

November 21, 2016

Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC 20005-4026

Re: **PBGC Proposed Rules on Missing Participants (RIN 1212-AB13)**

The American Retirement Association (ARA) is submitting this letter in response to the request for comments on the proposed changes to the Pension Benefit Guaranty Corporation (“PBGC”) program to hold retirement benefits for missing participants and beneficiaries.

The ARA is a national organization of more than 20,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-deferred Savings Association (“NTSA”) and the ASPPA College of Pension Actuaries (“ACOPA”). ARA members are diverse but united in a common dedication to America’s private retirement system.

Summary

As authorized by the Pension Protection Act of 2006, the PBGC is currently considering a changes and a proposed expansion of the program for missing participants and beneficiaries¹. Subpart B of the proposed rule outlines how the proposed expansion would include certain defined contribution plans². The ARA acknowledges the PBGC’s skill at locating lost participants and is generally supportive of the proposed rule but recommends certain changes to the proposal as described herein. In particular, ARA recommends lengthening the 90-day filing deadline³ and the \$250 fee exemption threshold⁴.

Discussion

1. Voluntary participation in the missing participant program for non-title IV plans.

¹ 29 CFR § 4050

² 29 CFR § 4050.201

³ 29 CFR § 4050.205(b)

⁴ Pension Benefit Guaranty Corporation; Missing Participants, 81 Fed. Reg. 64706 (September 20, 2016)

The ARA supports the decision to make participation in the program voluntary for non-title IV and multi-employer plans⁵. Voluntary participation for both transferring plans and notifying plans will permit plan sponsors to retain the current solutions of working with private sector providers for missing participants and add additional flexibility.

2. Diligent search requirement

The ARA supports the decision to harmonize the diligent search requirements under ERISA section 404 with the diligent search requirements for terminated defined contribution plans under the proposed rule⁶. We believe this will avoid confusion that could otherwise arise due to conflicting regulatory requirements as well as avoid unnecessary administrative burdens on terminating defined contribution plans.

3. 90-day filing deadline

The ARA recommends that for defined contribution plans, the 90-day deadline for filing with PBGC be extended to 180 days. The proposed rule stipulates that a Subpart B plan must file with the PBGC within 90 days⁷ after the last distribution that is not subject to the proposed rule. There is a likelihood that terminating defined contribution plans may have a large number of missing or unresponsive participants which may require considerable time for diligent searches and other administrative functions related to plan termination and distributions.

4. Proposed user fee and fee exemption

The ARA recommends that the minimum missing distributee account balance to which a user fee would apply be increased from the proposed \$250⁸ threshold to \$500. The PBGC proposes to apply a user fee calculated to cover the costs of essential services such as periodic searches for missing distributees, tracking the missing distributee accounts, and processing benefit payments, while providing an exemption for small accounts⁹. The ARA agrees that the proposed fee of \$35 per missing distributee account transferred¹⁰ is reasonable. However, a \$35 fee reflects a significant 14% of the value of a \$250 account. As a result, plan sponsors may be deterred from using the PBGC's program to the potential detriment of the missing distributee. We believe that this higher minimum balance is consistent with the stated policy objective¹¹ of encouraging participation in the program, especially when considering the voluntary participation of non-title IV plans and the private sector alternatives also available.

5. No interest adjustment to benefit transfer amount

⁵ 29 CFR § 4050.203

⁶ 29 CFR § 4050.204

⁷ 29 CFR § 4050.205(b)

⁸ *Id.*

⁹ 81 Fed. Reg. 64706

¹⁰ *Id.*

¹¹ *Id.*

The ARA recommends that final regulations provide a 30-day grace period for which no adjustment to the benefit transfer amount for a defined benefit plan is required, or continue to permit an interest adjustment for situations where payment to PBGC is on a date later than the date as of which the anticipated benefit transfer amount was determined (as adjusted for grace period). The proposed regulations contemplate valuation of the "benefit transfer amount" as of the "benefit transfer date", eliminating the need for an interest adjustment for the period between the valuation date and the benefit transfer date.¹² In practice, there are likely to be situations where the actual payment to PBGC does not occur on the anticipated benefit transfer date.

6. Benefit transfer amount spreadsheet

The proposed regulations indicate a spreadsheet will be made available to calculate the benefit transfer amount for defined benefit plans.¹³ ARA would like the opportunity to review the spreadsheet before it becomes available for public use, either by interacting with PBGC during the development stage, or having an opportunity to comment on a proposed version of the spreadsheet.

