Washington, DC 20210

RE: Missing Participants

Dear Assistant Secretary Rutledge:

The SPARK Institute and its member firms applaud all efforts to re-connect missing participants with any retirement benefit they have accrued. We share with the Department of Labor (the Department) the goal of minimizing missing participants and doing what we can to make the U.S. retirement system work to its fullest for every participant. With that goal in mind SPARK members worked together to develop the following suggestions. We hope that by working together with the Department we can help improve the system and reduce the number of missing and unresponsive participants.

Please note that our recommendations relate solely to defined contribution plans.

Background

SPARK worked for more than 5 months with operations, legal and technical experts from our member firms to research and identify current processes for missing participants. Ten SPARK members shared their missing participant search process.¹ The most commonly used processes are shown in *Table 1*. Member firms often use more than one search process to locate a missing participant.

Common Search Methods	
	<u>Frequency of Use</u>
Commercial locator services	10
Certified Mail	3
Internal Search Across Other Products	3
In partnership with plan sponsor	3
Government Sources (USPS, SSA)	3
Social Security Death Index	2

¹ While we did not specifically ask members to provide information solely as to their defined contribution plan business, for most of our members, this is the primary market that they serve.

Internet Search Engines (Google)	2
Social Networking sites (Facebook, LinkedIn)	1
Credit reporting agencies (example, Equifax)	0

Table 1

The information in **Chart 1** was developed by comparing the normal steps taken in the search process for each firm. For most respondents using a **Commercial Location Service** is the first, second or third step in their process. It was also interesting to note that very few firms go back to their plan sponsors for better records, or if they do it is not the first step they take.

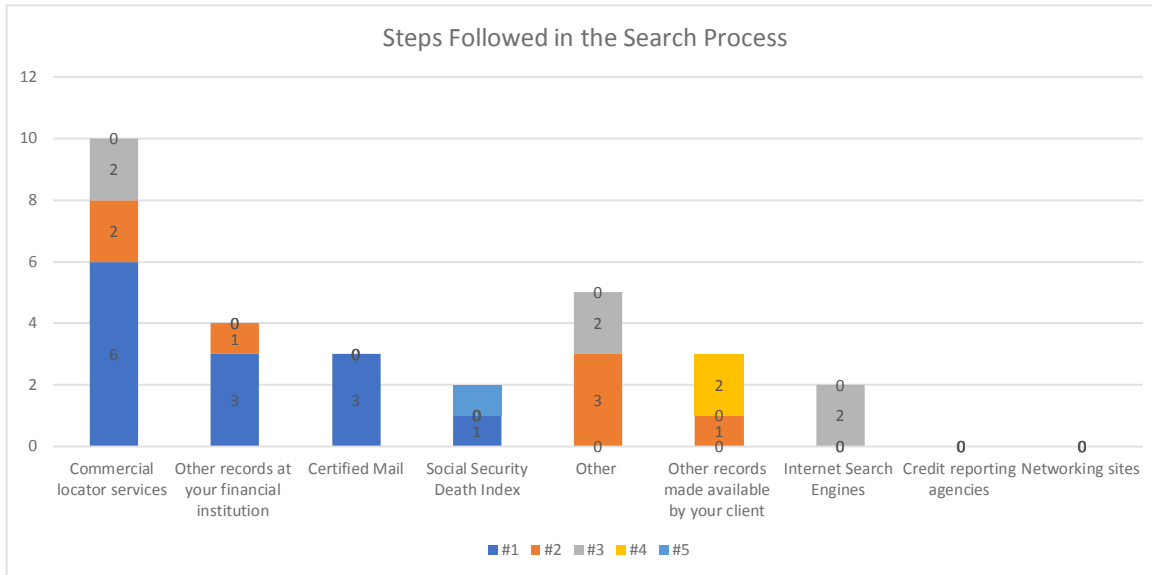


Chart 1

SPARK also asked members if they charged for missing participant searches and found that **50% did not separately charge** the plan sponsor, **20% did charge a fee**, but only under special circumstances and **30% regularly charged** plan sponsors.

