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AMERICAN BAR ASSOCIATION

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January 13, 2014

<u>BY EMAIL (reg.comments@pbgc.gov) AND REGULAR U.S. MAIL</u>

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

Re: Supplemental Comments on Proposed Extension of Missing Participants Program to Individual Account Plans

Ladies and Gentlemen:

These supplemental comments and recommendations pertain to Pension Benefit Guaranty Corporation's ("PBGC") request for information regarding the proposed extension of the Missing Participants Program to individual account plans and are submitted on behalf of the American Bar Association's Section of Real Property, Trust and Estate Law (RPTE). Previously, on August 19, 2013, we submitted comments to PBGC regarding this matter. Several practitioners suggested additional comments based on the ones made in the August 19th submission. These comments represent the views of RPTE only and have not been approved by the ABA's House of Delegates or Board of Governors and, therefore, do not represent and should not be construed as representing the position of the ABA.

The attached submission was prepared by members of the Qualified Plans and Plan Transactions and Terminations Committees (the "Committees") of the Employee Benefit Group of RPTE. Henry Talavera supervised the preparation of these comments, and Thomas C. Farnam, John R. Paliga, Bonita L. Hatchett & Karen K. Suhre from the Committees participated in the preparation of these comments. Also assisting with these comments in their individual capacities were Jose J. Valcarce, Anne M. Meyer, Kathryn Kennedy and Robert A. Miller. These comments were reviewed by Steven B. Gorin on behalf of the Section's Committee on Government Submissions.

Although the attorneys who participated in preparing these comments have clients who may be affected by the legal issues addressed by the comments or have advised clients on these issues, no such member (or firm or organization to which any such member belongs) has been engaged by a client to make a submission with respect to, or otherwise influence the development or outcome of, the specific subject matter of these comments.

SECTION OF REAL PROPERTY | TRUST & ESTATE LAW
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The Committees and the RPTE Section appreciate the opportunity to submit these comments, and we respectfully request that the PBGC consider our recommendations. Members of the Committees are available to meet and discuss these matters with the PBGC and its staff and to respond to any questions. The principal contacts for discussion are listed below.

Thomas Campbell Farnam, Esq (for the Qualified Plans Committee)
(314) 406-5201
John R. Paliga, Esq. (for the Plan Transactions and Terminations Committee)
(410) 576-4166

Very truly yours,

Susan G. Talley
Chair, Section of Real Property, Trust and Estate Law

cc: Catherine B. Klion, Esq., Assistant General Counsel
Cara Lee T. Neville, Secretary, American Bar Association
Thomas M. Susman, Governmental Affairs, American Bar Association

AMERICAN BAR ASSOCIATION
SECTION OF REAL PROPERTY, TRUST, AND ESTATE LAW
EMPLOYEE BENEFIT PLANS AND OTHER COMPENSATION ARRANGEMENTS GROUP
QUALIFIED PLANS COMMITTEE
AND PLAN TRANSACTIONS AND TERMINATIONS COMMITTEE

SUPPLEMENTAL COMMENTS ON THE PROPOSED EXTENSION OF THE MISSING PARTICIPANTS PROGRAM TO INDIVIDUAL ACCOUNT PLANS

I. Overview

We filed comments on August 19, 2013 (the "Initial Comment")[1] regarding the Pension Benefit Guaranty Corporation's ("PBGC") Proposed Extension of the Missing Participants Program (the "Program") to Individual Account Plans in response to a request from the PBGC. In its Federal Register Notice[2], the PBGC had requested comments on six (6) topics specifically identified in the Notice. In our Initial Comment we analyzed and provided information for each of the six (6) topics requested by the PBGC. In addition, we listed the following four (4) ways in which the proposed extension of the Program would aid missing participants and plan sponsors by suggesting that the PBGC should:

(1) add the names of missing participants in defined contribution plans to the PBGC's registry of missing participants in defined benefit plans;

(2) specify simple easy to follow rules for plan sponsors to use once the decision had been made to transfer plan benefits of the missing participants to the PBGC;

(3) provide a simple, clear method for plan sponsors to use in conducting a diligent search for missing participants prior to transfer of any such funds to the PBGC; and

(4) provide diligent search services at a reasonable fee determined by PBGC.

We received positive feedback from practitioners who reviewed the Initial Comment. We received comments from several practitioners who identified additional reasons why extending the Program would be beneficial to participants and plan sponsors. Accordingly, we have prepared this memorandum (the "Supplemental Comments") to explain how the proposed extension of the Program would materially benefit both employee plan sponsors and missing participants in defined contribution plans by:

- Preserving the tax-deferral advantages and opportunities for missing participants' benefits, and

[1] *See* American Bar Association, Section of Real Property, Trust, and Estate Law, Employee Benefit Plans and Other Compensation Arrangements Group, Qualified Plans Committee and Plan Transactions and Terminations Committee, Comments on the Proposed Extension of the Missing Participants Program to Individual Account Plans, available at http://www.pbgc.gov/documents/Missing-Participants-in-Individual-Account-Plans-Comments.pdf.
[2] *See* 78 Fed. Reg. 37598 (June 21, 2013).

- Narrowing the circumstances in which participants' retirement savings would escheat pursuant to the laws of the fifty states and the District of Columbia.

Plan fiduciaries and their agents must proceed in a prudent manner to operate and administer employee plans in the best interests of participants and beneficiaries.[3] This includes the selection of distribution options and the disposition of plan assets upon plan termination.[4] The proposed extension of the Program would provide plan fiduciaries with an additional alternative for reuniting missing participants with their retirement savings when a defined contribution plan is terminated. We suggest that the expanded Program would mitigate certain adverse effects which could otherwise result after applying long-standing principles of federal tax and state escheat laws. We would expect the expanded Program for missing participants in defined contribution plans would maintain the favorable tax attributes of any amounts transferred to the PBGC, as well as provide enhanced protection of the benefits that would be in the custody of the PBGC.

II. Applicable Legal Requirements and Analysis

A. Taxation of Distributions

As noted in Section III.A of the Initial Comment, nonconsensual distributions may be made to the participants and beneficiaries in terminating defined contribution plans that do not offer an annuity option, provided that neither the plan sponsor nor any other entity within the same controlled group, of which the plan sponsor is a part, maintains another defined contribution plan other than an employee stock ownership plan (ESOP).[5] This long-standing Internal Revenue Service ("IRS") rule is helpful in ensuring that plan assets are distributed as soon as administratively possible to effectively complete the plan termination process.[6]

For the accounts of missing participants in terminating defined contribution plans, the Department of Labor ("DOL") has indicated the preferred distribution method is to roll over the distribution to an Individual Retirement Account ("IRA"), in order to preserve the tax deferred status of such assets and avoid potential exposure to the additional 10% early distribution penalty imposed under section 72(t) of the Internal Revenue Code of 1986, as amended ("Code").[7] The DOL has indicated that if

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[3] ERISA § 404(a)(1).
[4] Department of Labor Adv. Op. 97-03A (January 23, 1997), available at http://www.dol.gov/ebsa/programs/ori/advisory97/97-03a.htm ("while the decision to terminate a plan is such a settlor or business function, activities undertaken to implement the plan termination decision are generally fiduciary in nature.")
[5] Code § 411(a)(11) and ERISA §203(e); Treas. Reg. § 1.411(a)-11(e)(1).
[6] Rev. Rul. 89-87, 1989-2 C.B. 81. *See also*, 29 C.F.R. § 4041.28.
[7] DOL Field Assistance Bulletin 2004-2 ("FAB 2004-2") and Code § 72(t)(1)-(2). Even when plan fiduciaries are able to find IRA providers willing to establish IRAs, excessive fees may be assessed by providers in comparison to the account balance, because, among other reasons, there appears to be little competition among providers for this type of business based upon anecdotal experience of some practitioners. One practitioner from a large law firm representing various large to mid-sized plans indicated that there is typically: (a) an initiation fee that ranges from $30-$125; (b) annual fees that range from $15-$45; (c) account closing fees of $10- $35; (d) and paper statement fees of $10, if web access is not elected. Plan fiduciaries are frequently unable to find any IRA providers that are

a plan fiduciary is unable to locate an IRA provider that is willing to accept a rollover distribution on behalf of a missing participant, the plan fiduciary may consider either establishing an interest bearing federally insured bank account or transferring the missing participant's account balance to the state unclaimed property fund in the state of the participant's last known residence or work location.[8] Unlike a rollover to an IRA, however, such a transfer to a bank account or state unclaimed property fund will constitute a taxable distribution to the missing participant under section 402(a) of the Code.[9]

Upon termination of a defined contribution plan, the assets in each participant's individual account are typically distributed in a lump sum and are eligible for rollover into one of the eligible retirement plans described in section 402(c)(8)(B) of the Code. These amounts constitute "eligible rollover distributions," and are subject to mandatory federal income tax withholding of twenty percent (20%), unless a direct rollover is made to another eligible retirement plan.[10] An "eligible rollover distribution" includes any distribution to an employee, subject to certain exclusions, of all or any portion of the balance to the credit of the employee in a qualified trust.[11] Further, the corresponding Treasury Regulations provide that eligible rollover distributions are not permitted by non-spousal distributees.[12] Under the Program, the PBGC clearly would not be an employee or "spousal distributee" of any terminated defined contribution benefits transferred to it. Thus, existing law, as described above, suggests the transfer of assets to the PBGC under an expanded Program would not constitute an eligible rollover distribution, and consequently, any distribution to the PBGC should not constitute a taxable

willing to establish IRA accounts for smaller account balances – especially those with less than $1,000, and plan fiduciaries also do not want to contend with issues associated with uncashed checks. Indeed, the results of the Questionnaire that is attached to the Initial Comment show that seven of nine respondents indicated that they would be more likely to choose PBGC over a private service provider if the level of service was comparable to private services and at a comparable cost.

[8] FAB 2004-2.

[9] Code§ 402(a). Distributions from a plan intended to be qualified under Code § 401(a) ("qualified plan") are generally taxable as ordinary income in the year the distribution is made. Such distributions are reportable on IRS Form 1099-R per Code § 6047(d). Also, the future interest/earnings attributable to funds in such bank account will be taxable as earned and reported as such by the financial institution which receives the distribution from the qualified plan. Tax withholding occurs at the time a distribution check is issued. If the check for any reason remains uncashed, we understand that certain practitioners, providers and consultants take the position that an uncashed check constitutes a distribution for federal income tax withholding and reporting purposes, but potential concerns may exist regarding not only the tax treatment and whether a distribution has actually occurred, but also whether the amount involved should continue to be considered plan assets and the degree of ongoing fiduciary responsibility with respect to such amounts. In certain cases, uncashed checks may pose the last hurdle to completion of a plan termination. *See generally* Ilene H. Ferenczy and Peter E. Preovolos, Uncashed Checks: The Billion Dollar Question, Vol. 18 Pension Benefits Number 1 (Fall 2010), available at http://www.ihflaw.com/Articles/Penchecks.pdf (discussing outstanding issues with respect to qualified plan distributions and uncashed checks).

[10] Code § 402(a); Code § 3405.

[11] Code § 402(c)(4).

[12] Treas. Reg. § 1.402(c)-2, Q&A-12(b) ("A distributee other than the employee or the employee's surviving spouse (or a spouse or former spouse who is an alternate payee under a qualified domestic relations order) is not permitted to roll over distributions from a qualified plan. Therefore, those distributions do not constitute eligible rollover distributions under section 402(c)(4) and are not subject to the 20-percent income tax withholding under section 3405(c).")

event for the missing participant. We also suggest that a distribution to the PBGC should not result in the imposition of a tax withholding obligation on the fiduciary of the terminating plan.

Based on reasonable interpretation of existing law, we recommend that PBGC should receive all of the remaining assets from terminated plans so that such amounts can be treated as eligible rollover distributions when distributed to the participants.[13] This suggestion is made in an attempt to be consistent with guidance issued by the IRS Office of Chief Counsel (the "IRS Chief Counsel") in connection with the current Program. By letter dated February 26, 1997, to the PBGC addressing whether income tax withholding applies to transfers from a terminated defined benefit plan to the PBGC, the IRS Chief Counsel stated that the withholding requirement under section 3405(c)(1) of the Code applies when distributions are made to the employee. The IRS Chief Counsel further indicated that transfers to the PBGC under the Program do not constitute eligible rollover distributions within the meaning of section 402(c)(4) of the Code.[14] The PBGC has also indicated that the PBGC, not the fiduciaries of a terminating plan, is required to withhold twenty percent (20%) of the distribution when paid to a participant by the PBGC as payor.[15] Accordingly, PBGC would be able to ensure the proper treatment of all distributions that are made to the plan's participants, including distributions of more complex plan assets such as demutualization proceeds and similar settlements transferred to a qualified plan after termination of such qualified plan.[16] The IRS has pragmatically concluded that no qualification defect should occur when a surprise asset appears several years after the plan has been terminated.[17]

We recommend the PBGC should eliminate any requirement that Plan fiduciaries be required to withhold federal income tax on amounts transferred to the PBGC under the expanded Program for missing participants in terminated defined contribution plans. We also recommend that the PBGC should hold participants' accounts under the expanded Program without reporting a taxable event to any such participants or the IRS until receipt by such participants of the distribution from the PBGC, as payor, under the Program. Current law supports the PBGC's assumption of the applicable federal income

[13] This follows from the rule that the plan administrator may delegate the withholding obligation to the payor of the benefits if certain requirements are met. Treas. Reg. § 31.3405(c)-1, Q&A-5.

[14] *See* IRS information letter to PBGC dated February 26. 1997(http://www.pbgc.gov/prac/terminations/missing-participants/irs-letter-on-missing-participants-program.html). The information letter reasoned that a transfer of assets to the PBGC from a terminating defined benefit plan under the existing Program would not be a distribution to the participant. Although this information letter applied with respect to terminating defined benefit plan, the same result should apply in the defined contribution plan context. *See also* Instructions for IRS Forms 1099-R and 5498 (2013) (providing that "generally do no report a transfer between trustees or issuers that involves no payment or distribution of funds to the participant, including a trustee-to-trustee transfer from one IRA to another IRA". However, you must report direct rollovers from qualified plans.)

[15] *See* PBGC Letter dated February 19, 2004 concerning the Thorn Apple Valley-Smoked Meats Hourly Employees' Pension Plan (Case 190028) available at http://www.pbgc.gov/documents/apbletter/decision--thorn%20apple%20valley-smoked%20meats%202004-02-19.pdf.

[16] DOL Adv. Op. 2001-02A (demutualization proceeds); DOL Field Assistance Bulletin No. 2006-1 (settlements in connection with mutual fund late-trading and market timing violations).

[17] Priv. Ltr. Rul. 200938030 (June 26, 2009) available at http://www.irs.gov/pub/irs-wd/0938030.pdf (demutualization assets after termination are plan assets); *see also* Bank of New York v. Janowick et. al., 470 F.3d. 264 (6th Cir. 2006) (involving a determination of whether employees are entitled to demutualization proceeds of a terminating defined benefit plan); DOL Adv. Op. 2003-05A.

tax withholding and the corresponding IRS reporting obligations (*i.e.* issue the IRS Form 1099-R to the participant) with respect to benefits paid to formerly missing participants in the expanded Program.[18] This practice would conform to the existing procedures established under the existing Program for terminated defined benefit plans. We suggest that continuation of the tax favored status of retirement accounts transferred to the PBGC under the expanded Program would mitigate the adverse effects of established taxation requirements associated with distributions to savings accounts and state unclaimed property funds. Fiduciaries would also find this an attractive feature of the expanded Program as it would reduce the administrative burdens associated with terminating plans.

B. Escheat and Unclaimed Property Laws

We respectfully suggest plan fiduciaries would in many circumstances find the transfer of unclaimed assets of terminating plans to the PBGC to be a desirable alternative to the potential transfer of such funds to various state authorities pursuant to escheat or unclaimed property laws. Transferring unclaimed plan benefits to state unclaimed property funds may not be the optimal result for participants in many circumstances, because of the increased burden and complexity in later locating and claiming such benefits by such participants, along with the possible adverse tax consequences discussed above. It is likewise generally not the optimal result for plan fiduciaries who must incur additional administrative costs in attempting to comply with myriad and complex state laws.

Simply determining whether plan assets can or must be turned over to state authorities can be a nightmare of complexity, particularly for plans with participants in multiple states. In addition to contending with multiple state authorities and divergent laws, the application of such laws may or may not be preempted by ERISA, depending on the jurisdiction and particulars of the applicable state statute. Several courts have found in some cases that particular state unclaimed property or escheat laws are preempted by ERISA.[19] Other courts have found that state abandoned property or escheat laws were not preempted by ERISA.[20] In addition, some states have apparently sought to avoid ERISA preemption by attaching criminal penalties or fines to unclaimed property requirements.[21] In many cases, a plan

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[18] The PBGC has indicated that it will not withhold for state income tax obligations. *See* http://www.pbgc.gov/wr/transactionss/irs-1099.html.

[19] Commonwealth Edison Company v. Vega, 174 F.3d 870 (7th Cir. 1999)(ERISA preempted state of Illinois's claim that its Unclaimed Property Act applied to uncashed or undeposited checks issued by pension plan); Blue Cross & Blue Shield of Florida v. Department of Banking and Finance, 791 F.2d 1501 (11th Cir. 1986)(Florida's Unclaimed Property Act was preempted as applied to uncashed health insurance benefit checks issued pursuant to federal employees' welfare benefit plan, analogizing to ERISA preemption concepts); Herman v. Lincoln National Life Insurance Co., 842 F. Supp. 2d 851 (D.Md. 2012)(ERISA completely preempted participant's claim that uncashed welfare plan check should be reissued or escheated to the state pursuant to state law); Manufacturers Life Ins. Co. v. East Bay Restaurant and Tavern Retirement Plan, 57 F.Supp.2d 921 (N.D.Cal. 1999)(ERISA preempted California's Unclaimed Property Law as applied to unclaimed benefits funded by annuity contract owned by retirement plan).

[20] Aetna Life Insurance Company v. Borges, 869 F.2d 142 (2d Cir. 1989)(Connecticut's abandoned property law was not preempted as applied to uncashed checks issued with respect to group welfare plan); Attorney General v. Blue Cross & Blue Shield of Michigan, 168 Mich. App. 372 (1988)(ERISA did not preempt Michigan escheat requirements as applied to uncashed checks issued to health plan participants and providers).

[21] *See* Qualified Pension & Profit Sharing Plans 2013/2014, para. 18.14 (Pamela Perdue and Thompson Reuters/WG&L 2013).

fiduciary may be faced with a demand for turnover of unclaimed plan accounts by state authorities, and may lack the resources or time to challenge the demand on the basis of preemption or otherwise.

Guidance from federal regulatory agencies indicates some diversity of opinion as to whether ERISA plan benefits may or must be delivered to state authorities pursuant to escheat or unclaimed property laws. The DOL has opposed efforts by the states to seize ERISA plan assets, unless those efforts have been part of the state's regulation of the insurance industry.[22] Nevertheless, under certain circumstances, DOL has permitted ERISA plan fiduciaries to transfer unclaimed assets of terminated defined contribution plan to state unclaimed property funds.[23] Treasury Regulations appear to assume the validity of escheat provisions as applied to qualified plan benefits of participants who cannot be located, but give such plans an alternative to escheat by forfeiting the benefit of a participant who cannot be located, subject to a requirement that the plan reinstate the benefit if the participant or beneficiary subsequently appears to claim the benefit.[24] Such a forfeiture provision is understood to avoid state unclaimed property or escheat provisions if the forfeiture is timed to precede the time such funds would otherwise be required to be remitted to the state, and any such forfeiture provision is of course subject to the plan fiduciary's ERISA duty to make reasonable efforts to locate missing participants. We suggest the forfeiture-and-reinstate procedure may not be workable in the case of a terminating plan, such as when the plan sponsor ceases to exist.

A review of these authorities reveals a bewildering array of circumstances in which plan benefits apparently must, may, or may not be turned over to state authorities. In some states, an uncashed check that a participant may have received but lost (or that was lost in the mail) may be treated differently from the account of a participant that remains in the plan due to the plan administrator's inability to locate the participant and obtain signed distribution paperwork. The result may turn on obscure legal concepts such as whether the unclaimed payment is considered a "liquidated chose in action" under state law.[25] State escheat or unclaimed property laws vary as to whether a participant has an unlimited period of time to reclaim his benefits,[26] or whether the property permanently passes to the state at some point.[27] The time period for which the property is unclaimed before it may or must be turned over to the state likewise varies from state to state, as do the procedures for claiming the funds from the state's unclaimed property fund. Yet another complication is that one state may assert escheat over unclaimed benefits of its residents, while another state may claim the same amount based on the situs of plan assets.

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[22] *See* DOL Advisory Opinion 94-14A (Texas Unclaimed Property Statutes preempted as applied to unclaimed benefits of lost participants held in a retirement trust bank account; distinguishing Borges as involving an insurance company reserve account representing uncashed checks); DOL Advisory Opinion 83-39A (New York Abandoned Property Law dealing with unclaimed insurance proceeds was saved from preemption as law regulating insurance).

[23] DOL FAB 2004-2 (transfer of unclaimed assets of terminated defined contribution plan to state unclaimed property fund permitted, barring certain other alternatives).

[24] Treas.Reg. §1.411(a)-4(b)(6).

[25] Blue Cross & Blue Shield of Michigan, 168 Mich. App at 379.

[26] Vega, 174 F.3d at 872.

[27] Borges, 869 F.2d at 143.

Transferring unclaimed accounts into a rollover IRA or bank account in the name of a participant does not avoid state escheat or unclaimed property laws, and in fact, may put a participant's retirement benefits at higher risk of possible loss or forfeiture under these laws, due to the absence of ERISA preemption with respect to rollover IRAs or regular bank accounts.

Against this backdrop, it is easy to see why many practitioners have provided positive feedback about the possibility of transferring unclaimed benefits to the PBGC. In addition, having a national, centralized repository for unclaimed benefit funds may in many cases:

(1) reduce the administrative expenses that might otherwise be charged against funds transferred to the PBGC if the plan fiduciary must deal with state authorities;

(2) provide an easier way for participants to discover and reclaim their benefits; and

(3) help participants avoid adverse tax consequences. We are not aware of any instance when a state has sought unclaimed benefits from the PBGC, or of any state law that purports to provide for escheat or unclaimed property status of funds held by the PBGC.

Accordingly, we recommend that a transfer of unclaimed funds to the PBGC under an expanded Program should be an available option, subject to the plan fiduciary's option of transferring funds to the appropriate state authorities, if such fiduciary determines that such a transfer is legally required or is in the best interests of participants. In addition, for the reasons discussed above, we recommend that the PBGC should treat any uncashed distribution checks under the expanded Program the same as any other account balances transferred to the PBGC under such Program (i.e., the same as any other benefits which would be transferred to the PBGC of participants who cannot be located prior to distribution from a qualified plan).