7. Basis information

The ARA recommends that the proposed instructions for reporting basis applicable to defined contribution plans should be extended to defined benefit plans. Although not common, defined benefit plans may include after-tax employee contributions or other participant basis in the benefits (such as repayment of loans after a deemed distribution). Also, the final regulation should make it clear that rollover accounts in defined benefit plans are treated like defined contribution plans.

8. Lump sum payment amounts

The ARA recommends that the accumulated single sum amount for defined benefit plan non-de minimis benefits be limited to the plan lump sum amount accumulated at the federal midterm rate. The proposal contemplates that, for non-de minimis benefits where the participant may elect a lump sum, the benefit transfer amount is the greater of the present value of the XRA life annuity or the lump sum determined on plan lump sum assumptions.¹⁴ It further provides that the lump sum payable to the participant will be the accumulated single sum amount (i.e. the benefit transfer amount accumulated at the federal midterm rate).¹⁵ Although section 4050(a)(3)(A) requires this approach for de minimis amounts, the same approach does not appear to be required for non-de minimis benefits payable under section 4050(a)(3)(B).

For plans with significant early retirement subsidies not included in plan lump sums, the benefit transfer amount for benefits that are in excess of those distributable without consent under ERISA section 205(g) could be well in excess of the lump sum that would be payable under the terms of the plan. By including this excess in the accumulated single sum amount, the participant receives a windfall by going "missing". Instead the accumulated single sum amount should be limited to the plan lump sum amount accumulated at the federal midterm rate. Any excess in the benefit

¹² 81 Fed. Reg. 64705

¹³ *Id.*

¹⁴ 29 CFR § 4050.302

¹⁵ 29 CFR § 4050.206

transfer amount over the plan lump sum amount should be treated as an experience gain in the program.

9. Early retirement age

The ARA recommends that the program recognize all plan-based early retirement ages as allowable commencement age for both annuity and single sum amounts for defined benefit plans. The proposal provides that PBGC will not commence benefit payments, other than de minimis payments, before age 55.¹⁶ Regulations under section 4022.10 establish age 55 as the earliest payment date for an annuity. ERISA section 4050 (a)(3) provides benefits to missing participants shall be made available under the same forms and at the same time of payment as under section 4022. It is not clear from the proposal whether the age 55 restriction applies only to payments in the form of an annuity or if the restriction also applies to payments of the accumulated single sum amount. Regardless, ARA is concerned that this restriction is a significant cutback in benefits in small plans and Cash Balance plans of any size, which frequently provide that terminated vested participants may commence distribution any time after termination of employment. In addition, ARA is concerned that to the extent the program used is voluntary, the plan sponsor could be held liable for choosing to use a program that severely restricted a promised plan benefit.

10. Default rollovers for plans required to use the missing participant program

The ARA recommends that final regulations clarify the PBGC's position on a plan's use of default rollover provisions to provide benefits to missing participants after the decision has been made to terminate the plan. In the past, the PBGC has required certain plan sponsors who have transferred de minimis lump sums to default rollover IRAs to recover those amounts, and transfer the benefits to the PBGC. The proposed rule, by explicitly prohibiting "*voluntary*" users of the program from using default rollovers for some missing participants in lieu of transferring benefits to PBGC, can be read to endorse the use of default rollovers to IRAs to provide benefits for those plans that are required to use the missing participant program.¹⁷ Final regulations should make PBGC's position clear.

11. Forfeiture of benefits for missing participants

The ARA recommends that final regulations clarify whether a participant for whom benefits were previously forfeited due to the inability to locate the participant is to be treated as a missing participant upon plan termination. Internal Revenue Code section 411(a) prohibits the forfeiture of vested benefits. Regulation §1.411(a)-4(b)(6) provides that a benefit that is payable is not treated as forfeitable merely because the benefit is forfeitable on account of the inability to find the participant or beneficiary to whom payment is due, provided that the plan provides for reinstatement of the benefit if a claim is made for the forfeited benefit. Informal guidance has been provided to the effect that if a plan provides for forfeiture of benefits in accordance with this regulation, and the plan administrator has been unable to locate a participant despite making a diligent effort, the plan termination effectively initiates a claim for the forfeited benefit, and the participant is to be treated as a missing participant under ERISA section 4050. A formal statement

¹⁶ *Id.*

¹⁷ 81 Fed. Reg. 64703

of the PBGC's position in the final regulation would be helpful.

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These comments were prepared by ASPPA's Department of Labor Sub-Committee of the ASPPA Government Affairs Committee, Todd Burghuis, Chair, and the ACOPA Government Affairs Committee, Thomas Finnegan, Chair, on behalf of ARA. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at ARA, at (703) 516-9300 ext. 128, if you have any comments or questions regarding the matters discussed above.

Thank you for your time and consideration.

Sincerely,

/s/

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