Observations from Research

- 1. Uncashed Checks Are Concentrated Among Very Low Balances** – The clear majority of uncashed checks in defined contribution plans are associated with very small balances, less than \$100. Often, the address does not appear to be incorrect, but the check is simply not cashed. It follows that any procedure to address uncashed checks should recognize that many of these uncashed checks are very small. (See more data below.)
- 2. Warning Signs Typically Precede the Problem** – There are often events that indicate a plan sponsor may be losing contact with a participant. Steps should be implemented as soon as there is any indication the participant has relocated.

3. **The Partnership with Plan Sponsors is Very Low** – SPARK members agree that the employer ultimately owns the fiduciary responsibility for missing participants and uncashed checks. Since bad addresses lead to missing participants, it follows then that the best starting point for resolving bad addresses is the plan sponsor.
4. **Typically, the Employer is Not Paying for Searches** – This can lead to disengagement on the part of the employer and contribute to bad addresses and ultimately to uncashed checks. The more time that elapses, the lower the likelihood of connecting the participant with their plan assets, due to the plan sponsor’s records becoming inaccurate after one (and eventually multiple) physical moves by the participant. Another factor that may lessen the importance of the plan sponsor’s role with abandoned accounts is the fact that existing guidance only addresses the handling of missing participants in terminated plans. New guidance that addresses active plans as well could elevate the importance of the fiduciary obligations plan sponsors have in this area.

Definitions

SPARK members found it useful to accurately define various terms used in the missing participant process. The intent is to appropriately identify the status of a participant and when that status changes to then determine the best process for correction and the extent of the action to be taken.

Term	Definition
Non-Missing Participant	A participant is considered not missing if any of the following activities can be shown: <ul style="list-style-type: none"> • No returned mail • Web account activity within the last 12 months • Phone activity within the last 3 months • Active payroll status (i.e. still working for the plan sponsor).²
Missing Participant, Terminated with Balance (no outstanding check)	A participant in “Terminated Status” and their account has experienced all of the following: <ul style="list-style-type: none"> • Returned mail • Returned emails • No web account activity within the last 12 months • No phone activity within the last 3 months Note: Some providers will flag a participant

² This is an important point made repeatedly by our members. A participant in active status that nonetheless has a returned mail or email should not be considered “missing.” These participants are actively employed at their company and the employer should have the most-up-to-date records in their payroll or benefits system.

Term	Definition
	as missing as soon as critical mail is returned; others track all four of the above.
Missing Participant (Terminated with an outstanding check)	<p>A participant in “Terminated Status” and their account has experienced all of the following:</p> <ul style="list-style-type: none"> • Returned mail • Returned emails • No web account activity within the last 12 months • No phone activity within the last 3 months, and the participant has not been reached by other means • A subsequent locator search was not able to provide an address other than the address which generated return mail. <p>Note: Some providers will flag a participant as missing as soon as critical mail is returned; others track all of the above before flagging the participant as missing.</p>
Unresponsive Participant (active or terminated with an uncashed check)	<p>An active or terminated participant that has a valid address on file, but who also has an uncashed benefit check aged beyond a certain amount of time (for example, greater than 90 days). The participant has been sent reminder communications yet has not been motivated to cash their check. If the only issue is an uncashed check (but the address is valid), then the participant should be considered “unresponsive” rather than missing.</p>
Missing Beneficiary (associated with deceased participant)	<p>A participant with a balance in “Deceased Status” and any attempts to contact the beneficiary have resulted in all of the following:</p> <ul style="list-style-type: none"> • Returned mail • Returned emails (if known) • No web account activity within the last 12 months • No phone activity within the last 3 months, and the participant has not been reached by other means

Table 2

Recommendations

SPARK members believe that by identifying potential missing participants earlier in the process they can avoid losing contact with these participants and the uncashed checks that result from

this. We believe that the Department shares this thinking, but to accomplish this service providers will need the support and partnership of plan sponsors.

Before we discuss our recommended best practices, it is important to reiterate a relevant point. Plan fiduciaries, namely plan sponsors, ultimately retain the responsibility to make sure there are prudent administrative procedures and practices to:

1. Limit the number of missing participants³ to ensure they receive the benefits they are entitled to under the plan (even if a participant comes forward to claim uncashed assets at a future date) and
2. Safeguard these plan assets

Participants also bear the burden to stay in touch, and prudent administrative procedures would establish practices and reminders to facilitate participants staying in touch.