III. CONCLUSION

In addition to the information and analysis provided in our Initial Comment, we respectfully assert that the avoidance of premature taxation and the prevention of escheatment support the expansion of the Program to include missing participants in terminating defined contribution plans. These are important considerations that plan fiduciaries would need to evaluate in determining the distribution options for missing participant accounts in a defined contribution plan termination. In addition, as discussed above, we applaud the PBGC's efforts in establishing the expanded Program as a means to avoid or reduce tax uncertainties and mitigate escheatment risks. We suggest that these are key criteria that may support implementation and utilization of the Program and help to preserve and protect participant accounts and assets. Accordingly, we strongly support the idea of the PBGC extending the Program to terminating defined contribution plans consistent with these, among other, suggestions to the PBGC.

U.S. Department of Labor

Employee Benefits Security Administration
Washington, D.C. 20210

AUG 26 2013

Catherine B. Klion
Assistant General Counsel
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: Request for Information – Missing Participants in Individual Account Plans

Dear Ms. Klion:

The Pension Benefit Guaranty Corporation (PBGC) recently published a Request for Information (RFI) seeking public comments about implementing a new program pursuant to section 4050 of the Employee Retirement Income Security Act of 1974, as amended by the Pension Protection Act of 2006, to deal with benefits of missing participants in terminating individual account plans. The RFI solicited views on a broad range of subjects, including the demand for such a program.

As you are well aware, the Employee Benefits Security Administration has a long history under title I of ERISA in regulations and other interpretive pronouncements of trying to help plan fiduciaries with missing participant problems. Indeed, just recently, we received several comment letters from financial institutions in response to the Department's publication of proposed amendments to our Abandoned Plan Regulations (see 77 FR 74063, December 12, 2012) that contained statements supporting the establishment of a PBGC program under section 4050 of ERISA that would accept transfers of missing participants accounts from terminating individual account plans. I am enclosing copies of those letters so that they will be part of your public record.

We expect there will be substantial public backing for PBGC taking steps toward the establishment of a viable missing participant program for individual account plans under section 4050 of ERISA. The persistence of missing participant issues across all types of pension plans evidences a need for a comprehensive solution to the problems faced by both missing participants and plan fiduciaries.

Sincerely,

FOR John J. Canary
Director of Regulations and Interpretations

cc: David M. Abbey, Senior Counsel – Pension Regulation, Investment Company Institute
Gary L. Yerke, Vice President and Associate General Counsel, FMR LLC

Enclosures

INVESTMENT COMPANY INSTITUTE

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February 11, 2013

Submitted Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Attn: Abandoned Plan Regulations; RIN 1210-AB47

Ladies and Gentlemen:

The Investment Company Institute[1] supports the Department of Labor's initiatives to address abandoned defined contribution plans through the implementation of a program in which service providers are permitted to help participants obtain their benefits in an expeditious manner. While we are pleased that certain issues of concern to our members were addressed in the recently proposed amendments to the abandoned plan program regulations,[2] we are disappointed that many of the issues we previously raised with the Department were not addressed.

As you know, in October 2006, the Institute and several of its members participated in a conference call with the Department during which Institute members raised various concerns that have presented obstacles to their participation in the program. In a subsequent letter dated June 14, 2007 ("2007 letter")(copy enclosed), the Institute provided the Department with further detailed explanation of such issues.[3] While the proposed amendments sufficiently address two issues raised in

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $14.2 trillion and serve over 90 million shareholders.

[2] 77 FR 74063 (December 12, 2012).

[3] We note that the Institute had previously raised several of these issues with the Department in our comment letter on the proposed regulations. *See* Letter to Department of Labor from Thomas T. Kim, Associate Counsel, Investment Company Institute, dated May 9, 2005.

our letter (*i.e.*, the required disclosure of government examinations and the distribution of account balances of deceased participants), it is unfortunate that the other concerns presenting obstacles to our members' participation in the abandoned plan program were not dealt with by the Department. Although more fully described in our attached 2007 letter, for your convenience we have provided below a summary of these issues. Additionally, we have provided comments on the decedent transfer and eligible designee appointment provisions contained in the proposed amendments. We believe these additional changes or clarifications are necessary to successfully implement a more widely-used abandoned plan program.

Acting as a QTA

Under the proposed amendments, to act as a QTA (or to be able to serve as an eligible designee appointed by a chapter 7 bankruptcy trustee), an entity must (1) be eligible to serve as a trustee or issuer of an individual retirement plan within the meaning of Internal Revenue Code section 7701(a)(37) and (2) hold assets of the plan. As we explained in our 2007 letter, we believe changes or clarifications to this definition may be necessary so that more financial institutions are eligible to serve as QTAs, particularly with respect to self-trusteed plans. In a self-trusteed plan, the financial institution may merely act as a recordkeeper and therefore not "hold" assets of the plan in a legal sense, thereby not meeting the regulatory requirements to act as a QTA. In this regard, it would be helpful to for the Department to clarify that holding legal title is not required to act as a QTA. In addition, the Department could expand the definition of a QTA to include parties (such as third-party administrators) that hold participant-level records for the plan.[4]

Fiduciary Liability

As is detailed in our 2007 letter, many Institute members continue to be concerned about potential ongoing financial liability after the abandoned plan is terminated and assets are distributed, particularly with respect to missing participants. We continue to recommend that the general liability relief under section 404(a) be available where a QTA undertakes reasonable and diligent efforts to comply with the requirements for winding up the affairs of the plan. Our members are concerned that the QTA could have continuing liability subsequent to the winding up of the affairs of the plan for subsequent actions taken by the transferee of the assets. For example, the QTA might be considered to have a continuing responsibility to monitor the efforts of the transferee bank or savings association to

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[4] As stated the Institute's 2005 comment letter on the proposed abandoned plan regulation, if the Department is concerned about unregulated entities serving as QTAs, the Department could address this by expanding the definition of QTA to include entities regulated by the SEC, which would cover a broader range of parties.

locate the participant or to ensure that the fees associated with the account remain unchanged (*i.e.*, that the fees continue to be charged only against earnings). We recommend that the Department clarify that a QTA which has substantially complied with the conditions set forth in the regulation has no continuing liability subsequent to the winding up of the plan for subsequent actions taken by the transferee of the assets.

Missing Participants

The proposed amendments would allow a QTA to transfer the account balances of *decedents* to an interest-bearing, federally-insured bank or savings association account, or to a state unclaimed property fund (regardless of the account balance). While this change will be very helpful, the proposed amendments do not address other issues previously raised by the Institute regarding missing participants. As detailed in our attached letter, the Institute recommends that the Department clarify several aspects of the regulations with respect to missing participants, as follows:

- We recommend that the regulations include a de minimis exception for very small accounts where the cost of locating a participant would use up the account balance.

- For accounts of missing participants that are too large to fall under a de minimis rule, we continue to recommend that the PBGC implement a program to allow for the transfer of missing participant accounts to the PBGC.[5]

- We continue to recommend that the Department clarify that the use of the QTA's own IRA is not required when the account balance is greater than $1,000 or meets the minimum balance requirement for an IRA of the QTA.

- We continue to recommend that the Department consider expanding the options for small accounts with assets of $1,000 or less. In the absence of the PBGC option, Institute members would like to be able to transfer these small accounts to a bank or savings account or state unclaimed property fund, even if the account balance meets IRA minimum balance requirements.

- We continue to recommend that the Department clarify that an IRA provider accepting a transfer of assets from a QTA is not subject to the same limitation on fees that appears in PTE 2006-06, the class exemption for a QTA designating itself as the

[5] Although the Pension Protection Act of 2006 amended ERISA section 4050 to allow terminating defined contribution plans to transfer assets of missing participants to the PBGC, effective when final regulations are prescribed, as of this date, the PBGC has not prescribed final regulations.

IRA provider for missing participant distributions (*i.e.*, fees may be charged against earnings only).

Decedent Transfers

With respect to decedents, in the preamble to the proposed amendments, the Department solicited comments on whether the proposed conditions allowing for the transfer of decedent balances to an appropriate bank account or state's unclaimed property fund, regardless of the size of the account balance, sufficiently safeguard the rights of participants and beneficiaries. As an example, the Department sought comment on whether a QTA should be prohibited from making such a transfer if it has knowledge that a descendent of the deceased has a claim.

In some instances, a deceased participant's or beneficiary's heirs may claim a right to the decedents plan account, although it may be unclear whether the claim is valid. Additionally, there are circumstances when a participant may designate his estate as his beneficiary or where the plan's terms provide that the participant's estate is his beneficiary in the absence of another designation. As the proposed amendments do not clarify whether the decedent transfer provisions override the valid rights of a claimant or the designation (either by the decedent or by default) of a decedent's estate as his beneficiary, we recommend that the proposed amendments clarify that the decedent transfer provisions do not apply if a the QTA has received a claim with respect to the account from any person or if the participant's beneficiary is his estate.

Further, many times a potential QTA will not have a record of a deceased participant's beneficiary designation, as that information may be maintained by the plan sponsor or plan administrator. We therefore recommend that the proposed amendments clarify that a QTA may follow the decedent provisions contained in the regulation if it has determined that a participant is deceased and the QTA has no record of a beneficiary designation.

Annuities

Our 2007 letter noted certain obstacles specific to plans funded with annuity contracts or otherwise required to distribute benefits in the form of an annuity. As discussed in our prior letter, these issues, which are not easily resolved, include (1) the inability of QTAs to obtain payment for services in circumstances where the annuity contract does not permit the deduction of service fees from the annuity, and (2) small account balances in plans subject to the qualified joint and survivor annuity (QJSA) requirements of the Internal Revenue Code. In the first case, an inability to obtain payment for services could discourage providers from assuming QTA responsibilities. In the second case, particularly where the plan cannot be amended to eliminate the annuity distribution option (such as a money purchase plan), finding an annuity for the small accounts may be difficult and not economically feasible.

Appointment of an Eligible Designee

The proposed amendments provide that a bankruptcy trustee may designate an eligible designee to serve as the QTA. However, there are no provisions in the proposed amendments providing for acceptance of such an appointment by the eligible designee. Given that such a designation results in the assumption of fiduciary responsibility by the eligible designee, a bankruptcy trustee should not be permitted to unilaterally appoint an eligible designee without the eligible designee's written consent to accept the designation. We therefore recommend that the amendments clarify that an eligible designee must accept such designation before it becomes effective.

* * *

We would be pleased to meet and discuss these issues further with the Department and will follow up with you in the near future to discuss whether such a meeting would be beneficial. In the meantime, please contact me (david.abbey@ici.org or 202/326-5920) or Howard Bard (howard.bard@ici.org or 202/326-5810) if you have any questions.

Sincerely,

David Abbey
Senior Counsel – Pension Regulation

Attachment

INVESTMENT
COMPANY
INSTITUTE

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June 14, 2007

Jeffrey Turner
Chief, Division of Regulations
Employee Benefits Security Administration
U.S. Department of Labor
Suite N-5669
200 Constitution Avenue, NW
Washington, DC 20210

Re: Abandoned Plan Regulation

Dear Mr. Turner:

The Department requested that the Investment Company Institute solicit feedback from its members on any concerns or reluctance they have to use the final rule and exemption established by the Department in April 2006 for terminating abandoned individual account plans. We were pleased to assist the Department. After speaking to several member companies, we held a conference call on October 16, 2006 with you, members of your staff, and representatives from various Institute member companies, during which Institute members raised various concerns that have presented obstacles to their participation in the program. This letter further explains the issues raised by Institute members.

Acting as a QTA

Under the regulation, to act as a Qualified Termination Administrator (QTA), an entity must (1) be eligible to serve as a trustee or issuer of an individual retirement plan within the meaning of Internal Revenue Code section 7701(a)(37) and (2) hold assets of the plan. Changes or clarifications to this definition may be necessary to give financial institutions comfort that they are eligible to serve as a QTA, particularly with respect to self-trusteed plans.

In a self-trusteed plan, the owner of the business serves as trustee and the financial institution administering, or providing investment services to, the plan is not a trustee or custodian of plan assets. In this situation, some Institute members that we surveyed believe the financial institution has no authority to act as a QTA. In a self-trusteed plan, a portion of plan assets may be invested with the financial institution, but the institution does not have legal title and may not know where all of the plan's assets are located. This type of arrangement does not involve the issuance of ownership certificates – the financial institution merely acts as a recordkeeper and does not "hold" assets in the legal sense. One possible solution to this problem would be for the Department to provide a procedure for appointing a new trustee for the plan. In addition, the Department could clarify that legal title is not required to act as a QTA – that is, if the entity is eligible to serve as an IRA trustee or issuer, the entity need not be the actual trustee for the abandoned plan. This clarification is important, although, as described below, it will not resolve all issues relating to QTA status.

The application of other laws (*e.g.*, trust or banking laws) may prevent the QTA from acting without direction from the actual trustee. Logistical problems also could arise. The financial institution may have had a relationship with the plan sponsor as an investment provider, but no knowledge of the plan's third party administrator, which could be the only entity with access to all the plan's records. The inability to identify where plan records are located would make it virtually impossible for the potential QTA to carry out its duties.[1]

Another problem can arise if the institution holding self-trusteed assets (*e.g.*, a mutual fund family) is not itself eligible to serve as an IRA trustee even though an affiliated entity may be eligible. Our members explained on the conference call that moving plan assets to an affiliate that is eligible to serve as trustee of an individual retirement plan may not be possible. There is no legal mechanism for making a transfer with respect to assets that have been abandoned by the sponsor, and affiliated entities may not be comfortable either initiating or accepting a transfer of assets without direction from the actual trustee.

The issues involved in determining whether an institution has authority to act as a QTA and where to find relevant records are complex and we believe additional discussion could be beneficial. The Institute would be pleased to discuss these issues further with the Department.

Disclosure of Government Examinations

The regulation requires a QTA to notify the Department whether the QTA or any affiliate (as defined in the regulation) is, or within the past 24 months has been, the subject of an investigation, examination, or enforcement action by the Department, Internal Revenue Service, or Securities and Exchanges Commission concerning the entity's conduct as a fiduciary or party in interest with respect to any ERISA plan. The Department should clarify the scope of this obligation. The members that we sampled noted that it may not be possible to gather this information with absolute certainty, particularly with respect to a large organization with many affiliates. Furthermore, many examinations (such as those of the SEC) are conducted on a routine basis and should not need to be disclosed. We recommend that the QTA be required to provide information only on non-routine examinations *to the best of the QTA's knowledge.*

[1] In its comment letter on the proposed abandoned plan regulation, the Institute recommended that the QTA definition be expanded to include parties that hold participant-level records for the plan. *See* Letter to Department of Labor from Thomas T. Kim, Associate Counsel, Investment Company Institute, dated May 9, 2005. If the Department is concerned about unregulated entities serving as QTAs, the Department could address this by expanding the definition of QTA to include entities regulated by the SEC, which would cover a broader range of parties.

Fiduciary Liability

Many Institute members are concerned about potential ongoing fiduciary liability after the abandoned plan is terminated and assets are distributed, particularly with respect to missing participants. A financial institution acting as a QTA accepts significant fiduciary responsibility, notwithstanding the Department's guidelines for winding up the plan and the fiduciary safe harbor for missing participants. The QTA must prudently select and monitor service providers to carry out the termination activities and has fiduciary responsibility for choosing an annuity provider where the Internal Revenue Code's survivor annuity requirements apply. For missing participants, the decision to escheat assets could carry liability and the QTA's attempts to locate the missing could be questioned later. It would be helpful if general liability relief under section 404(a) were available where the QTA undertakes *reasonable and diligent* efforts to comply with the requirements for winding up the affairs of the plan. A substantial compliance approach would provide more incentive for service providers to take on QTA responsibilities.

Missing Participants

In our conference call, Institute members discussed the difficulties in dealing with small accounts of missing participants – particularly finding IRAs or bank accounts willing to accept small account balances – and the complexities associated with state unclaimed property laws.[2] We believe a number of clarifications or changes to the final regulation would be helpful in this regard. First, a de minimis exception for very small accounts would be helpful where the cost of locating a participant would use up the account balance. Although the general guidelines for winding up the affairs of a plan permit a QTA to treat as forfeited an account balance that is less than the estimated share of plan expenses allocable to the account, this provision may not go far enough. The fiduciary safe harbor for making distributions to missing participants should include a similar forfeiture rule that specifically covers the estimated costs of locating the participant, in addition to the estimated share of plan expenses allocable to the account.

For accounts of missing participants that are too large to fall under a de minimis rule, we strongly urge the Department and the PBGC to permit transfer of defined contribution plan assets to the PBGC. It is important to have this option because the other alternatives for dealing with missing participant accounts are problematic, as described later. The Pension Protection Act of 2006 amended ERISA section 4050 to allow terminating defined contribution plans to transfer assets of missing participants to the PBGC, effective when final regulations are prescribed. We believe this alternative would provide QTAs with a failsafe solution for distributing missing participant accounts. Should the

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[2] State laws for unclaimed property may have varying rules, including extensive mailing requirements and specified periods of time during which the property holder must not have had contact with the individual. It is unclear whether these requirements would be preempted by ERISA.

missing participant or beneficiary ever attempt to recover his or her assets, the PBGC would be a simple and easy place for the individual to turn.

Another way to encourage more institutions to act as QTAs would be to clarify the circumstances under which a QTA is permitted to transfer assets to an IRA of another institution. As discussed in our call, the regulation appears to require use of the QTA's own IRA unless the account balance is $1,000 or less *and* the account is less than the minimum balance requirement for an IRA of the QTA financial institution. The Department should clarify that use of the QTA's own IRA is not required when the account balance is greater than $1,000 or meets the minimum balance requirement for an IRA of the QTA. The Department seemed amenable to these clarifications when we spoke.

The Department should consider expanding the options for small accounts with assets of $1,000 or less. In the absence of the PBGC option, Institute members would like to be able to transfer these small accounts to a bank or savings account or state unclaimed property fund, even if the account balance meets IRA minimum balance requirements. As discussed during our call, many service providers offer low minimum balance requirements for IRAs as a service to plan clients with mandatory cashout provisions or to attract new IRA investors who will be actively contributing to the account. If no new contributions are made to the account, as is likely with a missing participant account, the costs of maintaining the IRA could quickly erode the value of the assets. Therefore, even if a QTA (or another IRA provider) offers an IRA with a minimum balance requirement lower than the value of the missing participant's account, it may not be feasible to transfer the account to an IRA, and the other options would be useful.

Another issue is whether an IRA provider accepting a transfer of assets from a QTA is subject to the same limitation on fees that appears in the class exemption for a QTA designating itself as the IRA provider for missing participant distributions (*i.e.*, fees may be charged against earnings only). The Department indicated during our call that it did not intend to impose this limitation outside of the class exemption. While we maintain that this limitation should not be imposed at all, clarification that it does not apply outside the class exemption will help QTAs find other providers willing to accept small accounts.

Finally, additional problems arise when a QTA discovers that a missing participant is deceased and the QTA has no beneficiary information. In order to transfer the deceased participant's account, depending on the terms of the plan document, the QTA may have to deal with state intestacy laws, which vary state to state and could result in months of delay. Institute members believe that a safe harbor for deceased participant situations would be helpful. For example, where there is no beneficiary information available, the regulation could provide that the deceased participant is treated as a missing participant and the account may be transferred to the PBGC under to the authority described above.

Annuities

Plans funded with annuity contracts or otherwise required to distribute benefits in the form of an annuity pose unique problems for potential QTAs. QTAs may encounter difficulties in obtaining payment for services when annuities are involved. Many annuity contracts do not permit deduction of service fees from the annuity. In that case, the QTA would have no way of getting paid. This issue is not easily resolved and could prevent or discourage many providers from assuming QTA responsibilities.

For plans subject to the qualified joint and survivor annuity (QJSA) requirements of the Internal Revenue Code, small account balances present problems. If the plan cannot be amended to eliminate the annuity distribution option (as is the case with a money purchase plan), finding an annuity for the small amount is extremely difficult. Annuities for very small amounts are not economically feasible. Although the QJSA rule is not under the Department's jurisdiction, we believe it is appropriate to raise the issue here.

* * *

The Institute and its members appreciate this opportunity to assist the Department with implementation of the abandoned plan program. We would be pleased to meet and discuss these issues further with the Department. We will follow up with you soon to discuss whether a meeting would be beneficial. In the meantime, please contact me (202/326-5821 or ebarone@ici.org) or Mary Podesta (202/326-5826 or podesta@ici.org) if you have any questions.

Sincerely,

/s/ Elena Barone

Elena Barone
Assistant Counsel – Pension Regulation

cc: Joseph Grant, Internal Revenue Service

FMR LLC
Legal Department
200 MAGELLAN WAY, COVINGTON, KY 41015

Submitted Electronically

February 11, 2013

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attn: Abandoned Plans

Re: RIN 1210-AB47
Proposed Amendments to the Abandoned Plan Regulations

Ladies and Gentlemen:

These comments are submitted on behalf of the group of financial service companies for which FMR LLC is the parent corporation (collectively, "Fidelity"). Fidelity companies provide investment management, recordkeeping, communications and directed trustee and custodial services to thousands of retirement plans covering millions of participants. Fidelity is acutely aware of the difficulties in administering abandoned plans and commends the Department for its proposed expansion of the abandoned plan regulations to better facilitate the termination of plans whose sponsors are in liquidation under Chapter 7 of the U.S. Bankruptcy Code.

We believe, however, that certain modifications to the proposed amendments and additional modifications to the original guidance will lead to a greater utilization of the Department's Abandoned Plan Program and benefit a greater number of participants and beneficiaries. Specifically, Fidelity's comments, set forth below, relate to the following issues as to which clarification or additional guidance would be desirable: (1) Deceased /Missing Participants and Beneficiaries; (2) Bankruptcy Trustee's Designation of a Qualified Termination Administrator ("QTA"); (3) Joint and Survivor Annuities; and (4) QTA's Fiduciary Liability.

(1) <u>Deceased /Missing Participants and Beneficiaries</u>

The proposed amendments permit QTAs to transfer the account balances of decedents to an appropriate bank account or a state's unclaimed property fund, regardless of account size, if the QTA "reasonably and in good faith finds that the participant and if applicable, the named beneficiary, are deceased." We agree with the statement in the Supplementary Information accompanying the proposed regulations that certain obstacles often prevent distribution of a deceased participant's benefits and thus discourage qualified entities

Fidelity INVESTMENTS

from serving as QTAs. However, we believe the amended regulation needs to go further to address the concerns of potential QTAs.

The Department has solicited comment specifically on whether these deceased participant provisions would sufficiently safeguard the rights of participants and beneficiaries, for example where the QTA has knowledge that a descendant of the deceased has a claim. In our experience, a deceased participant's or beneficiary's heirs may claim a right to the decedent's plan account, although it is often unclear whether the claim is valid under the terms of the plan. Similarly, some participants will designate their estate as beneficiary or a plan's terms will provide that a participant's estate is his or her beneficiary in the absence of another designation. It is not clear whether the proposed amendment's deceased participant provisions are intended to apply irrespective of the rights of a valid claimant or the affirmative or default designation of a decedent's estate as beneficiary under the plan. It is also unclear whether the claims of estates, heirs or other persons would be pre-empted by the proposed regulation if such were the intent. In the absence of such pre-emption, the proposed amendment should be revised to explicitly provide that the deceased participant provisions do not apply if a participant's beneficiary[1] is his or her estate or if the QTA has received a claim with respect to the account from any person.

In addition, many potential QTAs will not themselves have access to a record of deceased participants' beneficiary designations as that information may only be maintained by the plan sponsor/administrator. Guidance is requested on whether the QTA may treat the deceased participant as having not designated a beneficiary in such situations.

While the deceased participant provisions with the above clarifications would be a welcome improvement, we believe that deceased participants and beneficiaries represent only a small portion of a larger category of participants and beneficiaries that are problematic for potential QTAs: missing participants and beneficiaries, i.e., participants and beneficiaries for whom the QTA has no valid contact information. We strongly encourage the Department to provide QTAs with more guidance and a failsafe method of dealing with the accounts of all missing participants. In this regard, please confirm in the regulations that following the search methods set forth in Department of Labor Field Assistance Bulletin 2004-02 ("FAB 2004-02") will satisfy the QTA's fiduciary responsibilities.

Further, QTAs need more guidance regarding transfers of assets to states' unclaimed property funds. We request that the following concept from FAB 2004-02 be appropriately incorporated into the final Sec. 2550.404-3 and Sec. 2578.1 regulations to ensure consistency and clarity:

[1] The proposed amendment uses the term "named beneficiary" in connection with the deceased participant provisions but does not define that term. It would be helpful if the proposed amendment were clarified to indicate that a "named beneficiary" is any beneficiary as defined under the terms of the applicable plan document, including for example any primary, secondary or contingent beneficiaries affirmatively designated by a participant or any beneficiary designated by the plan document in the absence of an affirmative designation by the participant.

"...we believe that a plan fiduciary's transfer of a missing participant's account balance from a terminated defined contribution plan to a state's unclaimed property fund would constitute a plan distribution, which ends both the property owner's status as a plan participant and the property's status as plan assets under ERISA." (footnote omitted)

D.O.L. Field Assistance Bulletin 2004-02 (2004) (text accompanying note 19).

Finally, we continue to support the optional transfer of missing participants' accounts to the PBGC pursuant to the Pension Protection Act of 2006 and implore the Department to advocate for the issuance of regulations by PBGC to implement such program.

(2) Bankruptcy Trustee's Designation of a QTA

The proposed amendment allows a bankruptcy trustee the option of designating someone else to serve as the QTA. This seems useful insofar as it would enable a bankruptcy trustee to choose a designee that may have more experience in plan matters to act as QTA on its behalf. It would be helpful and minimize confusion, however, if the final regulations clarify that a designee must accept such designation in writing before it becomes effective. For example, a bankruptcy trustee should not be permitted to unilaterally designate the plan's current recordkeeper or trustee (assuming such service provider would otherwise qualify as a QTA) to serve as QTA for the plan. The service provider should be required to agree to such designation before it becomes effective.

(3) Joint and Survivor Annuities

The abandoned plan regulations continue to require the QTA to determine whether the survivor annuity requirements in sections 401(a)(11) and 417 of the Internal Revenue Code apply and distribute benefits in any manner reasonably determined to achieve compliance with those requirements. Due to the difficulties in distributing benefits in terminating plans that are subject to the survivor annuity requirements, it would be helpful to clarify that the QTA's responsibilities in this regard apply only to defined benefit plans and to defined contribution plans which include balances attributable to a money purchase pension plan or, alternatively, to specifically provide that the QTA may amend the plan to remove the survivor annuity option from other plans as permitted by the regulations under Internal Revenue Code Section 411(d)(6). The "deemed amendment" rule in Reg. Section 2578.1(d)(3) is not sufficient for this purpose as it would technically be possible for the QTA to "wind up the plan" without such an amendment.

In addition, it is very difficult for small employers to find annuity providers upon plan termination because the total amount involved is so small. The difficulties may be even greater for a QTA in the abandoned plan context. A potential QTA would be more likely to terminate a plan that is subject to the survivor annuity requirements if the regulations specifically provided for an alternative distribution form where an annuity provider could not be found after a diligent search.

(4) QTA's Fiduciary Liability

The abandoned plan regulations continue to provide fiduciary relief for QTAs that undertake specified activities in winding up the affairs of the plan and comply with the requirements of the regulation for each such activity. While this is somewhat helpful with respect to the specific activities detailed in the regulations, it provides no assurance for other activities normally performed by a plan administrator that may need to be assumed by the QTA (or its delegate) to effectively terminate the plan. For example, while the plan termination is underway, the QTA may receive a domestic relations order. If the QTA makes a determination that the order satisfies the QDRO requirements, has it performed a fiduciary function for which the relief is unavailable? Without broader relief that covers such situations, potential QTAs will be less likely to participate in the program.

Also, if the QTA fails to meet every requirement of the program, is the fiduciary relief unavailable for all activities undertaken pursuant to the program? The fiduciary standards should be deemed satisfied with respect to any activity for which the QTA complies with the program's requirements, even if the QTA has failed to satisfy all the program's requirements with respect to other activities it has undertaken.

Thank you for your consideration of these comments. If you have any questions or need further information, please contact the undersigned.

Sincerely,

Gary L. Yerke

Gary L. Yerke
Vice President and Associate
General Counsel

FMR LLC
Legal Department
200 MAGELLAN WAY, COVINGTON, KY 41015

Submitted Electronically

September 6, 2013

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

Re: Request for Information on Missing Participants in Individual Account Plans

Ladies and Gentlemen:

We were pleased to receive a copy of the Department of Labor ("DOL") letter to your office supporting the establishment of a viable missing participant program for individual account plans and including our comment letter on the DOL's proposed amendment to the Abandoned Plan Regulations. Our comment letter expressed support for the optional transfer of missing participant accounts in abandoned plans to the Pension Benefit Guaranty Corporation ("PBGC") under section 4050 of ERISA. We would like to take this opportunity to provide additional context for that position and also comment on the extension of PBGC services to the missing participants in all terminating individual account plans.

These comments are submitted on behalf of the group of financial service companies for which FMR LLC is the parent corporation (collectively, "Fidelity"). Fidelity companies provide investment management, recordkeeping, communications and directed trustee and custodial services to thousands of retirement plans covering millions of participants.

Fidelity participated in the discussion and development of several industry group responses to the PBGC's request for information on missing participants in individual account plans (the "RFI"). This letter will focus on items not previously covered or those which we believe merit additional emphasis: (1) abandoned plans; (2) PBGC services needed for terminating individual account plans; and (3) outstanding checks.

(1) Abandoned Plans

It has been our experience that the issues with missing participants are especially pronounced in abandoned plans. Where there is no longer an employer maintaining a plan due to business closure or corporate action, it is more likely for the plan to lose track of participants or vice versa.

The DOL Abandoned Plan Regulations allow a financial institution holding assets of an abandoned plan to act as a Qualified Termination Administrator ("QTA") in terminating the plan and distributing benefits to participants and beneficiaries. The regulations provide a fiduciary safe harbor for QTAs regarding distributions for missing participants. However, certain restrictions in those distribution provisions detailed extensively elsewhere (see ICI Comment Letter on PBGC RFI Regarding Missing Participants in Individual Account Plans dated August 20, 2013) present obstacles for QTAs and thus reduce the effectiveness and utilization of the DOL abandoned plan program. The challenges with missing participant accounts often further delay or prevent distributions to all other participants. Giving a QTA the option of transferring missing participant accounts to the PBGC would allow more abandoned plans to terminate and better serve the interests of participants.

(2) PBGC Services Needed for Terminating Individual Account Plans

The RFI solicited input on the provision of PBGC services for missing participant accounts in terminating individual account plans that are comparable to those services currently offered by the private sector, presumably services such as missing participant locator services. While such services offered by the PBGC may be helpful if provided more efficiently for a competitive price, the greatest need is the creation of a program under which "the plan administrator . . . may elect to transfer a missing participant's benefits to the [PBGC] upon termination of the plan", as provided in ERISA Section 4050 as amended by the Pension Protection Act of 2006.

In addition to providing a solution for terminating plans in those situations where the other approved methods of handling a missing participant's account (see DOL Reg. 404a-3. 29 C.F.R. §2550.404-3) are not practical or possible, the transfer of such accounts to the PBGC will often better serve the interests of participants. It provides for a more centralized system for participants to search for benefits that may be due to them. Cross-agency cooperation may also facilitate returning benefits to former employees (e.g., in conjunction with the Social Security Administration). Further, the PBGC is already experienced in, and has procedures for, holding and distributing the assets of missing participants in retirement plans.

For the PBGC program to satisfy these needs and provide value, it must accept missing participant accounts of all sizes, charge reasonable fees and provide the plan administrator with fiduciary protection. The PBGC should coordinate with the DOL on guidance that relieves the plan administrator of fiduciary liability for amounts transferred to the PBGC.

(3) Outstanding Checks

ERISA Section 4050 provides for transfer of a missing participant's benefits to the PBGC. For this purpose, a "missing participant's benefits" should include participant distributions from a plan in the form of a check which remains uncashed, notwithstanding that such distributions do not constitute plan assets under ERISA. In many cases, a participant is determined to be a "missing participant" only after a check is issued to the participant but returned as undeliverable, or a participant that has an otherwise valid address fails to cash a check. Although the DOL has provided guidance in Field Assistance Bulletin 2004-02 (September 30, 2004) which permits the escheatment of such outstanding checks in the context of a terminating plan, recordkeepers of ERISA plans may not generally be familiar with such processes and we believe that plan fiduciaries may be more inclined to use the PBGC service if outstanding checks could be transferred to the PBGC and the DOL was explicit in its position that ERISA would preempt any claims on such amounts by the various unclaimed property administrators under state law.

* * * * * * * * * * *

Thank you for your consideration of these comments. If you have questions or need further information, please contact the undersigned.

Sincerely,

Gary L. Yerke

Gary L. Yerke
Vice President and Associate
General Counsel

PUBLIC SUBMISSION

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Request for information.

Comment On: PBGC-2013-0003-0001
Missing Participants in Individual Account Plans

Document: PBGC-2013-0003-DRAFT-0011
Comment on FR Doc # 2013-14834

Submitter Information

Name: Donna Farino
Address: United States,

General Comment

Since the IRS Letter Forwarding service is no longer available, alternative ways of finding Participants would be welcomed and appreciated by Plan Sponsors trying to find Participants of DB plans. This would assist in avoiding RMD penalties.

American Benefits Council

August 20, 2013

Submitted electronically via regulations.gov

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

Re: Request for Information on Missing Participants in Individual Account Plans

Dear Sir or Madam:

The American Benefits Council (the "Council") appreciates this opportunity to comment on the Pension Benefit Guaranty Corporation's (PBGC) request for information on missing participants in individual account plans. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. The Council is pleased to support initiatives that streamline plan administration and are in the best interests of plan sponsors and participants. We support PBGC moving forward to open this program.

Rules governing lost and missing participants need to reflect the workforce of today and tomorrow. Today, not only do individuals often change jobs, move between communities and experience restructured families, but employers also engage in numerous different and complicated corporate and business related transactions, such as acquiring and divesting businesses, that impact employees, as well as employee benefit plans, systems and service providers.

Solutions to the problem of missing participants are crucial as we increasingly see plans adopt automatic enrollment and small employers sponsor 401(k) and other individual account plans. These positive developments show our voluntary employer-based retirement system continues to increase coverage. But more participants in our system means more participants will go missing despite employers' best efforts. In

2006, Congress sought to provide an additional solution when it amended ERISA[1] to provide that the plan administrator of a qualified individual account plan may transfer a missing participant's benefits to the PBGC upon termination of the plan.[2]

This program would provide an important additional option for plan administrators to address accounts of missing participants. Currently, the plan administrator of a terminating plan, after making a reasonable search, may transfer the account of a missing participant to an individual retirement plan.[3] Unfortunately, this solution can be less than ideal. Many large IRA providers are unwilling to accept these accounts, which tend to be small and are unlikely to have further contributions. In addition, some IRA providers have expressed concern about opening up an account with outdated information about the participant and without participant consent, particularly since 2001 as various anti-money laundering, red flag, and "know your customer" rules have been enhanced, and because of the growth of identity theft.

Council members told us that, if the PBGC program were available to accept accounts of missing participants, they might use that option if it proved easier to administer than locating an IRA provider. The PBGC program could have the following advantages:

- It would provide a centralized place for participants to look for benefits that might be due to them. The larger it grew, the more it would be viewed as a key place to look for benefits from a former job.

- PBGC could integrate it with other government efforts to reach out to retirees, such as the Social Security Administration's program to notify Americans of a deferred vested benefit reported on Form 8955-SSA (formerly Form 5500 Schedule SSA).

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[1] In the RFI, PBGC states that the new missing participant program for individual account plans and defined benefit plans not subject to title IV is "optional." We do not necessarily agree with that characterization of the statute. It is clear that the program is optional for a *plan administrator*, and that Congress provided that the program is only effective for distributions made after PBGC implements regulations. In any event, we agree that PBGC should seek information in advance of a proposal so that the regulation is most effective and applaud PBGC for seeking advance input on the program.

[2] The new program would also be available for terminating defined benefit plans that are not subject to title IV of ERISA, including plans with less than 25 participants. For simplicity we refer in this letter generally to individual account plans.

[3] The Department of Labor has issued regulations setting forth a fiduciary safe harbor for distributions from terminated individual account plans, 29 C.F.R. § 2550.404a-3, which generally require that the account of a participant who does not request another form of distribution be transferred to an IRA. DOL regulations also describe the safe harbor for mandatory distributions made to an IRA. 29 C.F.R. § 2550.404a-2. Department of Treasury rules allow a profit sharing plan account to be paid in a single sum. 26 C.F.R. § 1.411(d)-4, Q&A-2. Mandatory distributions of more than $1,000 must be transferred to an IRA unless the participant elects otherwise. IRC § 401(a)(31)(B).

- PBGC has experience with missing participants because it already administers a missing participant program for defined benefit plans.

- PBGC is one of the few federal agencies that has experience holding, in trust, for long periods of time, assets formerly held in the private sector.

The program should be expanded to cover other missing participants. As the PBGC points out in the request for information, the program will be most successful if it is used with regularity by plan sponsors. So long as the program is limited to terminated plans, it will not be available for many plan administrators dealing with participants missing from ongoing plans. We recommend PBGC consider opening the program for other missing participants. If PBGC feels that it does not have the statutory authority to do so, it should consider opening the program on a limited basis (that is, for terminated plans only), and seek additional authority from Congress after the program has proven effective.

The program, and any expansion for other missing participants, should be voluntary. Congress clearly intended that this program would be voluntary for plan administrators.[4] While this may be an effective solution for some situations, it will not be the best solution for all situations.

PBGC should work with DOL to update its guidance on missing participants. The last time DOL addressed the kinds of actions plan administrators should take with regard to missing participants was 2004.[5] This guidance is now outdated; for example it refers to an IRS letter forwarding program that is no longer available.

The ERISA Advisory Council is currently examining the issue of missing participants.[6] In our testimony we recommended the use of safe harbors that would provide a framework in which a range of solutions are available and which, if any is adopted, would shield plan administrators from liability and the plans from disqualification.[7] We also suggested that this framework could borrow from and expand upon the framework in the IRS's Employee Plans Compliance Resolution System.[8]

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[4] See Joint Committee on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," JCX-38-06 (Aug. 3, 2006), at 102 ("In addition, under the bill, plan administrators of certain types of plans not subject to the PBGC termination insurance program under present law are permitted, but not required, to elect to transfer missing participants' benefits to the PBGC upon plan termination.")

[5] Field Assistance Bulletin 2004-02.

[6] *See* 167th Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans; Notice of Meeting, 78 Fed. Reg. 44,600, 44,600 (July 24, 2013).

[7] Testimony of Allison R. Klausner on behalf of the American Benefits Council for the ERISA Advisory Council (June 4, 2013).

[8] Revenue Procedure 2013-12, 2013-4 I.R.B. 313.

The salient point here is that, for the program to be successful, it must work well with the existing structures and guidance for missing participants.[9] In addition, the PBGC program (a) should be an acceptable wind-up method under the DOL's abandoned plan (qualified termination administrator) program and(b) should provide a plan administrator with fiduciary protection – once the benefit is transferred, the plan administrator should have no further obligations under title I of ERISA with respect to those assets, just as if the assets had been distributed to the participant.

* * *

We look forward to working further with the PBGC as it moves ahead on this important initiative. If you have any questions or would like to discuss, please contact me at 202-289-6700.

Sincerely,

Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council

[9] IRC section 401(a)(31)(B) requires that mandatory distributions be made to an individual retirement account. PBGC should work with IRS to provide guidance that paying benefits to the PBGC program will not violate these automatic rollover rules. For example, IRS could issue guidance that such a transfer to PBGC is not treated as an eligible rollover distribution for purposes of IRC section 401(a)(31)(B).

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August 20, 2013

Submitted Electronically: *reg.comments@pbgc.gov*
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC

Re: Missing Participants in Individual Account Plans -- Request for Information

Ladies and Gentlemen:

The Investment Company Institute[1] is pleased to provide the following comments in response to the Pension Benefit Guaranty Corporation's (PBGC) Request for Information (RFI) regarding the implementation of a program for missing participants of terminating individual account plans.[2] We understand that PBGC is conducting the RFI in order to gain an understanding of the demand for a PBGC administered program for missing participants of terminating individual account plans pursuant to the directive provided by section 4050 of the Employee Retirement Income Security Act of 1974, as amended (ERISA).[3]

The Institute strongly supports initiatives designed to locate participants of terminating individual account plans to facilitate the ability of such participants to obtain their unpaid retirement assets in an expeditious manner. Although the RFI appears to focus on a program whereby PBGC would provide services to assist terminating individual account plans, including services to locate missing participants, we understand, based on telephone conferences with PBGC staff, that this alternative is among several program design options being considered by PBGC pursuant to the mandate described in ERISA section 4050.

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $14.9 trillion and serve more than 90 million shareholders.

[2] 78 Fed. Reg. 27598 (June 21, 2013).

[3] The Pension Protection Act of 2006 amended ERISA section 4050 to allow terminating defined contribution plans to transfer assets of missing participants to PBGC, effective after final regulations are prescribed by PBGC.

With respect to the Institute's members that provide administrative or investment services to defined contribution plans, issues involving missing participants in terminating plans generally arise in the context of abandoned or orphaned plans,[4] terminated plans, and in active plans as well. As is discussed below, due to the distribution restrictions contained in the Department of Labor's (DOL) current abandoned plan program regulations, the Institute believes that it is in the best interest of missing participants of terminating individual account plans for PBGC to implement a program whereby the entity terminating the plan has the option to transfer the missing participant's account balance to PBGC upon the plan's termination.[5]

Set forth below please find our responses to the questions posed in the RFI, a description of the current DOL abandoned plan program and the challenges associated with the program's distribution restrictions, and the Institute's recommendations with regard to the features of a PBGC program for missing participants of terminating individual account plans.

I. <u>Responses to RFI Questions</u>

We have set forth our responses to each of the questions raised in the order presented in the RFI.

<u>RFI Question 1</u>: For pension consultants: Among individual account plans that you are familiar with, what proportion has participants they cannot find? Among such plans, what is the average number of participants the plan cannot find? In your experience, what is the average account balance, and what is the range of account balances for participants that cannot be found?

With respect to the Institute's members that provide administrative or investment services to individual account defined contribution plans, the challenges and complexities associated with locating missing participants are well understood. As noted in the preamble to DOL final regulations issued in

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[4] Pursuant to DOL Regulation section 2578.1(b), an individual account plan may be found to be abandoned when either no contributions to, or distributions from, the plan have been made for a period of at least 12 consecutive months immediately preceding the date on which the determination is being made, or other facts and circumstances (such as a filing by or against the plan sponsor for liquidation under Chapter 11 of the United States Code, or communication from participants and beneficiaries regarding distributions) known to the qualified termination administrator suggest that the plan is or may become abandoned by the plan sponsor; and following reasonable efforts to locate or communicate with the plan sponsor the qualified termination administrator determines that the plan sponsor no longer exists, cannot be located or is unable to maintain the plan.

[5] While Section 4050 of ERISA appears to focus on missing participants of terminating plans, the challenges associated with locating missing participants extend to active plans as well and we would encourage PBGC to ensure that any program it establishes covers missing participants in active plans as well.

2006 under which an entity meeting certain requirements may voluntarily act as a "qualified termination administrator"[6] (QTA) and terminate a plan that has been abandoned by the plan sponsor,[7] DOL issued the regulations due to the increase in the number of requests for assistance from participants who were unable to obtain money in their individual retirement accounts as a result of the inability of service providers or participants to locate anyone with authority under the plan to authorize benefit distributions. The preamble further stated that DOL had opened over 1,500 civil cases involving defined contribution orphan plans as of September 30, 2005. Additionally, DOL stated that in the over 1,000 orphan plan cases it closed with results through that date, there were approximately 50,000 participants affected and $255 million in assets involved. In the preamble to its 2012 proposed amendments to the 2006 abandoned plan program,[8] DOL stated that the number of applications it received from potential qualified termination administrators to wind up plans had increased from 70 in 2007 to 331 in 2010. DOL recently announced that it had approved a process for JP Morgan Chase and ADP to terminate and wind up approximately 180 defined contribution plans affecting approximately 690 plan participants and beneficiaries and almost $3 million in assets. Further, the ERISA Advisory Council is currently examining issues associated with missing participants and the struggles associated with delivering benefits to participants who are lost or missing.[9]

Data from our members shows that the problems associated with locating missing participants in abandoned or orphaned plans continues to be significant. For example, one of our members has identified approximately 14,000 qualified individual account client plans that have likely been

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[6] In order to serve as a QTA, an entity must be eligible to serve as a trustee or issuer of an individual retirement plan within the meaning of Internal Revenue Code section 7701(a)(37) and hold assets of the plan.

[7] DOL's Final Abandoned Plan Program regulations are available here: http://www.dol.gov/ebsa/regs/fedreg/final/2006003814.pdf. Concurrent with the issuance of the final regulations, DOL issued a final class exemption that permits certain transactions associated with the abandoned plan program. The class exemption provides prohibited transaction relief for a financial institution acting as QTA to select and pay itself (or an affiliate) for rendering termination services to the plan. The final class exemption is available here: http://www.dol.gov/ebsa/regs/fedreg/notices/2006003815.pdf.

[8] The proposed regulatory amendments are available here: http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=26529. The proposed class exemption amendment is available here: http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=26530. The proposed amendments primarily focus on the ability of a chapter 7 bankruptcy trustee to act as a QTA and utilize the existing abandoned plan program to terminate, wind up and distribute benefits from such plans. The amendments also include technical changes to the current abandoned plan regulations not related to chapter 7 plans, but, rather to (1) the required notification by QTAs regarding whether they or an affiliate are the subject of an investigation, examination or enforcement action by the Department, IRS or SEC concerning their conduct as a fiduciary or party in interest to an ERISA covered plan; and (2) the distribution of account balances of deceased participants.

[9] *See:* 2013 ERISA Advisory Council Issue Statement "Locating Lost and Missing Participants" at: http://www.dol.gov/ebsa/pdf/2012ACIssueStatement3.pdf.

abandoned by plan sponsors (including 401(k) plans, profit sharing plans, money purchase pension plans and individual 401(k) plans), with approximately 16,000 participants, and assets of approximately $675.6 million. Another member, which has terminated abandoned plans under the DOL abandoned plan program, reported that 100 percent of the plans it terminated through the program had missing participants. Based on information received from our members, the average account balance attributable to such missing participants ranges from $12,303 to $42,380 and the account balances range from $2 to $72,304.