We recognize that recordkeepers play an important role in this process, and that keeping in touch with participants is most successful when the plan fiduciary and the recordkeeper have clearly defined their roles, the recordkeeper communicates its experience for the best mechanisms for success, and the plan fiduciary takes its responsibility seriously.

We believe, as a best practice, the plan's fiduciaries should annually send notice to participants (including terminated employees) reminding them of their obligation to keep the plan aware of changes in their contact information. This might be combined with other communications and, where possible, delivered electronically. This proactive communication would remind participants of their personal responsibilities and help prevent lost benefits.

SPARK's suggestions are broadly divided into two key processes; 1) the identification and tracking of a "missing participant" and 2) dealing with a returned or uncashed check.

Identification of a Missing Participant

Communication and reporting

- We believe a best practice is regular reporting of possibly missing participants from the recordkeeper to the plan sponsor or other fiduciary. This will help identify actual missing participants quickly when the plan sponsor may still have good method to contact them. Plan sponsors should routinely review reports provided by their provider that show the population of participants with invalid addresses and those with uncashed checks. If possible, these reports could be sorted and aged to help employers identify the oldest invalid addresses from newer ones. The remedies for invalid addresses and uncashed checks are likely to be influenced by the age of the invalid address and uncashed check.
- If a participant is in "Active Payroll" status the plan sponsor should update the record keeper with a valid address in a timely manner. If the plan sponsor does not have the

³ It is also important to note that fiduciary obligations do not require that all participants and beneficiaries are located. As with all fiduciary obligations, the key is putting in place reasonable procedures and effective internal controls.

new address they should contact the employee, confirm the correct address, and update their records and the address with the recordkeeper in a timely manner.

- If the participant is in “Terminated” status the plan sponsor should work with the recordkeeper to resolve the incorrect address and to minimize the potential for a future uncashed check event.

Procedures and search methodology

- Plan sponsors should maintain a documented procedure that they will follow in attempting to locate missing participants and reducing uncashed checks. We appreciate that in practice often plan sponsors work with a service provider. The plan fiduciary should acknowledge their understanding of any procedures used by the service provider and the fiduciary’s role in locating missing participants.
- The procedures for locating missing participants can vary among recordkeepers and should be evaluated by the plan sponsor. The plan sponsor needs to ensure these procedures meet their fiduciary responsibilities to the plan participants. These procedures can include one or more of the following:
 - Using free electronic search tools.
 - Engaging a professional commercial locator search company to locate missing participants.
 - Regular searching of other records by the plan sponsor, e.g., the plan sponsor’s health plan.
 - Because commercial locator services are constantly updated, a regular refresh search is appropriate. Since these searches have costs, the exact interval will probably vary by provider, but we believe that an **annual** search through a commercial locator service is a best practice.
 - Envelopes sent to a terminated participant should, if possible, identify the employer on the **outside** of the envelope. This may require more intervention by the employer, because that may not be possible for recordkeepers to create at a reasonable cost.
 - These steps are generally similar to those described in Field Assistance Bulletin 2014-01, with the exception of certified mail, which is described as a required step on FAB 2014-01. Some of our members repeatedly told us that certified mail is not more effective than regular mail, and is much more expensive.⁴
- As noted above, we believe that the Department should distinguish between participants who (a) are missing and have an uncashed check, (b) are missing and due a required minimum distribution,⁵ and (c) are missing and have not yet requested a distribution. We believe that, as a best practice, these kinds of participants should be part of a search

⁴ Other members do use certified mail, as noted in the survey results, probably because it is a search method identified in FAB 2014-01.

⁵ The IRS has provided guidance on this situation. See Memorandum for Employee Plans (EP) Examination Employees (TE/GE-04-1017-0033) (Oct. 19, 2017).

process, but because these searches have costs, we believe a best practice is to use a more robust process for missing participants with an uncashed check.

- We understand that the Department’s regional offices have, during audits, suggested that plan sponsors should contact former co-workers, family members, or friends to try to locate a missing participant. This is very controversial among plan sponsors, and we agree that such a step is burdensome and raises a variety of privacy and other concerns. From SPARK’s perspective it is important to understand that, even if it were required of plan sponsors, service providers cannot engage in these types of searches. Instead, we recommend the following best practices:
 - If other search efforts are not successful, the primary plan beneficiary designated by the participant may be contacted for updated information for the participant (if beneficiary contact information is available).
 - This best practice only works if the participant has designated a beneficiary and provided contact information. Therefore, another best practice is to periodically reach out to participants with no designated beneficiary, to encourage them to make a beneficiary election.