> ***<u>RFI Question 2</u>: What if any services for missing participants in individual account plans are unavailable in the competitive private marketplace (for example, handling very small benefits or QJSA benefits)? Why are they unavailable (for example because it is not cost effective to provide them)?***

Our members are not aware of any services relating to the termination of individual account plans, including services to locate missing participants in such plans that are not currently available in the competitive private marketplace. Indeed, our members that serve as transfer agents to plans and investment companies that are registered with the U.S. Securities and Exchange Commission (SEC) are required by law to conduct searches for lost security holders.[10] Consequently, such members have long been accustomed to searching for lost account holders, including holders of retirement accounts, through search services that are widely available in the private marketplace. As is discussed below, however, what is needed is a PBGC program whereby account balances of missing participants of terminating individual account plans may be transferred to PBGC upon plan termination.

> ***<u>RFI Question 3</u>: If PBGC provided services for missing participants' accounts in terminating individual account plans that were comparable to the services provided by the private sector and charged comparable fees, would you be likely to choose the PBGC program or the private sector program and why? Would it make a difference if PBGC provided a narrower range of services than typical private-sector providers?***

The Institute's members currently utilize several methods to locate missing participants in terminating individual account plans and some use external service providers. If PBGC could provide services more efficiently and at a competitive price point our members may use such services. However, as is further discussed below, our members do not believe that a PBGC program that solely provides

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[10] *See* Rule 17Ad-17 under the Securities Exchange Act of 1934. The rule requires that the transfer agent "conduct two database searches using at least one information database." In March 2013, this rule was revised, as required by the Dodd-Frank Act, to require all registered broker-dealers to conduct searches for lost security holders.

services to locate missing participants in terminating individual account plans is what is needed to assist missing participants of such plans in obtaining their unpaid retirement assets in an expeditious manner.

> ***<u>RFI Question 4</u>: How would individual account plans' choice to use a PBGC missing participants program for such plans –rather than a private- sector service – be affected by (1) The level of fees PBGC might charge, (2) the minimum benefit size PBGC might accept, (3) optional or mandatory electronic filing, and (4) other possible program features?***

If PBGC could provide missing participant locator services more efficiently and at a competitive price point, our members may use such services, but, more importantly and as is discussed in detail below, we recommend that PBGC implement a program that provides more than only locator services for missing participants of terminating individual account plans.

As stated above, the Institute recommends that PBGC implement a program whereby account balances of missing participants of terminating individual account plans may be transferred to PBGC upon plan termination. As many missing participant's accounts in terminating individual account plans are small, PBGC's implementation of a minimum benefit requirement size in such a program would likely impact our members' willingness to utilize the program. Our members do not believe that an electronic filing requirement would have an impact on their choice to utilize a PBGC program.

With respect to fees associated with locating missing participants in terminating individual account plans, we note that the current DOL abandoned plan program addresses the expenses a QTA may incur in terminating an individual account plan. Specifically, DOL regulations require that expenses incurred by a QTA in terminating an individual account plan be "reasonable." The regulations further provide that expenses are considered reasonable if they are necessary to wind up the affairs of the plan and distribute benefits to the plan's participants and beneficiaries, are consistent with industry rates for such or similar services (based on the experience of the QTA), and are not in excess of rates charged by the QTA (or an affiliate) for the same or similar services provided to customers that are not plans terminated under the abandoned plan program, if the QTA (or an affiliate) provides the same or similar services to other customers.

> ***<u>RFI Question 5</u>: What impact would a PBGC missing participants program for individual account plans have on private-sector benefit processing firms?***

The concerns raised by our members that have presented obstacles to their participation in the abandoned plan program are described below. Several of these issues can be addressed by the implementation of a PBGC program whereby an entity that has elected to serve as a QTA has the option to transfer defined contribution plan assets of missing participants to PBGC upon termination of the plan. Inclusion of a PBGC program of this type as a distribution option within the current DOL abandoned plan program would likely increase our members' willingness to participate in the DOL program.

> ***<u>RFI Question 6</u>: How would you view the value (such as convenience and reliability) of a single database of missing participants' benefits in terminated individual account plans, maintained by PBGC, compared to the burden on plans to provide the data and the burden on PBGC to maintain the database? How would the comparison change if plan reporting of data were voluntary rather than mandatory, making the database less comprehensive? What information should be in the database?***

PBGC's maintenance of a single database of missing participant's benefits in terminated individual account plans would be of great value to such participants, as it would provide them with the ability to seek information regarding their benefits from a single source – PBGC. In many circumstances where a plan has been abandoned by the plan sponsor, it is difficult for a participant to obtain information regarding the plan from the plan sponsor (who has likely ceased operating) and the participant may not have any information regarding the plan's recordkeeper, trustee, or investment service providers. In addition, missing participants in terminated and even active plans may have terminated from employment from the plan sponsor many years in the past and therefore have lost contact with the plan sponsor. A PBGC maintained database of missing participants' benefits in terminated individual account plans combined with a marketing campaign to make the public aware of a PBGC website where participants could easily locate lost retirement accounts would enable participants to determine if they have an account in a simple and effective manner.

In order for a PBGC database to be effective, it must be comprehensive. The Institute would support a mandatory reporting program only if such mandatory reporting was part of an overall PBGC program whereby entities that have elected to serve as a QTA under the DOL abandoned plan program regulations have the option to transfer defined contribution plan assets of missing participants to PBGC upon termination of the plan and such transfer is included within DOL's abandoned plan program fiduciary safe harbor.

In order to assist missing participants in locating their retirement accounts, the database should include the name of the former plan sponsor, the date of the plan termination, the name and contact information of the entity acting as the QTA, contact information for the investment service provider (if applicable), and the missing participant's name, social security number and account balance.

> ***<u>RFI Question 7</u>: ERISA section 4050(b)(2) defines a missing participant as "a participant or beneficiary under a terminating plan whom the plan administrator cannot locate after a***

diligent search." What "diligent search" requirements should apply for individual account plans? Should PBGC offer diligent search services for a fee or post on its Web site the names of private sector companies that provide diligent search services?

The PBGC program should provide that a "diligent and reasonable search" correspond to the search methods contained in DOL Field Assistance Bulletin (FAB) 2004-02.[11] FAB 2004-02 addresses the obligations of a plan fiduciary under ERISA with respect to locating missing participants of a terminating defined contribution plan and includes the following required search methods:

- Use of certified mail;
- Checking related plan records;
- Checking with the designated plan beneficiary; and
- Use of a letter-forwarding service.[12]

FAB 2004-02 states that, in addition to the above search methods, a plan fiduciary should consider the use of internet search tools, commercial locator services, and credit reporting agencies to locate a missing participant, and depending on the facts and circumstances concerning a missing participant, it may be prudent for a fiduciary to use one or more of these search options. The FAB further states that if the cost of using these services will be charged to the missing participant's account, plan fiduciaries will need to consider the size of the participant's account balance in relation to the cost of the services when deciding whether the use of such services is appropriate.[13] As discussed above, some of our members who are subject to SEC requirements utilize the database search procedures required by SEC Rule 17AD-17 (which includes requirements for locating lost security holders) to locate missing participants in terminating defined contribution plans.

We therefore recommend that PBGC, in the implementation of its program, model its definition of a "reasonable and diligent search" on FAB 2004-02 and provide the administrator of a terminating defined contribution plan with the flexibility to use internet search tools or commercial locator services, taking into consideration the size of the participant's account balance in relation to the cost of the services when deciding whether the use of such services is appropriate.

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[11] A copy of FAB 2004-02 is available here: http://www.dol.gov/ebsa/regs/fab_2004-2.html.

[12] We note that the FAB references both the IRS and Social Security Administration letter-forwarding services. Effective August 31, 2012, the IRS announced it will no longer provide a letter-forwarding service to locate missing or lost participants. *See* IRS Revenue Procedure 2012-35, available here: http://www.irs.gov/pub/irs-drop/rp-12-35.pdf.

[13] The Institute has previously recommended that DOL include in its abandoned plan program a *de minimis* exception for very small accounts where the cost of locating a participant would deplete the account balance.

With respect to PBGC providing search services for a fee, or posting on its Web site private sector companies that provide diligent search services, as is discussed below, we believe that a program whereby account balances of missing participants in terminating defined contribution plans may be transferred to PBGC upon plan termination is in the best interest of such participants, as opposed to a program whereby PBGC only provides search services or the names of other entities providing such services.

<u>RFI Question 8</u>: What special concerns do small plans or their sponsors or participants have regarding the treatment of missing participants in individual account plans?

The difficulties our members experience associated with locating lost participants in terminating individual account plans are generally unrelated to the size of the plan. However, we understand that small plans may tend to be abandoned by the plan sponsor more often than large plans due to the economic fragility of small employers.

II. <u>The Distribution Restrictions in DOL's Current Abandoned Plan Program Present Obstacles for Missing Participants and Service Providers</u>

The current DOL abandoned plan program is a voluntary program that allows a financial institution holding the assets of a plan which appears to have been abandoned by its sponsor to act as a QTA, terminate the plan, and distribute benefits to the plan's participants and beneficiaries. Upon the voluntary assumption of such role, a QTA is required, upon deeming a plan to have been abandoned, to wind up the affairs of the plan in accordance with the regulatory provisions of the abandoned plan program. This includes notifying DOL prior to and after terminating and winding down the plan, locating and updating plan records, calculating benefits, notifying participants of the termination and their rights and options, distributing benefits, and filing a final report.

The abandoned plan program also includes a fiduciary safe harbor with respect to the distribution options regarding missing participants.[14] Upon determining that a participant is missing, a QTA is required to roll over the account balance to an individual retirement account (IRA), or to an inherited IRA maintained by an entity eligible to serve as an IRA trustee or issuer. In the case of a distribution which is $1,000 or less and where the amount is less than the minimum amount required to be invested in an IRA offered by the QTA to the public at the time of the distribution, the QTA may distribute the account to either (1) an interest-bearing federally insured bank or savings association account in the name of the participant or beneficiary; (2) the unclaimed property fund of the state in

[14] DOL regulation section 2550.404a-3(b)(2) provides that a missing participant is a participant who has failed to elect a form of distribution within 30 days of the furnishing of the required Notice of Plan Termination by the QTA.

which the participant's or beneficiary's last known address is located; or (3) an IRA offered by a financial institution other than the QTA. DOL's fiduciary safe harbor for distributions from terminating individual account plans does not extend to the selection and monitoring of any service provider necessary for the winding up of the plan or to the reasonableness of compensation paid for such services.

Except with respect to a distribution to a state unclaimed property fund, a QTA must enter into a written agreement with the transferee that provides that (1) the distributed funds are invested in an investment product designed to preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with liquidity (except in the case of a distribution to a federally insured bank or savings association); (2) the investment product selected seeks to maintain a stable dollar value equal to the amount invested in the account and is offered by a state or federally regulated financial institution; (3) fees and expenses attendant to the transferee plan or account, including investments of such plan or account, shall not exceed the fees and expenses charged by the provider of the plan or account for comparable plans or accounts; and (4) the participant or beneficiary shall have the right to enforce the terms of the contractual agreement establishing the account. Finally, both the QTA's selection of a transferee plan or account and the investment of funds cannot result in a prohibited transaction,[15] unless such transaction is exempt from ERISA's prohibited transaction rules.

The distribution restrictions included within the DOL abandoned plan program regulations present challenges and obstacles for missing participants and service providers. With respect to missing participants, the restrictions raise issues involving state unclaimed property laws and make it difficult for a missing participant to obtain his or her account balance after the plan is terminated.

Recent changes to state abandoned property laws have been reported to be more focused on helping states close large budget deficits that have resulted from the recent economic climate than operating in the best interest of owners who have allegedly abandoned their property.[16] Indeed, the manner in which abandoned property laws operate in many states enable states to supplement their general revenues with abandoned property. This is because, if a shareholder's account is deemed abandoned after the applicable dormancy period (*i.e.,* the length of time that must elapse before

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[15] ERISA prescriptively identifies certain types of transactions between a plan and a so-called "party in interest" to the plan that would violate ERISA's prohibited transaction provisions, including, for example, the designation by a QTA of itself or an affiliate as the provider of an individual retirement plan or other account established for the benefit of a missing participant. DOL class exemption 2006-06 provides prohibited transaction relief for a financial institution acting as QTA to select and pay itself (or an affiliate) for rendering termination services to the plan, if certain conditions are met.

[16] *See, e.g.,* Walter Nagel, Donald Griswold, Jeremy Abrams, and Derek Young, "Are States (Es)Cheating You?", State Tax Notes (April 29, 2013).

property is deemed abandoned by law -- which generally ranges from 3-7 years), the shareholder's property escheats to the shareholder's state of residence. Upon escheatment, generally speaking, the property is liquidated and the proceeds are deposited into the state's general revenue fund. While the accountholder may still claim his or her property from the state after escheatment, the value of that property will not reflect any earnings or appreciation that might have otherwise accrued after the account is escheated.

For example, assume a missing participant has an account balance of $1,000 or less and that amount is less than the minimum amount required to be invested in an IRA offered by the QTA. The QTA may then transfer the account balance to an interest-bearing federally insured bank or savings association account in the name of the participant or beneficiary. If, for example, the address on the account is in Delaware or California (each has a three-year dormancy period), and if the "missing participant" for whom the account was established has not affirmatively contacted the financial institution in a three-year period, the account must be escheated to the state, where it is liquidated in short order. In the event the participant reappears after escheatment occurs, he or she must undertake an arduous process to obtain the claimed property. Moreover, the property that will be returned after a claim is validated is the value of the account on the date the state liquidated it, not the value when the accountholder claims it, which could be several years later. The ability to transfer missing participant assets to PBGC upon plan termination would better protect a participant's assets, thereby providing a significant benefit to a lost participant seeking to obtain his or her retirement savings after termination of the plan, regardless of how much time passes between the plan being terminated and the participant being located. Combined with an effective marketing campaign making the public aware of PBGC's role in holding the assets of missing participants of terminated individual account plans, the participant would simply and easily contact PBGC to obtain his or her benefits.

State escheat requirements would also apply to assets held in an IRA (assuming the QTA is able to locate a provider willing to accept a small account with no future contributions). Although each state unclaimed property law varies, we understand that most states require the escheatment of IRA assets when the participant reaches 70½ if there has not been any contact with the shareholder for the state's period of dormancy.[17] In the context of an abandoned plan, it is likely that the employer has ceased operating and the participant will have no information about his account, the asset custodian or other service providers, thereby increasing the likelihood that there will be no contact with the IRA shareholder during the state's period of dormancy.

With respect to our members' willingness to participate in the DOL abandoned plan program, while some of the Institute's members have agreed to act as a QTA and wind down individual account

[17] Internal Revenue Code section 401(a)(9) generally requires a participant to commence distributions from his account by April 1 of the year following the calendar year he reaches age 70½.

plans pursuant to the program, concerns with certain aspects of the program have impacted the willingness of other members to participate.[18]

Institute members continue to be concerned about potential ongoing liability after the abandoned plan is terminated and the assets are distributed, particularly with respect to missing participants. Specifically, our members are concerned that the QTA could have continuing liability subsequent to the winding up of affairs of the plan for subsequent actions taken by the transferee of the assets. For example, the QTA might be considered to have a responsibility to monitor the efforts of the transferee bank or savings association to locate the missing participant or ensure that the fees associated with the account remain unchanged (*i.e*., that the fees continue to be charged against earnings only).[19]

The limitations imposed on QTAs relating to the transfer of accounts balances of missing participants are also of concern to our members. In particular, the requirement that a QTA may only transfer account balances of missing participants to an interest-bearing federally insured bank or savings association account, or to a state unclaimed property fund if the amount to be distributed is less than $1000 *and* the account balance is less than the minimum amount required to be invested in an individual retirement plan product offered by the QTA to the public at the time of the distribution raises additional concerns. Many financial service providers offer low minimum balance requirements for IRAs as a service to plan clients with mandatory cashout provisions or to attract new IRA investors who will likely be actively contributing to the account. If no new contributions are made to the account, as is likely with a missing participant, the cost of maintaining the IRA could quickly erode the value of the assets.

Implementation of a program whereby a QTA could, as a distribution option, transfer the account of a missing participant to PBGC (without regard to the account balance) would both alleviate the obstacles described above and likely lead to increased participation in the abandoned plan program. In particular, it would (1) eliminate concerns regarding continuing fiduciary liability to monitor the

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[18] Some of our members are unwilling to serve as a QTA because they do not believe they meet the regulatory requirements to do so. The abandoned plan regulations require that, in order to act as a QTA, an entity must be eligible to serve as a trustee or issuer of an individual retirement plan within the meaning of Internal Revenue Code section 7701(a)(37) and hold assets of the plan. As we have discussed with DOL, in a self-trusteed plan, the financial institution may merely act as a recordkeeper and therefore not "hold" the assets of the plan in a legal sense. A summary of other concerns raised by our members presenting obstacles to their participation in the program is included in the Institute's comment letter in response to DOL's proposed 2012 abandoned plan program regulation amendments, which is available here: http://www.dol.gov/ebsa/pdf/1210-AB47-0003.pdf.

[19] DOL class exemption 2006-06 includes specific conditions for the provision of termination services and the receipt of fees. One of the conditions is that fees and expenses attendant to the individual retirement plan or other account, with the exception of establishment charges, may be charged only against the income earned by the individual retirement plan or other account.

subsequent actions and fees of the transferee as PBGC would be the transferee, and (2) alleviate the current problems described above associated with a QTA being required to transfer the account balance to an IRA if the balance is less than $1,000, but the QTA offers IRA products to the public in an amount less than $1,000.

III. The Institute's Recommendations Regarding Features of a PBGC Individual Account Missing Participant Program

Based upon discussions with our members, we recommend that PBGC implement a program for missing participants of terminating individual account plans with the following features:

- The program should provide that a QTA terminating a plan under the DOL abandoned plan program may, after the conduct of a diligent search (as is described above) transfer account balances of missing participants to PBGC, without regard to the account balance or whether the balance is less than the minimum amount required to be invested in an individual retirement plan product offered by the QTA to the public at the time of the distribution.[20]

- The program should model its definition of a "reasonable and diligent search" in a manner that corresponds to the applicable provisions of FAB 2004-02 and provide the administrator of a terminating defined contribution plan with the flexibility to use internet search tools or commercial locator services, taking into consideration the size of the participant's account balance in relation to the cost of the services when deciding whether the use of such services is appropriate.

- PBGC should coordinate with DOL so that the PBGC program would be included within the abandoned plan program fiduciary safe harbor provisions, and the program should provide that, subsequent to a transfer to PBGC, the QTA shall have no subsequent liability with regard to the missing participant's account.

- The program should specify that it is applicable to 401(k) plans, ERISA-covered 403(b) plans, money purchase pension plans, and profit sharing plans. Many of our members have informed us that the same issues present with respect to missing participants in terminating 401(k) plans are present with respect to missing participants of these other defined contribution plans.

As discussed above, the Institute does believe it necessary for PBGC to implement an individual account missing participant program that provides only "locator" services as such services are generally

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[20] As discussed at footnote 5, *supra*, we encourage PBGC to extend the program to respond to the challenges associated with missing participants in active plans as well.

available in the commercial marketplace. This type of program alone would not serve to remedy the difficulties detailed above, as it would not serve to increase further service provider participation in the DOL abandoned plan program, simplify the process for missing participants to obtain their retirement benefits, or ensure that such benefits have not been escheated to the state at the time they seek to obtain them.[21]

* * *

Thank you for considering our comments on this matter. The Institute is available to provide additional information and clarification regarding these issues and would welcome the opportunity to meet with you to discuss our comments. Please do not hesitate to contact Howard Bard at 202-326-5810 (howard.bard@ici.org) or the undersigned at 202-326-5920 (david.abbey@ici.org).

Sincerely,

/s/ David M. Abbey

David M. Abbey
Senior Counsel, Pension Regulation

cc: Joseph Canary, Department of Labor, EBSA
Jeffrey Turner, Department of Labor, EBSA

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[21] Further, we believe that restricting the PBGC program to a "locator" service only may be inconsistent with the intent of ERISA section 4050. The Technical Explanation of the Pension Protection Act prepared by the staff of the Joint Committee on Taxation explains that ERISA section 4050 is intended to extend the PBGC defined benefit missing participant program (in accordance with regulations) to defined contribution plans, defined benefit programs that have no more than 25 active participants and are maintained by professional services employers, and the portion of defined benefit pension plans that provide benefits based upon the separate accounts of participants and therefore are treated as defined contribution plans under ERISA. *See* Technical Explanation of H.R. 4, The "Pension Protection Act of 2006," As passed by the House on July 28, 2006 and as Considered by the Senate on August 3, 2006, available here: http://www.jct.gov/x-38-06.pdf.

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Submitted Electronically

August 20, 2013

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

Re: Request for Information Regarding Missing Participants in Individual Account Plans

Dear Sir or Madam:

On behalf of the American Council of Life Insurers ("ACLI")[1], we write in response to the Pension Benefit Guaranty Corporation ("PBGC") Request for Information on Missing Participants in Individual Account Plans published in the Federal Register on June 21, 2013 (the "RFI"). ACLI is pleased that PBGC has undertaken this effort.

The Pension Protection Act of 2006 ("PPA") extended PBGC's existing missing participant program (the "Program"), on a voluntary basis, to terminating defined contribution plans. Under the PPA, effective after final regulations implementing the provision are prescribed, administrators of defined contribution plans will be permitted to elect to transfer missing participants' benefits to the PBGC upon plan termination.

[1] The American Council of Life Insurers represents more than 300 legal reserve life insurer and fraternal benefit society member companies operating in the United States. These member companies represent over 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including both defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

Many plans struggle with how to handle the accounts of missing participants. As you know, one of the topics for the ERISA Advisory Council this year is "Locating Lost and Missing Participants." At the June 4th hearing on this topic, witnesses described the issues that arise regarding lost participants and suggestions for handling those issues. Multiple witnesses[2] suggested that the extension of the PBGC Program would be very helpful to plan administrators.

ACLI encourages PBGC to implement the extension of its Program to terminating defined contribution plans on a voluntary basis and agrees that it would be helpful for plan administrators and service providers. The Program would be particularly helpful in the case of accounts that are subject to the qualified joint and survivor annuity ("QJSA")[3] rules and in the case of low balance accounts. It is true that there are currently private solutions for missing participants' accounts and those solutions have a cost to the plan and to participants. Based on our members' experiences, when a plan is abandoned, in many cases it is primarily the small accounts of missing participants that are left behind. Using what's left of the small balances to engage a private carrier would leave even less (if anything) for the participant. In addition, making the Program available may result in other advantages, such as providing a central location for participants to look for missing defined contribution benefits.[4] Over time, a national PBGC solution would become known to the general public and would likely result in connecting participants and their benefits. It should be made clear that when a plan administrator transfers the accounts of missing participants to PBGC under the Program, the administrator will no longer have fiduciary liability for those amounts.

Abandoned Plan Program

One way that our member companies are directly affected by the problem of missing participants is under the Department of Labor's Abandoned Plan Program, which allows for the termination of, and distribution of benefits from, retirement plans that have been abandoned by their sponsoring employers. The Abandoned Plan Program permits certain financial institutions holding assets of such plans to act as qualified termination administrators ("QTAs") and to wind up the plans and distribute benefits to participants and beneficiaries. Without this important program, financial institutions generally would be unable to wind up these plans, and participants in many cases would be unable to access their plan benefits.

Some of our member companies serve as QTAs. One of the hardest parts of closing down an abandoned plan is the location of missing participants. Generally, the Abandoned Plan Program directs the QTA to distribute the account balance of missing participants through the purchase of IRAs.[5] Note that this option can pose a problem since many IRA providers have a minimum balance requirement. Using the Abandoned Plan Program to terminate defined contribution plans such as money purchase pension plans has proven difficult since they must comply with all of the QJSA

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[2] See testimony of Richard McHugh on behalf of the Plan Sponsor Council of America, Ellen Bruce on behalf of the University of Massachusetts Boston, and Jane Smith on behalf of the Pension Rights Center.
[3] Internal Revenue Code §401(a)(11)(B)(ii).
[4] We are not advocating a mandatory single database for missing participants in terminated individual account plans. However, even as a voluntary program, we feel that PBGC's website would be an easy place for participants to begin a search.
[5] Under current rules, for account balances of $1000 or less, distributions may be made to (1) an interest-bearing federally insured bank or savings association account in the name of the participant or beneficiary, or (2) the unclaimed property fund of the State in which the participant's or beneficiary's last known address is located, or (3) an IRA. See Final Regulation § 2550.404a–3(d)(1). Under amendments to the abandoned plan program proposed on December 12, 2012, the $1,000 threshold may be disregarded if the QTA determines that the participant and, if applicable, the named beneficiary are deceased. Proposed Regulation § 2550.404a–3 (d)(1)(5).

requirements.[6] Some of the difficulties that QTAs have in trying to comply with the QJSA rules with respect to missing participants include:

- The QTA may not be aware if the participant is still living;
- The QTA may not be aware if the participant is married, and if so may not have the date of birth of the spouse;
- The QTA may have difficulty finding an insurance company that will issue an annuity to a missing person; and
- The QTA may have difficulty finding an insurance product that can be used for this purpose.

If the QTA were able to send these benefits to the PBGC under the Program, then the spousal protections under QJSA could be preserved, with minimal expense or administrative burden.

Factors Affecting Plans' Choice to Use PBGC Program

In the RFI, PBGC asked about a variety of features or requirements and the effect they would have on plans' decision to use the PBGC Program. A number of factors would affect whether administrators choose to use the PBGC Program versus a private sector service. Section 408(b)(2) of ERISA requires that no more than reasonable compensation be paid for services under a contract with a plan. Therefore, clearly the comparison of fees and services the PBGC charges relative to a private sector provider would be a primary factor in the decision. Because low balance accounts are more difficult for plan administrators to handle, PBGC should not impose a minimum balance for its Program. If PBGC were to impose a minimum balance, the higher the minimum balance, the less useful the Program would be. Our member companies would be pleased to use electronic filing. Therefore, optional or mandatory electronic filing would not be a deterrent to choosing the Program.

Diligent Search Requirements

As noted in the preamble to the RFI, ERISA section 4050(b)(2) defines a missing participant as a "participant or beneficiary under a terminating plan whom the plan administrator cannot locate after a diligent search." PBGC asked in the RFI what "diligent search" requirements should apply for individual account plans. Under PBGC's existing Program for defined benefit plans, a diligent search includes inquiry of any beneficiaries of the missing participant whose names and addresses are known to the plan administrator. It also includes use of a commercial locator service. In the DOL's Abandoned Plan Program, a participant is considered missing if he or she fails to respond within 30 days from the date the notice of plan termination is furnished by the qualified termination administrator.[7] Either of these options seems reasonable. We note that the IRS letter forwarding

[6] The Department of Labor recognized these difficulties and in Section (d)(2)(vii)(B)(2) of the Proposed Regulation amending the Abandoned Plan Program, provided that "[i]f a qualified termination administrator determines that the survivor annuity requirements in sections 401(a)(11) and 417 of the Internal Revenue Code (or section 205 of ERISA) prevent a distribution under paragraph (d)(2)(vii)(B)(1) of this section, [it shall distribute benefits] in any manner reasonably determined to achieve compliance with those requirements." However, our members have requested more guidance on this provision.
[7] See § 2578.1(d)(2)(vii)(B).

program has ended.[8] The Social Security letter forwarding service is prohibitively expensive for this purpose.[9]

Database of Missing Participants

In the RFI, PBGC asks about a single database of missing participants' benefits in terminated individual account plans, to be maintained by PBGC. This database would enable more Americans to recover lost or abandoned assets to help with their retirement savings. Given the retirement readiness problem in the United States, anything we can do to help Americans accumulate retirement assets should be considered beneficial. However, rather than mandate reporting of data, PBGC should encourage plan administrators to provide information on a voluntary basis. Encouragement could be done by making the reporting simple and convenient and by emphasizing the benefit to participants of having the database become as comprehensive as possible. There are already so many complex administrative requirements in maintaining and terminating a qualified plan, and administrators should not be penalized for not using this database. In addition, we don't believe that PBGC currently has the authority to mandate this reporting for defined contribution plans. Before implementing a database, PBGC should coordinate with other agencies including the Social Security Administration, to ensure that it is not duplicating its efforts.

* * * * *

On behalf of the ACLI member companies, thank you for consideration of these comments. As stated above, we welcome the opportunity to discuss these comments and engage in a productive dialogue with the PBGC on these important issues.

Sincerely,

Walter C. Welsh

Walter C. Welsh
Executive Vice President,
Taxes & Retirement Security

James H. Szostek
Vice President,
Taxes & Retirement Security

Shannon Salinas
Counsel
Taxes & Retirement Security

cc: Jeffrey Turner, Office of Regulations and Interpretations, EBSA
Stephanie Ward Cibinic, Office of Regulations and Interpretations, EBSA

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[8] On August 31, 2012, the Internal Revenue Service issued Revenue Procedure 2012-35 revising the scope of its letter-forwarding program. Revenue Procedure 2012-35 provides that the IRS will no longer forward letters on behalf of plan sponsors or administrators of qualified retirement plans or QTAs of abandoned plans under the Department of Labor's Abandoned Plan Program who are attempting to locate missing plan participants and beneficiaries.

[9] The current rate is $35 per letter.

PENSION RIGHTS
CENTER

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August 20, 2013

Submitted electronically to
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Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC 20005-4026

Re: Missing Participants in Individual Account Plans: Request for Information

The Pension Rights Center is a nonprofit consumer organization that has been working since 1976 to protect and promote the retirement security of American workers, retirees, and their families. The Pension Rights Center commends the Pension Benefit Guaranty Corporation for seeking public input on establishing a missing participant program for terminating defined contribution plans. This program, when implemented, will complement the already successful PBGC missing participant program for single employer defined benefit plans.

BACKGROUND

Employers terminating retirement plans must distribute all benefits to participants and beneficiaries before termination is complete. However, it is not uncommon for a plan administrator to be unable to locate one or more plan participants or beneficiaries who are entitled to benefits. Since the plan cannot properly be terminated until the benefits owed are distributed, the question becomes what to do with the benefits owed to participants and beneficiaries who cannot be found.

The PBGC's missing participant program for terminating single employer defined benefit plans has been successful in connecting participants and beneficiaries with their benefits. Under the PBGC standard termination program employers must purchase an annuity from a private insurer for missing participants and beneficiaries and give the individual's personal and annuity information to the PBGC. Alternatively, the individual's benefit amount can be transferred to the PBGC. Both methods must be preceded by a diligent search for the "missing" person. The PBGC posts the names of missing participants on the PBGC website.

The Pension Protection Act of 2006 authorized an expansion of the PBGC missing participant program to include terminated defined contribution plans, such as 401(k) plans, multiemployer defined benefit plans and small professional service plans. This Request for Information seeks comments on establishing a missing participant program for terminating defined contribution plans.

DISCUSSION

A missing participant program managed by the PBGC will be helpful both to employers terminating individual account plans and to their former participants and beneficiaries who may need to search for their "missing" retirement benefits years after their plans are terminated.

Many employees with retirement accounts in an employer's defined contribution plan choose to leave their money in those accounts when they change jobs or stop working. Former employees who are separated from their employers can easily become "missing" participants. There are many ways former participants and beneficiaries become separated from their retirement plans. The most obvious is when the participant fails to notify the plan of a change in address. Similarly, when personal identifiers change due to divorce or marriage the plan may not be notified. Sometimes an employer has moved, merged with another company or changed names so that a participant cannot locate the plan to provide notice. Also, addresses can be incorrectly entered into a computer resulting in notices sent that do not reach the intended party. Participants and beneficiaries may not be aware of a missing benefit until they receive a "Notice of Potential Private Pension Benefits from Social Security"[1] long after a plan has been terminated.

<u>Central database</u>
The Pension Protection Act of 2006 gives the PBGC authority to require terminating defined contribution plans to submit information on missing participants and their benefits to the PBGC.[2] **We urge the PBGC to exercise this authority by *requiring* employers terminating defined contribution plans to provide information to the PBGC on missing participants and their benefits for inclusion in a central database maintained by the PBGC.** A central database listing the names of missing participants and the location of their benefits would provide an invaluable one-stop source for participants, beneficiaries and their advocates seeking to find missing benefits, and would not be burdensome for employers. A voluntary, rather than mandatory, system would be far less efficient. A voluntary database would merely be one source among many that participants searching for their benefits would have to pursue, without any guarantee of success.

The required information for the database should be detailed enough to enable a former "missing" participant or beneficiary to later locate and claim his or her benefits. For accounts not transferred to the PBGC, the information could include the name of the participant or beneficiary, the name of the employer, the amount of money in the account, and contact information for the institution receiving the benefits.

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[1] This notice is sent to individuals when they apply for Social Security benefits. Beneficiaries of deceased participants receive the notice upon applying for a survivor benefit from Social Security. The notice is based on information filed with the IRS by employers. The notice states that a private pension plan benefit may be available from the employer.
[2] See Sec. 410 of the Pension Protection Act. http://www.gpo.gov/fdsys/pkg/PLAW-109publ280/pdf/PLAW-109publ280.pdf

Diligent Search
A "diligent search" must precede any distribution of missing participant accounts from terminating defined contribution plans. The PBGC has established guidelines for a diligent search for missing participants from terminating defined benefit plans.[3] The Department of Labor issued somewhat different guidance for a diligent search in Field Assistance Bulletin 2004-02, "Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans."[4]

We urge the PBGC to work with the Department of Labor in establishing standards for a diligent search. Similar guidance for a diligent search will ensure that employers will not choose one method of distribution over another based solely on differences in the standards for searches.

We recommend that the PBGC define a diligent search by listing the steps to be followed, beginning with the simplest and least costly. Notice by first class mail should be a required first step. Electronic notification is not sufficient since e-mail addresses change frequently. Also, electronic messages can be deleted by other family members or buried in large volumes of spam. Certified mail is also not adequate since a certified letter can be returned while a participant is on vacation or visiting relatives, and certified mail notices are so small that they can easily be lost in a bundle of mail.

Employers may have internal sources for locating a participant. Employers often have contact information for beneficiaries or other family members. Some employers may have other plans, such as health plans, that can be checked for participant or beneficiary addresses. Employers can use Internet search tools to locate a participant. Social Security offers a letter forwarding service for a nominal fee of $35.[5] It is our view that use of a commercial locator service should be a last step. Fees for a commercial search should not be charged against individual account balances.

Guidelines for Individual Accounts Transferred to the PBGC
We recommend that the PBGC consider the following guidelines in designing the missing participant program for terminating individual account plans.

* To the greatest extent possible, participant and beneficiary accounts transferred to the PBGC should not be reduced by fees and charges, neither to search for missing participants nor to manage accounts once distributions are received.

*Participant account balances should be managed to preserve principal.

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[3] See 29 CFR Sec. 4050.4.
[4] http://www.dol.gov/ebsa/regs/fab2004-2.html

[5] Social Security generally forwards a letter to the last employer of record unless the person is receiving benefits from Social Security and Social Security has the person's address.
http://www.socialsecurity.gov/foia/ltrfwding.html

*PBGC fees, if any, should be graded so that small employers with limited resources are not discouraged from transferring missing participant accounts to the PBGC.

*All accounts, regardless of their size, should be transferable to the PBGC. Small benefit amounts have value, especially for persons with limited incomes.

We also recommend that the PBGC coordinate with the Labor Department in designing the missing participant program. The Labor Department has the authority to interpret the fiduciary obligations of employers in terminating defined contribution plans. Employers terminating defined contribution plans who do not choose to transfer the accounts of missing participants to the PBGC must follow Labor Department fiduciary guidance on search methods and distribution options for terminated defined contribution plans.[6] The Labor Department will likely wish to revisit this guidance to accommodate an expanded PBGC missing participant program. For example, the tax consequences, if any, of account transfers and distributions should be similar under DOL and PBGC rules.[7]

Additional Resources

The Pension Rights Center has previously recommended that the PBGC establish a Lost Pension Plan Registry that would provide information needed by participants to locate a former employer's plan when the employer has changed name, location or corporate structure.[8] Information for a Lost Pension Plan Registry is already provided by employers on IRS Form 8955-SSA. A Lost Pension Plan Registry could be established with minimal effort and at low cost. Unlike the Missing Participants Program, the proposed Registry would not list individuals. Participants seeking benefits would use the registry to search for their former employers. Such a registry would reduce the overall number of missing participants, and thus, the costs of the PBGC missing participant program.

Conclusion

By connecting participants with their earned benefits, the PBGC's missing participant program will be very helpful to the sponsors of terminating defined contribution plans. It will also provide missing participants and their beneficiaries an invaluable one-stop location to search for their benefits.

[6] See EBSA Field Assistance Bulletin 2004-02. http://www.dol.gov/ebsa/regs/fab2004-2.html.

[7] The PBGC received guidance from the IRS that transfers from terminating defined benefit plans to the PBGC missing participant program will not be taxed until the participant claims the account. http://www.pbgc.gov/prac/terminations/missing-participants.html

[8] Pension Rights Center statement before the ERISA Advisory Council on Locating Missing and Lost Participants. http://www.pensionrights.org/sites/default/files/docs/130604_jsmith_statement_to_erisa_council_lost_pension_plans_registry.pdf and Pension Rights Center fact sheet on establishing a Lost Plan Registry. http://www.pensionrights.org/sites/default/files/docs/proposal_for_lost_pension_plan_registry.pdf

We appreciate the opportunity to comment on this initiative that will help so many participants and beneficiaries locate their earned benefits.

Sincerely,

Jane T Smith

Jane T. Smith
Policy Analyst

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J. Spencer Williams
President & CEO

August 20, 2013

Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW., Washington, DC 20005–4026

Dear Sir/Madam,

Retirement Clearinghouse, LLC (RCH) is pleased to present our response to the Pension Benefit Guaranty Corporation's Request for Information concerning the potential expansion of its Missing Participant program to include terminating individual account (i.e., defined contribution, or "DC") plans. We appreciate the PBGC's approach in soliciting feedback from the public to consider a range of options to assist in efforts to reunite participants with their retirement plan savings.

EXECUTIVE SUMMARY

The issue of missing participants in our retirement system is a multi-dimensional problem. When providing solutions to address this problem, it is tempting to consider only those elements directly related to searching for -- and finding -- missing participants. RCH believes that this over-simplifies the problem. RCH urges all missing participant service providers to craft solutions that not only locate missing participants but also mitigate and/or eliminate both the upstream causes and the downstream effects. This is even more critical when contemplating a solution with broad scope, scale and potential system-wide impact.

Missing participants are a significant and recurring issue in the American retirement system:
Meanwhile, job-changing, re-location and early mortality all combine to drive the missing participant issue. These factors, when combined with more plans offering auto-enrollment, create a problem that is widespread and increasing, as job-changers leave behind stranded, mostly small-balance defined contribution accounts.

Systematically dealing with the missing participant issue can deliver significant benefits:
Although "people locator" services are common, in practice few providers or plan sponsors address missing participants effectively or seamlessly. However, industry best practices clearly point the way to solutions that can provide the necessary scale and efficiency to perform these services effectively and affordably.

Simply "finding" missing participants is not enough:
The critical, missing link in dealing with missing participants occurs after they are found. For working, small-balance job-changers, it is particularly critical to offer guidance that keeps these "found" participants invested in their retirement, thus avoiding the over-whelming behavioral tendency to cash out their retirement savings. Offering the "found" participant the option of consolidating their retirement savings into an active plan is an effective solution, and one which the PBGC should consider.

Expanding the PBGC's Missing Participant program, if done correctly, can make a difference:
Expanding missing participant services to terminating DC plans -- if correctly conceived and implemented -- can not only minimize the problem, but can better-position millions of small-balance job-changers for retirement. In our response, RCH outlines what we believe is an industry best practices model, and we are willing to share our experience with the PBGC as it moves forward in considering this important initiative.

I. OUR APPROACH TO THE PBGC REQUEST FOR INFORMATION

The problem of missing participants in our retirement system is well-known by providers and plan sponsors who frequently struggle to effectively deal with this issue. For DC plans that are terminating, the problem is more acute, as both the plan sponsor and the provider are likely to be facing a number of challenges.

Less well-known are the problem's causes or the industry best practices that have evolved to deal with it.

<u>Accordingly, RCH's response to PBGC's RFI first provides critical background information on the missing participant problem, including:</u>

1. Over-arching goals for a missing participant program
2. A root cause analysis of the missing participant problem
3. Industry best practices that address/minimize the issue
4. The missing link: best practices for helping missing participants once they are found

<u>Based on the foundation laid above, RCH's response then provides our responses to specific questions posed in the PBGC RFI , including:</u>

1. Extent of demand for a missing participant program and database of missing participants
2. Availability of private sector missing participant services
3. Potential program costs and fees
4. Other considerations

II. BACKGROUND

Over-arching goals for a missing participant program

At first glance, the over-arching goals of a missing participant program seem obvious: simply find missing participants and re-unite them with their retirement savings. While important, RCH believes that this over-simplifies the issue, ultimately leading to sub-optimal retirement outcomes.

<u>RCH believes that there should be three overarching goals for missing participant programs:</u>

1. To minimize or significantly reduce the overall incidence of missing participants;
2. To effectively find missing participants once they become lost to a plan; and
3. To offer to "found" participants unbiased, product-neutral and balance-blind assistance that delivers the appropriate consolidation service, depending upon each participant's individual needs.

In #3 above, RCH advocates giving priority to re-uniting balances to an existing plan, given the safeguards within the plan system.

A root cause analysis of the missing participant problem

On June 24th, 2013, RCH testified before the ERISA Advisory Council on the topic of locating lost and missing participants (http://www.dol.gov/ebsa/pdf/retirementclearinghouse060413.pdf), identifying three primary drivers of the problem: change of residence, change of job and early mortality.

As participants change jobs, re-locate and "go missing," plan sponsors and providers see their mail returned and their retirement distributions un-cashed. The dimensions of the job-changer dynamics are staggering and are documented in Appendix A: The Job-Changer Market By The Numbers.

To estimate the number of missing participants in the defined contribution system, RCH uses a range of 2% (low) to 6% (high) against the population of 70,000,000 defined contribution participants, arriving at the totals in Table 1 below.

Table 1: Estimated Number of Missing Participants (Defined Contribution System)

	Estimated Number of Missing Participants		
Percent Missing	2%	4%	6%
No of Missing Participants	1,400,000	2,800,000	4,200,000

Industry best practices that address/minimize the issue

RCH has developed and implemented a set of best practices that proactively update participant address information beginning at the point of termination to minimize the impact of job-changers on the number of missing participants. The process is analogous to a funnel by which participants are located via progressively diligent address update and search activities, resulting in far fewer truly missing participants emerging at the end.

Best practices to minimize missing participants include:

1. Initiating periodic data "scrubbing" efforts at termination;
2. Utilizing "waterfall" methodology with credit service bureaus;
3. Engaging subscription-only legal and journalistic services; and
4. Performing "last-ditch" creative searches

These best practices are addressed in detail in our testimony before the ERISA Advisory Board.

The missing link: best practices for helping missing participants once they are found

For working, small-balance job-changers, it is particularly critical to offer guidance that keeps "found" participants invested in their retirement, thus avoiding the overwhelming behavioral tendency to cash out their retirement savings. Industry cash-out and leakage statistics as well as behavioral finance case studies support this point.

The most critical best practice for ensuring that "found" participants avoid cashouts and remain invested in their retirement is the plan-to-plan "roll-in. " The "roll-in" option enables participants to easily consolidate their retirement savings into a current, active retirement savings account, which also saves them time and money in managing their retirement savings.

Taken together, these best practices address the root causes of missing participants and as we've testified, we believe could eliminate 90 to 95 percent of lost and missing participants while simultaneously reducing cash outs dramatically and simplifying management of retirement savings for millions of Americans.

These best practices have been validated in research performed by the Boston Research Group in April, 2013. The group's white paper can be found at www.bostonresearch.com/whitepaper.pdf.

III. OUR RESPONSE TO THE PBGC REQUEST FOR INFORMATION

Key Assumptions:
RCH assumes that the PBGC would have to act in accordance with the DOL's Field Assistance Bulletin 2004-02, "Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans." According to the same Field Assistance Bulletin, "[a] plan fiduciary cannot distribute a missing participant's benefits… unless each of these methods proves ineffective in locating the missing participant." After missing participant search cycles are exhausted and all voluntary distributions are taken, the remaining assets are distributed into a safe harbor IRA of the plan sponsor's choosing. Distributions to safe harbor include never-located missing participants, non-responsive participants, and those who have decided they want their funds to roll into the safe harbor.

RCH further assumes that the expansion of the PBGC Missing Participants program to terminating DC plans would be subject to the same ERISA limits as terminating defined benefit plans. In other words, only the "never-located" missing participants of terminated DC plans would be eligible for consideration in this service.

Operating under those assumptions, the PBGC could consider:
1. Simple recordation of never-located, missing participants in the PBGC Unclaimed Benefits database;
2. Voluntary transfer of never-located, missing participant balances to a PBGC-administered safe harbor;
3. Missing participant search services, delivered after movement of missing participants to safe harbor; and
4. Additional services delivered to "found" missing participants (e.g. account consolidation to an active retirement savings account).

If the PBGC chooses to offer a voluntary safe harbor IRA option (#2 above) for never-located missing participants, then RCH believes -- given the benefits to the system -- that it is imperative to effectively structure this service. This requires an effective process to handle the setup and ongoing administration of the safe harbor accounts, as well as implementation of best practices for items #3 and #4 above.