Dealing with returned mail and email

- A best practice identified by SPARK’s members is, for those participants that receive communications by email, if an email bounces back, the participant is switched to U.S. postal service mail for all communications in a timely manner.
- Conversely, if mail is returned, two steps may be taken as a best practice. First, an email be sent to the email address on file that states mail was returned and urges the participant to contact the plan. Second, in the event the participant logs on, an alert “pop-up” can be added to the online portal requesting that the participant to update their address.
- In any case where mail or email has been returned, the participant’s account can be noted as such so that any call center employee that speaks with the participant is shown a screen to ask for updated contact information.⁶ Some service providers include as part of regular interactions a question to confirm address information is accurate.

As stated earlier, if a participant is in active status and has mail returned or an email bounce back, that participant is not missing. While search methods might not be as robust for someone who is not yet considered a missing participant, it’s still important that the plan sponsor act to try to prevent that situation in the future. After resolving, the plan sponsor should report these updates to the provider so that the provider can update its recordkeeping system.

⁶ This may not be possible for active employees, because some plan sponsors insist that only the plan sponsor initiate address changes. Active participants are typically directed to make the address change with their employer, who will subsequently update the address information on the recordkeeper’s system. Recordkeepers can accept address changes directly from terminated participants.

- Many plans use a cash-out provision, and the accounts of unresponsive participants are sent to an automatic rollover IRA provider. Just like all IRA custodians, these providers often employ ongoing search services for missing account holders.
- We believe it is appropriate to charge a participant for the cost for searching for him or her. FAB 2014-01 allows this in the context of terminated plans, and we think it is much fairer than spreading this cost to other participants who have kept their address information current. While all decisions on how to charge expenses should be left to plan fiduciaries, the Department should confirm that charging individual participants for the cost of the search is permissible.⁷
- Social Media and Internet Searches – Our members indicated that they do not believe searching for participants through social media is a best practice. Searches like these are not based on unique identifiers like SSN or last known address. We also believe that these are more susceptible to risk and fraud and, because they are hard to automate, are much more expensive.
 - If the Department has had success with these searches during audits, it should provide more information on (a) what sources were used and how were they conducted and (b) what vetting occurred after a possible match was made through official sources. If the Department wants to encourage Internet and social media searches we believe there needs to be an effective and reliable identity validation process. The current process to properly validate the identity of the rightful owner of money is a problem. The industry encourages the establishment of a National Registry of Missing Participants. This National Registry would be operated by the government, but accessed by registered third parties, such as banks, broker dealers and insurance companies that are part of the trusted network. Participants and beneficiaries can access a nationwide network for financial institutions to which they could present valid identification and proof of identity to claim assets.

Dealing with Returned or Uncashed Checks

Returned or uncashed checks represent a challenge somewhat different from a missing participant. To put the issue into perspective SPARK gathered uncashed check data from members. **TABLE 3** shows the average number of uncashed checks our member firms experience on an annual basis.

⁷ The Department might provide guidance on whether the cost of search for missing participants is a fee that would need to be disclosed on the 404a-5 participant disclosure.

	Number of Checks	
	2017 Industry Average	
Issued	4,098,684	
Cashed	3,913,166	95.47%
Uncashed	185,518	4.53%

Table 3

In **TABLE 4** we broke down the size of uncashed checks to get a better understanding of how they originated. When we looked deeper into these uncashed checks we found most of them fell into the following categories:

- Loan repayments received after loan had been fully paid off
- Contributions or company match received after account had been fully distributed (Many plan sponsors allocate employee matches quarterly or annually)
- Cash dividends for plans with company stock that allow for dividend pass through
- Trailing dividends received after full distributions

Uncashed Check information:			
Industry Average			
Amount	# of checks	Total Dollar Value	Percent of Uncashed Checks
>\$100,000	37	\$ 5,811,529	0.020%
+20,000 - \$100,000	313	\$ 11,972,080	0.169%
+5,000 - \$20,000	1,013	\$ 9,643,554	0.546%
+1,000 - \$5,000	2,720	\$ 6,198,042	1.466%
+100 - \$1,000	36,766	\$ 11,534,164	19.818%
<\$100	144,669	\$ 1,877,102	77.981%
TOTALS	185,518	\$ 47,036,472	100.000%