Availability of private sector missing participant services

Currently, there are a number of well-known providers offering bundled and un-bundled missing participant services, including:

- Numerous service partners linking to the National Change of Address (NCOA) registry;
- Consultants offering participant record audits;
- One-stop web-based searches (e.g. www.employeelocator.com);
- The major credit service bureaus (Experian, Equifax and TransUnion);
- Subscription-only legal and journalistic services (e.g. Lexis/Nexis);
- Generic people search websites (e.g. www.four11.com, www.anywho.com, www.whowhere.com, www.whitepages.com); and
- Generic web search engines

Clearly, there is no shortage of people locator services.

As RCH has pointed out above, the problem of missing participants would be dramatically reduced if preventative techniques were consistently employed. This is particularly true in the case of terminating DC plans, in which most, if not all of the participants are already ex-employees, and are more likely to have changed jobs or re-located.

Once transferred to safe harbor, it is important to implement best practices that 1) effectively and efficiently find missing participants (or their beneficiaries) and 2) when found, offer appropriate guidance. According to industry leakage statistics, up to 60 percent of the small-balance participants are likely to cash out their retirement savings instead of consolidating them with another, active retirement account. This unfortunate behavioral tendency deprives millions of Americans of their retirement savings.

In summary, while people search services are common, they are generally not efficient, effective or comprehensive enough to truly serve the needs of the American job-changer, since they do not help in re-uniting "found" balances with existing plans.

Extent of demand for a missing participant program and database of missing participants

It is important to realize that market demand may or may not align with public interest, but the PBGC can still serve an overall market need with a strong offering, whether currently recognized by the market or not.

Demand for a PBGC Missing Participant Program
If structured simply as a generic missing participant search service for terminating DC plans, the PBGC Missing Participant Program will encounter relatively low market demand, largely due to the already-existing, private-sector services noted above.

The PBGC Missing Participant program could promote higher market take-up rates by differentiating itself from other programs, through the inclusion of best search practices, also as noted above.

Finally, if the PBGC chooses to offer a voluntary safe harbor option for terminating DC plans and incorporates best practices for missing participant search services, as well as "post-found" guidance, this would clearly create a service that is differentiated from others. This, in our view, would create the optimal combination of market demand, as well as clearly being in the public interest.

Demand for a Database of Missing Participants
While there is no market demand per se, RCH gives its unqualified support to a centralized database of missing participants for terminating DC plans, linking participants to private-sector providers who offer their funds safe harbor. RCH believes that this is clearly in the public interest.

Potential program costs and fees

Program Costs
Missing participant costs are based upon the services employed, as well as the support required to offer and to operate them.

At the low end of the cost scale are services offered by National Change of Address (NCOA) affiliates. Each automated search, submitted in electronic format and in high volumes, costs a fraction of a cent.

As other, more-sophisticated automated search technologies are employed, costs rise. Credit service bureau checks can cost $0.25 per search, if submitted in batch, and can increase as "waterfall" services are engaged. Subscription-only legal and journalistic searches range from $0.30 to $1.25 per search, increasing if the participant is deceased.

Web-based search services can vary in cost. Some "free" services can locate participants, but have the drawback of requiring a dedicated operator to manually perform each search. Thus, the cost of labor becomes the significant component of the missing participant search process.

If the PBGC considers offering a voluntary safe harbor IRA option, then the cost of account setup and ongoing administration must be considered, and can vary greatly, depending upon the solution. The cost of incorporating "found" participant guidance and account consolidation services should also be considered.

Program Fees
With respect to missing participant search services, RCH assumes that PBGC would adopt a market-based approach. The PBGC could choose to "bundle" or to "un-bundle" their search services, based upon the specific service that is ordered or eventually utilized. For example, if a customer delivers an electronic file of missing participants, and these participants are found with low-cost search tools (e.g. NCOA), then the fees could be

tiered. Alternatively, the PBGC could elect to completely "bundle" their search services, assuming that a mix of search tools will be employed but averaging their cost over their expected mix and volumes.

If the PBGC elects to offer a more comprehensive Missing Participant search to terminating DC plans, including a voluntary safe harbor IRA option, then safe harbor account administration fees should be considered. In the private sector, these fees are generally quite low. When considering fees for account consolidation, these can generally be commensurate with fees charged by the private sector for safe harbor IRA distributions.

Other considerations

As the PBGC begins to define the scope and approach of their expanded Missing Participant program, RCH believes that the PBGC should consider a partnership with private-sector search services and/or missing participant providers.

This approach offers the PBGC the following advantages:

- Lower development costs;
- Ability to oversee services directly related to terminating DC plans;
- Leveraging best practices already in place in the private sector;
- Economies of scale, if the program is adopted by additional large plan sponsors, service providers and other governmental entities; and
- Combining missing participant services with "found" participant guidance and account consolidation services.

IV. CONCLUSION

RCH firmly believes that the extension of PBGC missing participant services to terminating DC plans -- if correctly conceived and implemented -- can make an important contribution to our retirement system. RCH believes that this is particularly true for the expansion of the database for missing participants, which we support for terminating DC plans.

This view is based on:

- Our own experience in performing missing participant search services for small, medium and mega plan sponsors;
- Validation by industry statistics and independent case studies; and
- Our direct interaction with public policy makers and with a cross-section of industry trade groups.

RCH further believes that the PBGC should consider a partnership with the most capable, experienced and independent private sector providers in order to launch, operate and integrate these services within a broader framework, which includes consolidation within the plan system.

RCH would be pleased to work with the PBGC to further define the parameters of this important project.

Appendix A: The Job-Changer Market By the Numbers

Retirement Clearinghouse — an RLJ company

The Job-Changer Market: By the Numbers

Statistic	Description	Source
I. THE U.S. JOB-CHANGER PHENOMENON		
7.4:	number of times an employee will change jobs in a 40-year career	Employee Benefit Research Institute (Employee Tenure Trends, 1983-2012)
70 million:	total number of D.C. participants	Investment Company Institute, "The U.S. Retirement Market, 2007," Research Fundamentals, vol. 17, no. 3 (2008)
9.5 million:	estimated number of D.C. participants affected by job-changing, annually	Job persistence (avg. tenure / avg. length of career) x total number of D.C. participants (70 million; from GAO Study)
34%:	of dollar distributions to job-changers with balances less than $5,000	Employee Benefit Research Institute (Lump Sum Distributions at Job Change)
66%:	of dollar distributions to job-changers with balances less than $20,000	Employee Benefit Research Institute (Lump Sum Distributions at Job Change)
II. THE CRISIS AT THE POINT-OF-SEPARATION		
Cash-Outs Leaving the System		
$74 billion:	annual cash-outs, at separation	General Accounting Office, Report to the Chairman, Special Committee on Aging, U.S. Senate (August 2009)
42%:	of workers terminated in 2010, taking a cash distribution	Aon Hewitt (Leakage of Participants' DC Assets: How Loans, Withdrawals, and Cashouts Are Eroding Retirement Income, 2011)
40%:	of participants with balances < $20,000, cashing out completely	Fidelity Investments (Plugging the leaks in the DC system: Bridging the gap to a more secure retirement: Q2 2010)
74%:	of employers expressing alarm over cashout behavior	Aon Hewitt (Leakage of Participants' DC Assets: How Loans, Withdrawals, and Cashouts Are Eroding Retirement Income, 2011)
Proliferation of Small-Balance IRAs and "Stranded" D.C. Accounts		
38 million:	separated/retired participants remaining in D.C. plans ("stranded")	Cerrulli (Quantitative Update, Retirement Markets 2009)
25 million:	small-balance IRAs (less than $25,000)	EBRI / IRS Data (2004)
III. THE OPPORTUNITY FOR POLICY & BEST PRACTICES		
Reducing Cash-Outs by 50%		
$1.3 trillion:	increase in retirement savings by 2020, if cashout rates reduced 50%	EBRI Center for Retirement Income
Consolidating Small-Balance & "Stranded" Accounts		
$43.5 billion:	participant fees saved by consolidating "stranded" D.C. accounts	2012 "stranded" accounts, growing at 5% per year, over 10 years @ $92/account/year

August 20, 2013

Filed Electronically:
Via reg.comments@pbgc.gov

Pension Benefit Guaranty Corporation
Suite 12300
1200 K Street, NW
Washington, DC 20005-4026

Re: Missing Participants in Individual Account Plans
78 Fed. Reg. 37,598 (June 21, 2013)

Dear Sir and Madam:

AARP appreciates the opportunity to comment on the Pension Benefit Guaranty Corporation's (PBGC) Request for Information Concerning Locating Missing Participants in Individual Account Plans.

As the largest nonprofit, nonpartisan organization representing the interests of Americans age 50 and older and their families, a major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. Many of our members currently participate, or have participated, in employer-sponsored retirement plans, including individual account plans. U.S. Dep't of Labor, *Private Pension Plan Bulletin Abstract of 2010 Form 5500 Annual Reports*, Emp. Benefits Sec. Admin., 1-3 (Nov. 2012), http://www.dol.gov/ebsa/PDF/2010pensionplanbulletin.pdf. It is crucial that plan participants actually receive the benefits to which they are entitled so that they may achieve and maintain an adequate income in retirement.

The problem of lost pensions and missing participants are mirror images of the same problem — a failure to distribute retirement benefits to the participants who earned them. The reasons for this failure are also related.

American workers and their families are mobile, both in the amount of time they stay in their jobs and the number of years they stay at one address. Currently the overall median job tenure — the amount of time an individual has been with his or her current employer — is 5.4 years. Paul Fronstin, Employee Tenure Trends, 1983–2012, 33 EBRI Notes, no. 12 (Employee Benefit Research Institute, Dec. 2012), http://www.ebri.org/pdf/notespdf/EBRI

_Notes_12_Dec-12.HCS-Tenure1.pdf. The data on employee tenure indicates that most workers frequently change jobs during their working careers. *Id*. Accordingly, an individual could have 7 or more jobs during his or her career. Moreover, approximately 12.5 percent of people in the United States change residences every year. *Census Bureau Reports Housing is Top Reason People Moved Between 2009 and 2010* (May 23, 2011), http://www.census.gov/newsroom/releases/archives/mobility_of_the_population/cb11-91.html. Thus, an individual could have a number of addresses during his or her job tenure with a particular employer, and even more after leaving that employer.

Relatedly, employers also go through changes. They may move their locations, cease operations for various reasons, go bankrupt, merge several times, spin-off into multiple companies, or just change names. Not surprisingly, just as plans have difficulty tracking down employees, employees have difficulty tracking down their former employers.

In addition, surveys demonstrate that smaller account balances are more likely to become lost. Given the combination of short job tenure, guaranteed vesting of employee contributions, shorter vesting periods for employer contributions, and automatic enrollment, it would not be surprising to see an increase in lost or forgotten individual account plans in the future.

For all of these reasons, there is a real and growing possibility that an individual may lose track of an individual account plan due to an inability to locate the plan and claim a benefit, forgetting about an account, or even ignorance as to the existence of an account. Given the growing problem of retirement readiness, for some individuals, even a small account balance can make a difference in their future financial security in retirement. Moreover, unlike in the defined benefit plan context, death does not extinguish the benefit; the account can be inherited by the participant's beneficiaries. Therefore, the issue of locating lost account participants has implications both for participants themselves and for beneficiaries of deceased participants.

AARP believes that having one centralized database where participants can check to determine whether they have a lost account as well as a lost pension will make it easier for participants (and their beneficiaries) to track down their lost retirement monies. AARP submits that the database should be established in the same manner as the current Missing Participant database — the participant's name, the name of the plan, the last known address of the participant, and the termination date are all relevant and essential data. AARP also suggests the database be searchable by name of the participant and name of the employer.

Inasmuch as it is generally the plan sponsor's decision to terminate the plan, AARP submits that it should be the plan sponsor's obligation — if the plan cannot find a participant — to pay whatever reasonable fees the PBGC decides to assess to hold the account of the missing participant. This is particularly important because many holders of small rollover individual accounts charge substantial account maintenance fees so that the account is gradually reduced and possibly even drained of all assets, leaving the participant with little or no retirement monies from that account.

AARP would also support using this database so that participants can locate their accounts, even if the plan is active, given the numerous reasons participants could lose track of their accounts. For active plans with lost participants, the PBGC could just collect information with a minimal fee charged to the plan for use of the database. Alternatively, the PBGC could hold accounts of lost participants in active plans making the PBGC's efforts more cost-effective.

Finally, AARP believes that the PBGC should require terminating individual account plans to transfer the accounts and their assets of missing participants to the PBGC after the terminating plans have performed a diligent search. The PBGC should be the preferred custodian for these accounts to better preserve the assets in the account. The PBGC is the logical entity for maintenance of such a database and related account assets for at least two reasons. First, the two government departments regulating individual account plans — the Treasury and Labor — sit on the PBGC's Board of Directors with the Secretary of Labor as Chair. Second, the PBGC has investment experience from dealing with terminated defined benefit plans.

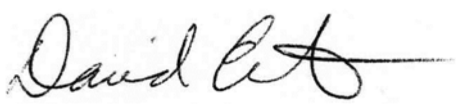
AARP supports the requirement that diligent search procedures should apply to missing participants in individual account plans. However, the PBGC need not delineate exact steps to conduct a diligent search, but could recommend — similar to the Department of Labor — the types of steps that a terminating plan should consider. *See* Field Assistance Bulletin 2004-02: *Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans* (Sept. 30, 2004). Some steps may be more productive for a plan than others on account of the context, such as a multiemployer plan checking with a related health plan.

AARP applauds the PBGC's continuing efforts to locate missing participants so that they may receive their pension benefits. AARP calls on the Departments of Labor and Treasury to share data and information with the PBGC and to take actions within their jurisdiction to make the PBGC's efforts successful to connect missing participants with their accounts. *E.g.*, 2013 ERISA Advisory Council, Issue Statements, *Locating Missing and Lost*

Participants, http://www.dol.gov/ebsa/pdf/2012ACIssueStatement3.pdf. AARP further pledges our continued cooperation with the PBGC to locate missing participants. Indeed, the July/August 2013 edition of the AARP BULLETIN — our publication that reaches every AARP member household — includes a suggestion to "find your pension" using the PBGC's online database.

Once again, AARP appreciates this opportunity to provide its views on this Request for Information Concerning Locating Missing Participants in Individual Account Plans. If you have any questions, please do not hesitate to contact Cristina Martin Firvida at 202-434-6194.

Sincerely,



David Certner
Legislative Counsel & Legislative Policy Director
Government Affairs

cc: Catherine B. Klion
Assistant General Counsel
PBGC

August 20, 2013

Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, D.C. 20005–4026

RE: Missing Participants in Individual Account Plans Request for Information

Ladies and Gentlemen:

On behalf of the ERISA Industry Committee ("ERIC"), Plan Sponsor Council of America ("PSCA"), and the U.S. Chamber of Commerce (the "Chamber"), we are writing in response to the Pension Benefit Guaranty Corporation's ("PBGC") request for information on missing participants in individual account plans (the "RFI").[1]

The Pension Protection Act of 2006 (the "PPA") directed the PBGC to create a program whereby plan administrators of defined contribution plans would have the option of transferring a missing participant's benefits to the PBGC upon the termination of the plan (a "missing participants program").

In general, ERIC, PSCA and the Chamber support the PBGC's efforts to implement a missing participants program. We encourage the PBGC to continue to move forward to implement such a program.

INTEREST IN RETIREMENT PLANS

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

PSCA is a nonprofit association that provides services, best practice information, and advocacy to defined contribution plan sponsors. Members have access to a broad range of resources and programs that address the varying needs of both small and large companies. Membership includes 1,000 companies ranging in size from Fortune 100 firms to small, entrepreneurial businesses.

[1] 78 Fed. Reg. 37598 (Jun. 21, 2013).

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business – manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

SUMMARY OF COMMENTS

The following is a high-level summary of ERIC, PSCA and the Chamber's comments:

- We anticipate that many plan fiduciaries would be interested in participating in a program provided by the PBGC, particularly for smaller accounts.

- The program must ensure fiduciaries of terminating plans that participate in the program that: (1) the funds will be handled appropriately; (2) the account will be charged no more than reasonable fees; (3) the participant (once found) will be able to obtain an accounting of the manner in which their funds have been handled by the PBGC; and (4) the fiduciaries will not face significant administrative burdens.

- Once the program is established, the PBGC should encourage the U.S. Department of Labor ("DOL") to issue guidance providing that fiduciaries of terminating plans that participate in the program are relieved of fiduciary liability for the amounts transferred to the PBGC. However, the PBGC should not delay the creation of the program for the issuance of this guidance.

- As provided in the PPA, participating in the program should be optional and should be in addition to any private sector arrangements that provide similar services.

DETAILED COMMENTS

The PBGC has requested the following information regarding the creation of a missing participants program.

1. PBGC requires an understanding of the demand for such a program and how that demand might be affected by fees, minimum benefit requirements, and information requirements, measured against private providers of similar services.

We believe that there would be significant demand for a missing participants program. Plan sponsors are frequently unable to find IRA providers willing to accept smaller account balances, particularly those with less than $1,000.

A missing participants program could be very useful for the retirement plan system, particularly if it managed smaller accounts and had competitive fees. Fiduciaries of terminating plans would be required to evaluate the services and fees for those services that would be provided by the PBGC compared with those available in the private sector. The Employee Retirement Income Security Act of 1974 ("ERISA") requires fiduciaries to use a prudent process and act in the best interests of participants and beneficiaries.[2] The DOL interprets this requirement in Field Assistance Bulletin ("FAB") 2004-02 as requiring a fiduciary to act prudently when choosing distribution options for missing participants in a terminating plan.

We anticipate that many fiduciaries would be interested in using services provided by the PBGC, particularly for smaller accounts for which it has historically been difficult to place with private sector IRA providers. However, the demand for such services would be impacted by the fees charged by the PBGC and any regulatory burden that was imposed. We anticipate that the fees for such services would be competitive as we hope a government agency would not charge more than a for-profit entity for similar services.

Furthermore, we note that the PPA provided that this type of program would be voluntary. Section 410 of the PPA states that "The plan administrator…may elect to transfer a missing participant's benefits to the [PBGC] upon termination of the plan." Additionally, section 410 only requires a plan administrator to provide information upon termination of a plan "with respect to benefits of a missing participant if the plan transfers such benefits—(A) to the [PBGC], or (B) to [another pension plan]." Thus, based on the language in the PPA, any program or database created by the PBGC for defined contribution plans should be voluntary rather than replacing any private sector alternatives.

Therefore, we recommend that the PBGC create a program whereby fiduciaries of terminating plans that transfer the accounts for missing participants to the PBGC can be confident that: (1) the funds will be handled appropriately; (2) the account will be charged no more than reasonable fees; (3) the participant (once found) will be able to obtain an accounting of the manner in which their funds have been handled by the PBGC; and (4) the administrative burden is not significant. Once the program is established, the PBGC should encourage the DOL to provide fiduciary relief for plans that use the missing participants program. However, the PBGC should not delay the creation of the program in order to obtain this relief. Additionally, as provided in the PPA, any program should be optional.

2. Among individual account plans that you are familiar with, what proportion has participants they cannot find? Among such plans, what is the average number of participants the plan cannot find? In your experience, what is the average account balance, and what is the range of account balances, for participants that cannot be found?

Based on informal data from service providers, we understand that approximately 3-4% of defined contribution plans terminate each year. The DOL reports that in 2010, there were

[2] ERISA § 404(a)(1).

654,421 defined contribution plans.[3] Thus, around 20,000 – 25,000 defined contribution plans terminate every year.

Service providers estimate that around half of these plans (i.e., 10,000 – 12,500 plans) will have at least one missing participant when they terminate. We understand that the majority of accounts are less than $3,000, but the value of the accounts of missing participants can vary significantly.

3. What, if any, services for missing participants in individual account plans are unavailable in the competitive private marketplace (for example, handling very small benefits or QJSA benefits)? Why are they unavailable (for example, because it is not cost-effective to provide them)?

Various service providers and financial institutions currently help plans to find missing participants or hold the assets of missing participants in IRAs. However, many terminating plans have difficulty finding IRA providers that will accept small accounts, particularly those valued at less than $1,000. Often, the IRA providers that will accept these small accounts are typically the plan's recordkeeper/trustee or, perhaps, a bank that does business with the plan sponsor.

4. If PBGC provided services for missing participants' accounts in terminating individual account plans that were comparable to the services provided by the private sector and charged comparable fees, would you be likely to choose the PBGC program or the private sector program and why? Would it make a difference if PBGC provided a narrower range of services than typical private-sector providers?

As discussed above, fiduciaries of retirement plans are required to act in the best interests of participants and beneficiaries with respect to choices related to distribution options. Guidance from the DOL provides that benefit distribution charges may be allocated to the participant to whom the distribution is being made.[4]

As a result, plan fiduciaries will need to evaluate the services and fees for those services that would be provided by the PBGC (and likely paid by the participant's account) compared with those available in the private sector.

We hope that the PBGC does not view this as an "either-or" situation and that it considers possible public-private partnerships with firms that provide rollover services for active and terminated plans.

[3] U.S. Dep't of Labor, *Private Pension Plan Bulletins: Abstract of 2010 Form 5500 Annual Reports* (Nov. 2012).
[4] U.S. Dep't of Labor, *Field Assistance Bulletin 2003-3* (May 19, 2003).

5. How would individual account plans' choice to use a PBGC missing participants program for such plans — rather than a private-sector service — be affected by (1) the level of fees PBGC might charge, (2) the minimum benefit size PBGC might accept, (3) optional or mandatory electronic filing, and (4) other possible program features?

As discussed above, plan fiduciaries would need to evaluate the services and fees for those services that would be provided by the PBGC compared with those available in the private sector. We view section 4050(d) to require the PBGC to accept all terminated plan missing participant assets without regard to amount of the individual account, and the program would be substantially less useful if the PBGC imposed any minimum benefit requirement. In addition, as mentioned above, regulatory burdens that create administrative complexity would discourage the use of a PBGC program.

6. What impact would a PBGC missing participants program for individual account plans have on private-sector benefit processing firms?

It would depend on the services provided and fees charged by the PBGC. As noted above, we hope that the PBGC considers partnering with private sector firms.

7. How would you view the value (such as convenience and reliability) of a single database of missing participants' benefits in terminated individual account plans, maintained by PBGC, compared to the burden on plans to provide the data and the burden on PBGC to maintain the database? How would the comparison change if plan reporting of data were voluntary rather than mandatory, making the database less comprehensive? What information should be in the database?

Retirement plans are already required to provide information about separated participants with deferred vested benefits to the Internal Revenue Service ("IRS").[5] This information is transmitted by the IRS promptly to the Social Security Administration.[6] Participants are notified by the Social Security Administration of their potential retirement benefits when they apply for Social Security Benefits. If the PBGC decides to create a database, it should use this information that plans already provide to the federal government.

Congress is also considering a bill that would require the PBGC to create a database. H.R. 2117 would require the PBGC to establish a lost pension plan registry database to record: (1) any change in a pension plan's name, (2) any change in the name or address of the plan administrator, (3) the termination of the plan, or (4) the merger or consolidation of the plan with any other plan or its division into two or more plans. It would also require the PBGC to publish this information on its website. We encourage the PBGC to create such a database using information from the Form 5500 to assist participants without adding any new requirements for plan administrators.

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[5] This information is reported on Form 8955-SSA.

[6] Internal Revenue Service, *Employee Plans News - June 8, 2012 - Form 8955-SSA and the FIRE System* (last updated on May 15, 2013), available at http://www.irs.gov/Retirement-Plans/Employee-Plans-News---June-8,-2012---Form-8955-SSA-and-the-FIRE-System.

Any database maintained by the PBGC would likely be largely duplicative of the information already provided by the Social Security Administration. As a result, plans should not be required to report additional information about participants to the PBGC. Executive Order 12866 "Regulatory Planning and Review" and Executive Order 13563 "Improving Regulation and Regulatory Review" direct agencies to balance additional costs of regulations on companies with a corresponding benefit to the system. Executive Orders 12866 and 13563 direct agencies to maximize *net* benefits, promote flexibility and reduce regulatory burdens on companies. Any database created by the PBGC should take these objectives into account and not overly burden plan sponsors.

8. ERISA section 4050(b)(2) defines a missing participant as "a participant or beneficiary under a terminating plan whom the plan administrator cannot locate after a diligent search." What "diligent search" requirements should apply for individual account plans? Should PBGC offer diligent search services for a fee or post on its Web site the names of private sector companies that provide diligent search services?

The PBGC should provide optional search services to help plans find missing participants. These search services should be able to be used to satisfy the requirements of both PBGC Regulation § 4050.4 and FAB 2004-02.

PBGC Regulation § 4050.4 provides that the search must begin not more than 6 months before notices of intent to terminate are issued and be carried on in such a manner that if the individual is found, distribution to the individual can reasonably be expected to be made on or before the deemed distribution date. Additionally, the fiduciary must contact beneficiaries of the missing participant and use a commercial locator service to search for the missing participant. The rules for terminating single-employer defined benefit plans provide that the search must be conducted without charge to the missing participant or reduction of the missing participant's plan benefit. However, given their unique nature, this restriction should not apply to defined contribution plans.

The DOL includes in FAB 2004-02 specific methods for fiduciaries to consider in order to locate missing participants. These include using first class mail or email, certified mail, records of other plans maintained by the plan sponsor, a letter-forwarding service, Internet search tools, commercial locator services, and credit reporting agencies. The DOL also suggests contacting designated beneficiaries.

For purposes of a missing participants program, we urge the PBGC to provide a service that satisfies both PBGC Regulation § 4050.4 and FAB 2004-02. Additionally, the PBGC should issue guidance that indicates that fiduciaries who comply with either PBGC Regulation § 4050.4 or FAB 2004-02 are deemed to have engaged in a "diligent search" under ERISA section 4050(b).

9. What special concerns do small plans or their sponsors or participants have regarding the treatment of missing participants in individual account plans?

PSCA and the Chamber note that large plans typically have economies of scale that enable them to negotiate for services that may not be available for smaller plans. Small plans may also have less customized plan features that limit their options. As a result, the PBGC may be able to offer missing participant services for a lower cost than small plans may otherwise be able to obtain.

ERIC, PSCA and the Chamber appreciate the opportunity to provide comments on the RFI. If you have any questions concerning our comments, or if we can be of further assistance, please contact us as indicated below.

Sincerely,

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August 19, 2013

PENSION BENEFIT GUARANTY CORPORATION

Missing Participants in Individual Account Plans

AGENCY: Pension Benefit Guaranty Corporation

ACTION: Request for Information

RESPONSE:

Xerox State & Local Solutions, Inc. d/b/a Xerox Unclaimed Property Clearinghouse (UPCH), as an entity having extensive expertise and experience in missing owner account reunification and claims initiation, is responding to the Request for Information (RFI) issued by the Pension Benefit Guaranty Corporation (PBGC). UPCH is a line of business of Xerox State & Local Solutions, Inc. Xerox State & Local Solutions, Inc. is a subsidiary of Xerox Business Services, LLC, which is a subsidiary of Xerox Corporation.

In the late 1990's, the states saw a need to create a national database where owners could search for unclaimed property held in any state at no cost. In 1999, working through the National Association of Unclaimed Property Administrators (NAUPA), the states established MissingMoney.com as a website where all states could post the names of owners of unclaimed property and members of the public at large could search without charge for their lost financial assets. MissingMoney.com is the only national unclaimed property database endorsed by NAUPA. Forty states currently participate in MissingMoney.com, which includes 65,000,000 owner records and allows missing owners to search and submit a claim to a state at no charge.

The MissingMoney.com website is owned and operated by UPCH and is hosted with the support of Xerox's Tarrytown data center.

In the five year period of 2008 to 2012, more than 315,000,000 searches were conducted on MissingMoney.com by an estimated 34,000,000 potentially missing owners which resulted in more than 8,000,000 claims being initiated, or a 23.5% searcher to claim ratio. In 2012, the corresponding numbers were 63,000,000 searches by 6,800,000 site visitors and 1,600,000 claims. In the 2013 year to date (January - July) period, nearly 44,000,000 searches were conducted by an estimated 4,800,000 individuals that initiated 1,100,000 claims. In general, the duration of a visit to MissingMoney.com is in excess of 7.5 minutes.

Presuming PBGC moves forward with the Missing Participants initiative, and as an alternative to developing a stand-alone site with its associated costs and time delays, it is suggested that PBGC enter into discussions with UPCH as to having limited missing participant data listed on MissingMoney.com. If PBGC decides to pursue its own site development, it is suggested that MissingMoney.com be considered as an addition to any PBGC developed search site. In either case, a PBGC listing on MissingMoney.com would allow PBGC to benefit from the flow of traffic to, the duration of visits to and the claims initiation capabilities of UPCH's missing owner search site.

Sincerely,

William F. Slade

Senior Vice President

Risk Compliance Performance
SOLUTIONS

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

Re: Missing Participants in Individual Account Plans

Dear Sir or Madam:

Thank you for requesting information in regards to missing participants in terminating Individual Account Plans. Please allow me to provide you a bit of background on our firm. We are a risk and compliance company and my division helps plan sponsors, record keepers and custodians mitigate risks such as missing participants in active and terminating DB and DC plans. Our heritage dates back to 1949 dealing with unclaimed assets by locating the owners/beneficiaries and getting them to take the necessary action required to put their account in good standing. Our position is as a "participant advocate" and we believe that when plan sponsors and providers take this approach, they reduce their risks greatly.

RCP Solutions has extensive experience providing services to address not only the missing, but also the non- responsive participants in a terminating plan. I call out non-responsives because oftentimes mail gets through but no one receiving the mail knows the participant. Consider scenarios where someone moves and fails to notify the provider and the post office. The mail is received by the residents where the mail is delivered and is simply thrown out, or worse, opened and confidential information potentially disclosed to the wrong individual.

In defined contribution plan terminations, we follow the guidelines as provided in Field Assistance Bulletin 2004-02 by the Department of Labor. In fulfilling this process for clients, they have an audit trail of all of the recommended steps taken as outlined in the FAB as part of our standard reporting. Should a participant come forward after any remaining assets have been removed at the end of the process and sent to a rollover provider, FDIC insured bank account or escheated, there is a record of that end destination. Oftentimes, short cuts are discussed by providers to their plan sponsor clients to simply mail to the participant and rollover any assets if the mail is undeliverable or the participant fails to act in a short period of time. This guidance puts the plan sponsor at risk by not following the recommended guidance and/or regulation and rewards the service provider financially.

The FAB process has become an expensive one since the IRS discontinued their letter forwarding program in 2012. For the last step in the FAB process, the only option is now to fulfill the letter forwarding through the Social Security Administration which has a base cost of $35/letter plus the cost to create the letters and send them via a traceable means. This charge is extremely expensive and the plan sponsor receives no information from an audit perspective of where the Social Security Administration mailed the letter. In addition, all participants go through this program regardless of value. We have seen accounts as low as a few dollars run through the FAB process which ultimately may shift the cost of the overall program to those account with higher balances.

Some of the challenges we see in the process are accounts that have missing information such as a full name, full address and social security number. In some instances this can present a problem in the ability to search for the participant, as well as the fact that the social security number may not match the participant. Raw data from a search provider is not always the best information and we believe the proprietary process we have developed using both sophisticated matching routines and human validation where appropriate is best. We have invested significant time and money in our proprietary tools and services and continue to do so. Given that we have years of experience and investment in the business, we do not feel it would be in our best interest – or that of our clients and their participants that we serve – for the PBGC to enter this market. Small businesses like ours exist and can provide the appropriate level of service and due diligence to meet the industry's needs today.

However, we do believe that the PBGC would be a reasonable end destination for unclaimed assets, provided the costs are in line with the other options available; rolled over to an IRA, moved to an FDIC insured bank account or escheat. The ability for the PBGC to maintain a database would be beneficial, provided participants know where to go and are communicated with on a periodic basis about their asset. The best practice process for the PBGC to initiate in regards to providing a "diligent search" effort for participants and assets it receives at the close of a plan termination would be the SEC search requirements outlined in SEC 17-Ad17. Our experience has shown that effective rollover providers perform searches on Welcome Kit's that are returned undeliverable from assets that are rolled over at the end of a plan termination. In addition, some provide periodic searches to determine the best address for participants that have mail returned undeliverable and where they have the participant coded at a bad address in order to establish or re-establish the relationship. This would be something that the PBGC should follow as a best practice as well, though not necessarily do that work itself given the expert providers that are already available.

We'd welcome the opportunity to discuss this RFI in person and provide any insight we can on the marketplace with searches as well as the plan termination process.

Sincerely,

Mark D. Sweatman
President – RPMS division, RCP Solutions

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August 19, 2013

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

Re: PBGC Request for Information on Missing Participants in Individual Account Plans
Federal Register, Vol. 78, No. 120, June 21, 2013

Dear Sir or Madam:

We are writing on behalf of the Pension Action Center (PAC) in regards to your request for comments on the implementation of a new program to deal with benefits of missing participants in terminating individual account plans.

The PAC is a non-profit organization located in the Gerontology Institute of the John W. McCormack School of Policy and Global Studies at the University of Massachusetts Boston. We provide free legal services to pension plan participants, as well as other individuals who may be entitled to pension benefits, throughout New England and the state of Illinois. The staff of the PAC has had many years of experience working with clients who are unable to locate their pension benefits due to plan terminations and other reasons.

Though the PBGC has raised numerous issues regarding the implementation of this new program, we have decided to focus our attention on several questions that fall within our area of expertise. Specifically, we would like to address the following issues:

1. the value, in terms of convenience and reliability, of having a single database of missing participants' benefits in terminated individual account plans compared to the burden on plans to provide the data and the burden on the PBGC to maintain the database;
2. the need for a comprehensive database, made possible by mandatory reporting of plan data;
3. the categories of information that should be included in the database, and;
4. the "diligent search" requirements that should apply for terminating individual account plans.

The value of a comprehensive database of missing participants' benefits in terminated individual account plans far outweighs the burden to plans of reporting data and the PBGC of maintaining the database.

The PBGC program for terminating defined benefit plans has proven to be effective at matching missing participants with their pension benefits. Although we do not know the cost of the program, we have seen the value of connecting individuals to their retirement money and having a central, easily accessible data base for terminated defined benefit plans is useful. Our project uses it when looking for benefits for clients and we recommend it to individuals as well. It is our understanding that it has successfully connected many individuals with the benefits they earned.

At this time there is no comparable data base that participants can use to locate lost defined contribution plans. The process of trying to track down money from both defined benefit and defined contribution plans can be difficult and in some cases impossible. A central place to look would enhance the chance of finding retirement money. Also, as defined contribution plans become the dominant plan offered by employers, more workers will be looking for money that was not rolled over or cashed out.

The primary complaint that we have about the PBGC defined benefit unclaimed benefit data base is that it only covers terminated plans. A comprehensive data base including all unclaimed benefits, whether the plan is a defined benefit plan or a defined contribution plan and whether the plan is terminated or active, would be the most useful for participants and plans alike. We appreciate that the PBGC is not considering such an ambitious expansion of its data base at this time but we feel that such a data base should be the long-term goal.

Reporting of plan data of terminating defined contribution plans should be required in order to create the most *comprehensive* database of missing participants' benefits.

There are two components to the PBGC's proposed program. The first is the acceptance of the money from accounts of terminated individual account plans where the plan has failed in locating the participant entitled to the account. In those cases we assume that PBGC will require all of the plan data required to pay the participant and that this data will be put into the data base.

The decision of an administrator to place the account of a lost participant with the PBGC is voluntary.[1] However, we would urge that if an administrator decides not to give the PBGC the money in the account of the lost participant to hold, it should still be required to file information on lost participants with the PBGC. This information should be adequate to enable the participant to claim the account. The PBGC already requires this for defined benefit plans and therefore it could be easily implemented in the context of individual account plans.[2] The law requires that the plan administrator of a terminating DC plan "...To the extent provided in regulations ... **shall,** (emphasis added) upon termination of the plan, provide the corporation information with respect to benefits of a missing participant if the plan transfers such benefits (A) to the corporation, or (B) to an entity other than the corporation....[3] Thus, information on the

[1] 29 U.S.C. § 1350(d)(1) (Stating "The plan administrator of a plan described in paragraph (4) *may* elect to transfer a missing participant's benefits to the corporation upon termination of the plan." (emphasis added)).
[2] *See* Schedule MP, available at http://www.pbgc.gov/Documents/schedule-mp.pdf.
[3] 29 U.S.C. § 1350(d)(2).

missing participant's account is being gathered for terminated plan accounts which will no longer be held by the plan sponsor. We would recommend that plans that have terminated but continue to keep the account also report the information on the missing participant and that this information be added to the data base as well.

In addition, all defined contribution plans, not just those that are terminating, should be given the option to voluntarily submit missing participant information to the PBGC. Allowing plans to submit missing participant information prior to terminating will provide another means of locating missing participants by listing them on the PBGC data base. It may also encourage plans to be more proactive in seeking out participants. The sooner a plan recognizes that it has missing participants and begins the process of pairing those participants with their accounts, the larger the likelihood that the participants will be successfully matched with their accounts. Although this might add a small administrative burden for the PBGC, the burden would easily be outweighed by the benefit of finding missing participants more quickly.

We anticipate that the costs associated with requiring plans to report plan data would be low because ERISA already requires plans to compile and report plan data in their yearly Form 5500s.[4] Requiring terminating individual account plans with missing participants to report this same information, perhaps in a somewhat different form, would create only a small administrative burden but would add a great deal to the consistency, quality, convenience, and reliability of the information included in the PBGC's comprehensive database.

Plans should be required to report information already contained in Form 5500s, in a format similar to the Schedule MP in the defined benefit context, so as to provide missing participants with necessary information while reducing reporting costs to the plan.

The PBGC requires terminating defined benefit plans with missing participants to complete a Schedule MP.[5] This form provides the PBGC with information about the plan in general and about any missing participants that could not be paid out by the plan prior to termination.[6] This document helps to match missing participants with their accounts by ensuring that there is a record indicating where the benefit can be found.[7] This same form, or one similar to it, should also be required for terminating individual account plans with missing participants.

The Form 5500, which plans are required to prepare each year, contains a large amount of data that could easily be used to create a database of terminating individual account plans.[8] With minimal effort a plan could file a Schedule MP using information gathered almost exclusively

[4] *See* Internal Revenue Service Form 5500, available at http://www.dol.gov/EBSA/5500MAIN.HTML.

[5] Schedule MP, available at http://www.pbgc.gov/Documents/schedule-mp.pdf.

[6] *Id.*

[7] *Id.*

[8] *See* Form 5500, available at http://www.dol.gov/EBSA/5500MAIN.HTML.

from the Form 5500. The categories of information required by the Form 5500 which would also be included on the Schedule MP are as follows: the plan name; the plan sponsor's name, phone number, and address; the employer's EIN; the plan administrator's name, telephone number, and address, and; the administrator's EIN.[9]

The only additional information that would have to be produced by plans would be the information regarding individual missing participants for whom irrevocable commitments were purchased or whose accounts were taken over by the PBGC.[10] Currently, this information includes the participant's full name, last known address, social security number, and birthdate, as well as the beneficiary's full name, Social Security number, and birth date.[11] If irrevocable commitments were purchased on behalf of any missing participants, then information regarding those commitments would also be required.[12] Having all of this information in one database would allow participants looking for a lost pension to search based on a variety of different metrics. Ultimately, this would result in a greater number of participants successfully locating terminated individual account plans and seeking their benefits through the PBGC.

Assuming this database would eventually be expanded to include all individual account plans, not just terminating individual account plans, the framework would already exist to easily integrate the new data. Having an expansive database in place would allow missing participants to independently seek out their benefits before a plan termination, thus avoiding the costly and time consuming process of undertaking a diligent search to find missing participants prior to plan termination.

The "diligent search" requirements laid out in 29 C.F.R. § 4050.4 and Field Assistance Bulletin 2004-02 should be adopted in relation to terminating individual account plans.

There is an important difference between the benefits of missing participants in terminating individual account plans and those in defined benefit plans. Whereas defined benefit plan assets are generally quite large, it is not uncommon for an individual account plan to be fairly small. A diligent search for missing participants is a required step before a terminating individual account plan can be taken over by the PBGC. We feel that the requirements of the diligent search should be based in part on the money at stake.

As laid out in Field Assistance Bulletin 2004-02, there are certain search methods that "involve such nominal expense and such potential for effectiveness that a plan fiduciary must always use them, regardless of size of the participant's account balance."[13] These methods are: using

[9] *Id.*
[10] Schedule MP, available at http://www.pbgc.gov/Documents/schedule-mp.pdf.
[11] *Id.*
[12] *Id.*
[13] EBSA Field Assistance Bulletin No. 2004-02 (Sept. 30, 2004).

certified mail; checking related plan records (e.g. searching a group health insurance plan to ascertain whether it lists a more current address for the missing participant); checking with designated beneficiaries, and; using the SSA Letter-Forwarding Service where possible.[14] For accounts with relatively small account balances, a plan that uses these methods should be deemed to have performed a diligent search.

For accounts worth more than a threshold dollar value (to be determined by the PBGC), plans should also be required to use a commercial locator service to find missing participants, as per 29 C.F.R. § 4050.4(b)(3).[15] The necessity of matching missing participants entitled to large account balances with their accounts justifies the higher cost of using a commercial locator service.

In either instance, the search should also comport with 29 C.F.R. § 4050.4(b)(1). This section requires a search to begin "not more than 6 months before notices of intent to terminate are issued" and to be carried out in a way such that "if the individual is found, distribution to the individual can be reasonably expected to be made on or before the deemed distribution date."[16] Additionally, regardless of account value the costs of performing a diligent search should be undertaken without charge to the participant's account.[17] This is particularly important in regards to terminating individual account plans of small value, as the cost of performing a diligent search would be far more detrimental to the participant than to the plan.

Finally, we would like to mention that plans sponsored by employers with fewer than 100 employees are the plans that our clients have the most difficulty locating. In a study of our cases handled between 1998 and 2001, cases with small employers accounted for 6% of our cases but 10% of our lost pension cases.[18] Smaller employers also have fewer resources to locate "lost employees." Thus, the PBGC data base of lost participants DC plans becomes all the more important in connecting retirees to their benefits.

Very truly yours,

Ellen A. Bruce, JD
Director, Pension Action Center

Brian Reilly
Legal Intern

[14] *Id.*

[15] 29 C.F.R. §4050.4(b)(3).

[16] 29 C.F.R. § 4050.4(b)(1).

[17] *Compare* 29 C.F.R. §4050.4(b)(3) (prohibiting plans from charging diligent search fees to participant accounts) *with* Field Assistance Bulletin No. 2004-02 (allowing reasonable diligent search costs to be charged to participant accounts).

[18] Bruce, E.A., J. Turner, D. Lee (2005), Lost Pensions: An Empirical Investigation. *Benefits Quarterly*, Vol. 21. No.1 p.45.

AMERICAN BAR ASSOCIATION

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August 19, 2013

BY EMAIL (reg.comments@pbgc.gov) AND
REGULAR U.S. MAIL

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

Re: Comments on Proposed Extension of Missing Participants Program to Individual Account Plans

Ladies and Gentlemen:

These comments and recommendations pertain to Pension Benefit Guaranty Corporation's request for information regarding the proposed extension of the Missing Participants Program to individual account plans and are submitted on behalf of the American Bar Association's Section of Real Property, Trust and Estate Law (RPTE). These comments represent the views of RPTE only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent and should not be construed as representing the position of the ABA.

The attached submission was prepared by members of the Qualified Plans and Plan Transactions and Terminations Committees (the "Committees") of the Employee Benefit Group of RPTE. Robert A. Miller and Henry Talavera supervised the preparation of these comments, and Thomas C. Farnam, John R. Paliga & Bonita Hatchett participated in the preparation of these comments. These comments were reviewed by Steven B. Gorin on behalf of the Section's Committee on Government Submissions.

Although the attorneys who participated in preparing these comments have clients who may be affected by the legal issues addressed by the comments or have advised clients on these issues, no such member (or firm or organization to which any such member belongs) has been engaged by a client to make a submission with respect to, or otherwise influence the development or outcome of, the specific subject matter of these comments.

The Committees and the RPTE Section appreciate the opportunity to submit these comments, and we respectfully request that the PBGC consider our recommendations. Members of the Committees are available to meet and discuss these matters with the PBGC and its staff and to respond to any questions. The principal contacts for discussion are listed below.

Thomas Campbell Farnam, Esq (for the Qualified Plans Committee)
(314) 406-5201

John R. Paliga, Esq. (for the Plan Transactions and Terminations Committee)
(410) 576-4166

Very truly yours,

Susan G. Talley

Susan G. Talley
Chair, Section of Real Property, Trust and Estate Law

cc: Catherine B. Klion, Assistant General Counsel
Cara Lee T. Neville, Secretary, American Bar Association
Thomas M. Susman, Governmental Affairs, American Bar Association

AMERICAN BAR ASSOCIATION
SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW
EMPLOYEE BENEFIT PLANS AND OTHER COMPENSATION ARRANGEMENTS GROUP
QUALIFIED PLANS COMMITTEE
AND PLAN TRANSACTIONS AND TERMINATIONS COMMITTEE

COMMENTS ON THE PROPOSED EXTENSION OF THE MISSING PARTICIPANTS PROGRAM TO INDIVIDUAL ACCOUNT PLANS

I. Overview

The Missing Participants Program (the "Program") was established by Congress under Section 4050(a) through (c) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") for "missing participants" in terminating defined benefit plans that are covered under Title IV of ERISA. Missing participants are individuals who have benefit entitlements but have not been located by the plan administrator despite a diligent search for them. Under the Program, terminating plans may satisfy their obligations with respect to final distribution of assets with respect to missing participants by transferring the single sum value of the benefit of such missing participants to the Pension Benefit Guaranty Corporation ("PBGC"), which will then hold the assets as trustee until such time as it may locate the participants and distribute the benefits to them. In addition, whether a terminating plan distributes assets with respect to missing participants by transferring the assets to PBGC or by purchasing an annuity contract for the missing participants, the plan administrator is obligated to provide PBGC with certain information and certifications regarding the missing participants and their benefits.