Table 4

Since the cost of processing small balance uncashed checks can often exceed the amount of the check, SPARK members recommend that the Department confirm that it is appropriate to establish a **de minimis** threshold under which the required search actions are much less significant. We believe that it is consistent with the duty of prudence not to engage in expensive searches for very small amounts. Our members discussed various thresholds, and settled on

recommending \$200, as this is the threshold for offering a direct rollover.⁸ We are not suggesting that no follow up communication is needed for small uncashed checks, but that after a period of time, best practice would mean forfeiture of the check to the plan's forfeiture account to offset employer contributions or pay expenses (as opposed to returning the funds to a reopened account in the plan).⁹ We still acknowledge the plan sponsor's responsibility to reissue the check if the participant comes forward at a later date to claim their benefit.

Our members also passed along the following best practices.

- If a check is *returned*, then the participant is treated as missing and the procedures for missing participants should be undertaken. But if the check is not returned, and is simply uncashed, the participant should be viewed as “unresponsive.”
- Note that the plan should still be diligent to follow up on these situations using multiple communication channels, since there is the potential for these unresponsive individuals to become actual missing participants.
- When a check is not cashed, a notification is sent to the participant at two intervals (for example 90 and 180 days) to inform the participant that the check is still outstanding.
- When a check is issued, 1099-R reporting occurs, which means there is withholding and taxable income. Returning the amounts to the participant's account is somewhat unsatisfactory because the amounts have now been reported to the IRS as taxable income. We recommend the Department work with the IRS on a solution to this issue.
- After a set amount of time (one member uses 225 days), then the next steps in the procedures are applied.¹⁰ The action taken depends generally on instructions from the plan sponsor. In some cases, the plan sponsor directs that the funds be returned to the participant's account. In other cases, pursuant to IRS rules, the check is forfeited to the plan's forfeiture account.
- Our members also serve non-ERISA plans, including governmental and church plans. We recognize that the Department does not have authority to provide guidance on state laws that might govern these plans. Many non-ERISA qualified plans contain the IRS-approved forfeiture procedure. But we would note that for non-ERISA plans, the check might be entered into the state escheatment process or addressed as otherwise directed by the employer.

Final resolution. Regardless of all efforts, some participants will never be located or will not respond. For smaller accounts, the account can be sent to an IRA but some accounts are above the cash-out threshold or the associated plan does not include a cash-out provision. The Department should provide guidance on the options available:

⁸ Treas. Reg. § 1.401(a)(31)-1, Q&A-11.

⁹ Other trade associations have stated in letters to the Department that the regional offices have asserted that such a procedure is a prohibited transaction. We agree with our fellow trade associations that this is incorrect.

¹⁰ We do not currently have a recommendation as to how long a check should be outstanding before further actions are taken.

- As stated above, a critical component is a de minimis exception that would allow the assets to be forfeited (subject to reinstatement if or when the participant is located) and used for expenses or to offset plan sponsor contributions.
- We believe that forfeiture under the IRS rules more generally is an appropriate action in a defined contribution plan after a reasonable search process has been undertaken.
- We also believe that a plan should be allowed, but not required, to send these accounts, eventually, to an automatic IRA provider, the PBGC or through the state escheatment process. For amounts that cannot be rolled over (like amounts due in required minimum distributions to a participant or beneficiary), a transfer to a taxable account may be appropriate. Some members believe that the PBGC would be an appropriate location for accounts of participants who cannot be found or will not respond after reasonable efforts. (This would require an expansion of the current program for ongoing plans.) Other members prefer the use of IRAs or state escheatment.

While many of these recommendations would not rise to the level of being a new requirement for service providers or plan sponsors, we feel that wider awareness and implementation of the best practices we reference could result in far fewer instances of the abandoned accounts that are a result of plan sponsors losing track of participants.

The SPARK Institute appreciates the opportunity to provide these comments to the Department. If you have any questions or would like more information regarding this issue, please contact me at (508) 838-1919 or Tim@sparkinstitute.org.

Sincerely,



Tim Rouse
Executive Director