Section 4050(d) of ERISA, as added by the Pension Protection Act of 2006 ("PPA 2006"), authorizes the extension of the Program to cover participants in profit sharing, 401(k), and other terminating defined contribution plans. PBGC has requested information from its stakeholders regarding the development of a rule to implement the proposed extension of the Program. Missing Participants in Individual Account Plans, 78 Fed. Reg. 37598 (June 21, 2013) (the "Federal Register Notice"). In particular, PBGC has requested comments on the following topics: (1) the extent of the demand for extension of the Program, (2) the demand for a database of missing participants, (3) the availability of private-sector services to locate missing participants, (4) the potential costs and fees associated with such an extended Program, (5) the contours of the diligent search requirement, and (6) related logistical issues such as electronic filing of relevant information with PBGC.

We are pleased to respond to the Federal Register Notice by providing the following information and views to PBGC. Based on responses to our survey, and our own expertise and knowledge, we suggest that the PBGC would significantly benefit both plan sponsors and missing participants in defined contribution plans by taking the following actions:

● Adding to PBGC's national database of missing participants from defined benefit plans, missing participants from terminating defined contribution plans,

● Specifying simple, easy to follow rules for plan sponsors to send the benefits for such missing participants to the PBGC,

● Providing a simple, clear method for meeting the requirement for a diligent search, and

● Providing employers the ability to use PBGC as part of the diligent search process, at a reasonable fee determined by the PBGC.

II. Questionnaire Addressing Proposed Extension of the Missing Participants Program

Our Task Force of experienced leaders of the Qualified Plans ("QP") and Plan Transactions and Terminations ("PTT") committees and the Employee Benefit Plans and Other Compensation Arrangements Group of the American Bar Association's Real Property, Trust and Estate Law Section ("RPTE") as set forth in the cover letter to these comments (the "Task Force"), drafted the Questionnaire that is attached as Exhibit 1 to gather data with respect to the questions PBGC raised in the Federal Register Notice. The Questionnaire was distributed to a number of interested parties, including record keepers and other ERISA practitioners (lawyers and non-lawyers) that have extensive experience with defined contribution plans. Our Task Force received over ten responses from practitioners, who shared their collective experiences based on their work with numerous clients. We have summarized the responses in Exhibit 2, and in addition have provided the following discussion of the relevant legal guidance and our views with respect to the questions involved, all on behalf of the RPTE.

III. Applicable Legal Requirements and Analysis

A. Legal Restrictions on Nonconsensual Distributions

As PBGC knows, ERISA applies to pension plans until all benefits under the terms of such plans are distributed to the participants and beneficiaries who are entitled to receive them.[1] In addition, for purposes of the Internal Revenue Code (the "Code"), a tax-qualified retirement plan will be treated as terminated (and thus no longer subject to future changes in qualification requirements) as of the termination date specified by the sponsor in the instruments formally terminating the plan, as long as benefits are distributed to participants as soon as administratively feasible thereafter.[2] This is true for both defined benefit and defined contribution plans. Unlike PBGC-insured defined benefit plans, however, government approval is not required with respect to the termination of defined contribution plans.[3] Instead, defined

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1 Field Assistance Bulletin 2004-02 ("FAB 2004-02") issued by the Department of Labor on September 30, 2004 states "the distribution of the entire benefit to which a participant is entitled ends his or her status as a plan participant and the distributed assets cease to be plan assets under ERISA. . . ."

2 *See Rev.Rul. 89-87, 1989-2 C.B. 81; See also*, 29 C.F.R. § 4041.28.

3 The Internal Revenue Service ("Service") has a program for reviewing and issuing favorable determination letters upon the termination of defined contribution plans. However, in our collective experience, the use of the Service's determination letter program by the employers terminating defined contribution plans has become less common. Many employer sponsors of defined contribution plans use a master or prototype ("M&P") plan, and such plans typically rely on a favorable determination letter issued to the entity that created and/or marketed the M&P plan. Accordingly, many employers with M&P plans may never make a filing (other than Forms 5500) with the government regarding their plan.

contribution plans are treated as terminated once all necessary actions have been taken, including the timely distribution of their assets to participants and beneficiaries.[4]

One must review all the surrounding facts and circumstances to determine whether plan assets have been distributed as soon as administratively feasible following a termination of the plan. Generally a distribution that is not completed within one (1) year following the specified termination date[5] would be presumed not to have been made as soon as administratively feasible. A plan that fails to adhere to this requirement is treated as an ongoing plan for all purposes under the Code.

The Code and ERISA generally require defined contribution plans to obtain participant consent before making distributions of nonforfeitable account balances.[6] There are two notable exceptions to this general rule. The first exception permits the immediate, nonconsensual distribution of an account balance of less than $5,000 to participants who have terminated employment with the plan sponsor.[7] If such an account balance is more than $1,000 (but less than $5,000), the mandatory distribution must be paid in a direct rollover to an individual retirement plan (an "IRA") if the distributee does not make an affirmative election to have the amount paid in a direct rollover or to receive the distribution directly.[8] The Internal Revenue Service ("Service") has also provided useful guidance on the mechanics for setting up the IRAs under this scenario.[9] The second exception makes an even more significant change in the general rule if the plan is terminating. Terminating defined contribution plans that do not offer an annuity option generally may distribute all benefits – even ones in excess of $5,000 – without the Participant's consent.[10]

Nonconsensual distributions must be made in a manner that satisfies the fiduciary duty rules of Title I of ERISA. The Department of Labor ("DOL") has issued an ERISA safe harbor rule ("Safe Harbor Rule") and FAB 2004-02 providing guidance about the exercise of fiduciary duties with respect to locating participants and distributing their benefits from terminating defined contribution plans.[11] The Safe Harbor Rule for nonconsensual distributions

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4 *See* Rev.Rul. 89-87, supra.

5 We understand the Service would also consider it a timely distribution if payment occurred during a reasonable period of time after receipt of a favorable determination letter, even if that were longer than one year after the specified termination date.

6 *See* 26 U.S.C. § 411(a)(11); ERISA § 203(e).

7 Id.

8 26 U.S.C. § 401(a)(31)(B).

9 Notice 2005-5.

10 Treas. Reg. § 1.411(a)-11(e)(1).

11 29 C.F.R. §§ 2550.404a-3 and FAB 2004-02.

from terminating plans has several requirements, including, but not limited to, the following ones: [12]

● Participants and beneficiaries must be given a notice regarding their distribution election rights and the default distribution vehicle and fail to make a distribution election within 30 days of the furnishing of the notice (except that if a notice is returned to the plan as undeliverable, and the fiduciary take steps consistent with ERISA to locate the participant or beneficiary and provide the notice, but is unsuccessful, then the participant or beneficiary shall be deemed to have been furnished the notice and would fail to make an timely election).

● Distributions must be to an IRA (except for certain distributions under $1,000 by qualified termination administrators of abandoned plans, which may be to interest bearing bank accounts or state unclaimed property funds).

● The fees and expenses of the account cannot exceed the fees and expenses charged with respect to a comparable account that is consensually established.

● Distributions must be invested in an investment product that is designed to preserve principal and provide a reasonable rate of return consistent with liquidity.

● The investment product selected for the distribution must be offered by one of a number of specified entities, such as a federally regulated financial institution.

FAB 2004-02 provides additional guidance regarding fiduciary duties and alternatives for addressing lost participants in a defined contribution plan termination, including regarding steps for locating the lost participants. In this regard, FAB 2004-02 provides that a plan administrator should (a) use certified mail, (b) ask the employer and administrator(s) of related plans to search their records for a more current address for the participant (or ask them to forward a letter to the participant), (c) attempt to identify and contact any individual that the missing participant has designated as a beneficiary (e.g., spouse, children, etc.) for updated information concerning the location of the missing participant (or ask them to forward a letter to the participant), and (d) use the Service or Social Security letter-forwarding services (the Service has discontinued its letter-forwarding service). In addition, if those steps are unsuccessful, a fiduciary should consider using Internet search tools, commercial locator services, and credit reporting agencies to locate a missing participant. Where despite such steps the fiduciary is unable to locate participants or otherwise obtain distribution elections, FAB 2004-02 provides that the fiduciary may distribute the benefit via a direct rollover to an IRA with characteristics similar to the Safe Harbor Rule, or if the fiduciary is unable to locate an IRA provider that is willing to accept a rollover distribution on behalf of a missing participant, then the fiduciary may distribute the benefit to an interest bearing bank account in the name of the participant or to the state unclaimed property fund for the state of the participant's last known residence or work location.

[12] 29 C.F.R. § 2550.404a-2(c)(1).

Upon the satisfaction of the specified conditions set forth above and in the applicable DOL regulations, the plan fiduciary will be deemed to have satisfied the applicable fiduciary duties regarding the distribution of benefits to missing participants.[13]

B. Analysis

The overlapping rules under the Code and ERISA require plan sponsors and fiduciaries to exercise caution with respect to handling the accounts of lost participants. On the one hand, retaining these accounts in the plan raises a number of difficult, unresolved questions about the extent of the duties owed with respect to the benefits and whether the plan is ongoing.[14] On the other hand, however, the Code and ERISA rules discussed in Section III.A tend to promote inertia.

We appreciate the work that is being done by the ERISA Advisory Council, which has been holding hearings on the broader array of Title I issues associated with lost participants and is expected to issue recommendations to the Secretary of Labor.[15] One idea that has been mentioned in several of the comments submitted to the ERISA Advisory Council is the proposed extension of the Program. We respectfully suggest that an extended Program could provide plan sponsors with a single set of requirements to permanently safeguard the benefits of their plans' lost participants and to wind up the plan. The lost participants, in turn, could look to a single, easily accessible public source – the PBGC – for all of the lost plan benefits of plans by which they were covered during their working years. The following comments are offered for PBGC's consideration with respect to drafting the particular requirements for such an extended Program.

IV. Comments

Our Task Force received over ten responses to the Questionnaire that is attached as Exhibit 1 regarding many plans for which the respondents provide services. Exhibit 2 provides the aggregate data from those responses. In addition, on behalf of RPTE we also offer to PBGC the following additional comments and suggestions, which we have organized in a manner that is consistent with the organization of the Federal Register Notice.

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13 29 C.F.R. § 2550.404a-3(c) and FAB 2004-02.

14 Some of the open questions are as follows:

(1) has the plan administrator satisfied its obligations under Title I of ERISA, including the fee disclosure rules, default investment choices, summary of material modifications, or summary plan description if it sends information to the lost participants' last known address?

(2) Should lost participants who fail to take their required minimum distribution ("RMD") be subject to a 50% excise tax?

(3) Does a plan's failure to pay RMDs to lost participants adversely affect the tax qualification of the plan?

15 The Advisory Council's work is available on the DOL website at http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html#1.

A. Extent of the Demand for Extension of the Missing Participants Program

Most of the comments that were made to the ERISA Advisory Council were very supportive of extending the Program to terminating defined contribution plans.[16] This is also true with respect to the responses to our Questionnaire. We concur with those views and therefore encourage PBGC to extend the Program to terminating defined contribution plans, including permitting plan administrators to satisfy obligations for making distributions to missing participants by transferring the assets involved to PBGC.

There are numerous benefits to extending the Program in such a fashion. Missing participants would gain access to the single, public, searchable database established by PBGC, thereby substantially increasing the likelihood these former participants will have the necessary information to reclaim all of the accounts they earned during their working years. Plan sponsors would gain a valuable alternative to satisfying the varying requirements of IRA providers (or, if they are not available, bank accounts or state unclaimed funds programs). In addition, since the Program as applicable to terminating defined benefit pension plans is already designed to permit distributions in lump sum or annuity form, extending the Program could be an opportunity to allow missing participants in defined contribution plans to receive benefits as an annuity. This would be a valuable feature which typically would not be provided if distributions were made in the form of IRAs. We are aware of no downside to such an extension of the Program.[17]

Moreover, some of the responses to our Questionnaire requested clear, detailed guidance regarding the Program that would harmonize the various requirements of ERISA and the Code. Accordingly, our Task Force is pleased to offer PBGC several additional suggestions, both in this section and below, for how to make the extended Program even more useful and efficient. Our first recommendation is that the extended Program should be open to all of the plans that are described in Section 4050(d)(4) of ERISA, especially plans that are subject to the qualified joint and survivor annuity requirements under the Code (such as money purchase pension plans). Permitting plans subject to the qualified joint survivor annuity requirements to participate in the Program would allow those plans to complete the termination process even if they are unable to locate an annuity carrier who will agree to cover missing participants.[18]

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16 *See, e.g.*, Testimony of Ellen A. Bruce, JD on behalf of Pension Action Center Gerontology Institute ("The Pension Protection Act authorized the PBGC to hold money from terminated defined contribution plans which, if implemented, would solve the problem for terminating DC plans who cannot find all the participants."); Testimony of Richard P. McHugh on behalf of Plan Sponsor Council of America ("The Secretary of Labor, as a Director of the Pension Benefit Guaranty Corporation ("PBGC'), should ensure that the missing participant program for defined contribution plans is implemented by the PBGC."), both of which are available at http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html#1.

17 We believe that many of the concerns with the missing participants in terminating defined contribution plans are also present with respect to the lost participants of ongoing defined contribution plans (i.e., those for whom the plan has no current mailing address and has been unable to obtain some despite diligent efforts). We urge PBGC (and its sister agencies and Congress, to the extent necessary) to give further consideration to these issues at a later date, including possible further extension of the Program to cover such active plan scenarios.

18 In this regard, coordination with the Service to clarify that a transfer to PBGC under the Program would be treated as the equivalent of purchasing an annuity contract for purposes of completing the windup of the

In addition, we recommend PBGC regard a defined contribution plan as having terminated for purposes of the Program if all of the actions to formally terminate the plan required under its applicable terms have been completed and the plan administrator has used reasonable efforts to distribute all plan benefits in a timely manner, even if distributions with respect to certain participants, such as missing ones, may extend beyond the one-year timeframe typically expected under the Code.[19]

B. The Demand for a Database of Missing Participants

All of the responses that we received supported the idea of PBGC establishing a missing participant database for individual account plans. The responders listed the following information as important: the participant or beneficiary's name (and variations thereof), their contact information, including complete address of record and phone number, date of birth, Social Security Number (s) used, name of the plan and plan sponsor and value of account(s). We agree with these comments. We would add that including information such as Social Security numbers and dates of birth raises obvious privacy implications, but we assume PBGC would address such concerns under its regulations governing the privacy of certain information.[20] Most of the responses expressed the belief that a "voluntary only" database would be less comprehensive, but some responders were not convinced that a comprehensive database was necessary.

Although we believe that a comprehensive database would have somewhat more value for plan participants than a voluntary database, a voluntary database would still include information on all missing participants for whom the PBGC has received assets. Thus, the list would still satisfy its most fundamental purpose of helping missing participants be reconnected with those benefits actually held under the Program. Requiring plan administrators of all defined contribution plans to submit information regarding missing participants to PBGC might expand the number of plans and participants for which PBGC would have to maintain information, perhaps increasing the call on PBGC resources. Moreover, imposing an obligation on plan administrators and employers of defined contribution plans to report to PBGC regarding missing participants, even though they would never have interacted with the agency previously regarding those plans, is likely to come as a surprise. On balance, we believe it would be preferable for such a database to be voluntary.

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plan in conformity with the consent rules (see Treas. Reg. § 1.411(a)-11(e)(1)) and the anti-cutback rules (see Treas. Reg. § 1.411(d)-4 Q&A-2(a)(3)(ii)) would be helpful.

19 Our Task Force would not regard a plan as other than terminated if, for example, despite the exercise of reasonable efforts by the plan administrator, some plan assets have not been distributed within one year or less of the termination date in accordance with Rev. Rul. 89-87, 1989-2 C.B. 2. Indeed, PBGC has previously recognized, in the Preamble to the final regulations under Section 4050, that there are occasions where certain participants are discovered late in the termination process or even after it has concluded. *See* 60 Fed. Reg. 61740 (regarding discussion of so-called "late-discovered participant" and "recently-missing participant"). A plan administrator should be regarded as having used reasonable efforts upon making a filing with PBGC under the extended Program that the administrator reasonably believes is complete.

20 29 C.F.R. Part 4902.

C. Current Availability of Private-Sector Missing Participant Services

The responses indicated and the Task Force is aware there are a handful of private sector service providers that receive and handle benefits of missing participants. Still, the majority of responses expressed a preference for PBGC becoming the primary or exclusive means of making nonconsensual distributions to missing participants.

As noted above, we believe PBGC should extend the Program to terminated defined contribution plans. Nonetheless, we recommend that an extended Program not foreclose use of private sector alternatives for distributions to missing participants. Instead, plan sponsors and administrator should have the option of utilizing either the extended Program or a private sector provider for such purpose.[21] This would allow for the possibility that the marketplace may further develop, without preventing plans and plan participants from benefiting from access to the extended Program.

D. Potential Costs and Fees Associated with such an Extended Program

Most of the responses agreed PBGC should offer diligent search services for a fee. One responder suggested that the fee should be based on cost accounting, similar to the user fees that are charged by the Service. Suggested fees ranged from $3 to $35 per participant searched. One response asserted PBGC should conduct annual searches for missing participants upon taking over the accounts of such participants.

We believe PBGC should have the flexibility to price its services based on its own estimates of the cost and value of such services, with the fee covering the costs of receiving and recordkeeping the assets, distributing the benefits and taking such periodic steps as PBGC determines advisable to locate missing participants. In addition, we recommend, as discussed in more detail in the next section, below, that PBGC offer, at such an additional fee as it determines appropriate in light of the costs involved, to perform an initial "diligent search" for plan administrators who elect to use that service (rather than attempting to perform the search themselves).

E. Contours of the Diligent Search Requirement

Current guidance regarding the requirements of a diligent search is not uniform across the three ERISA agencies. Pursuant to regulations regarding the Program in its current form, PBGC regards a diligent search as one in which the plan administrator asks any known beneficiaries to disclose the missing participant's whereabouts and, if unsuccessful in that regard, employs a commercial locator service to search for the missing participant.[22] For example, as noted above, the DOL has specified the following four search methods: (1) certified mail, (2) the Social Security Administration's letter-forwarding service, (3) review of records of other plans maintained by the employer, and (4) contacting any beneficiary designated by the participant.[23]

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21 As indicated above, we urge PBGC to give future consideration to extending the Program to cover certain lost participants in ongoing defined contribution plans.

22 ERISA § 4050(b)(1); 29 C.F.R. § 4050.4.

23 FAB 2004-02.

The Service has given its approval to the two-step process of mailing to the individual's last known address using certified mail, and, if that is unsuccessful, an additional search method, such as the use of the Social Security letter forwarding program, a commercial locator service, a credit reporting agency, or Internet search tools.[24]

Part B of Exhibit 2 provides the summary of responses to several possible required actions. All responses agreed that some form of mail to the participant's last known address was a good idea. Most also agreed that the use of the Social Security letter forwarding program should not be required. Responders were divided on the issue of whether PBGC should post on its website the names of private sector companies that provide diligent search services. Those that opposed such a list expressed concerns about the listing being complete and whether it signified the government's endorsement of the entities listed.

We recommend that the extended Program should allow plan sponsors at least two means of satisfying the diligent search requirement to locate participants for whom mail returned as undeliverable. The first way to do so should be to purchase diligent search services from PBGC based on the fee(s) PBGC has prescribed. (See Section IV.D, above.) The second way of satisfying the diligent search requirement should be to allow plan sponsors to either use a commercial locator service (as the current Program does), or any of the other sets of procedures regarded as sufficient by the Service and DOL. The Task Force believes that small plans (such as those under 100 participants) may lack the resources or expertise to perform a diligent search and arrange for appropriate private sector services and therefore, especially for them, it may be more efficient and economical to purchase diligent search services from PBGC as part of turning over the accounts of the participants they have been unable to locate. Larger plans, due to their size, may be better able to purchase lower cost diligent search services in the private sector, and the extended Program should not prevent them from doing so.

F. Related Logistical Issues

The logistical issues are addressed in Exhibit 2. The Task Force has no additional comments to make regarding the logistics of the extended Program. We would be pleased to meet with PBGC representatives to discuss these issues or to respond to any additional requests by the PBGC.

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24 Rev. Proc. 2013-12 , http://www.irs.gov/pub/irs-drop/rp-13-12.pdf..

Questionnaire About Missing Participants In Terminating Individual Account Plans

The federal Pension Benefit Guaranty Corporation ("PBGC") is considering creating a missing participants program for terminating individual account plans. (PBGC already has a program for terminated defined benefit plans.) PBGC has requested comments on its proposed new program, and the Qualified Plans and Plan Transactions and Terminations Committees of RPTE intend to submit comments. We would appreciate your responses to a few questions to help us provide the most representative comments. **Please** email your completed version of this survey **immediately** with any supplementary comments to our QP chair, Thomas C. Farnam at TCF@FarnamLaw.com. **Any** response will be helpful, even a few notes on a copy returned by fax to 866-404-3089 will be useful.

A. Database

1. Should PBGC establish a missing participant database for individual account plans?

2. What information should PBGC provide in its missing participant database?

3. Would you be willing to share data to help PBGC create and maintain a database?

4. Would your views change if reporting of data were voluntary rather than mandatory?

5. Would "voluntary only" reporting of data make the database less comprehensive?

B. Diligent Searches

ERISA section 4050(b)(2) defines a missing participant as "a participant or beneficiary under a terminating plan whom the plan administrator cannot locate after a diligent search."

1. What requirements should be met to conclude that a "diligent search" has been made?

Please use the table below to share your thoughts about what should be required, or be a permissible alternative or not required as part of a diligent search.

Description of Action	Should be Required	Should be an Alternative	Should not be Required
First class mail to last known address in plan records			
Certified mail to last known address.			
1st class mail to last known address in *related* plan records			
Mail to named beneficiary			
SSA letter forwarding service			
Internet search tools			
Commercial locator services			
Use credit reporting agencies			

2. Should PBGC offer diligent search services for a fee?

3. What do you believe would be a reasonable fee for such services?

4. Should PBGC post on its website the names of private sector companies that provide diligent search services?

C. Problems Locating Participants & Beneficiaries

"Ps & Bs" refers to plan Participants and Beneficiaries

1. How often do plans with which you work have Ps&Bs they cannot find?

2. What is the average number of Ps&Bs these plans cannot find?

3. Account balances for those Ps & Bs – average & range of values.

Exhibit 2

Summary of Responses to Questionnaire About Missing Participants In Terminating Individual Account Plans

The Qualified Plans and Plan Transactions and Terminations Committees of RPTE drafted and distributed to interested parties the Questionnaire that is attached as Exhibit 1. We received twelve responses from lawyers and other benefit practitioners to our Questionnaire. Each response represents a number of plans for which the practitioner provides services. We have provided a summary of the responses in the discussion below – the numbers will not always tally to nine simply because not all respondents answered all questions.

A. Database

	Yes	No	
1. Should PBGC establish a missing participant database for individual account plans?	9	0	1
2. What information should PBGC provide in its missing participant database? **See * below**			
3. Would you be willing to share data to help PBGC create and maintain a database? **	4	0	3
4. Would your views change if reporting of data were voluntary rather than mandatory?***	2	5	1
5. Would "voluntary only" reporting of data make the database less comprehensive?	7	1	3
*Responders suggested a database should provide the individual's name (and variations used), plan sponsor's name, addresses, phone numbers, Social Security Number(s), date of birth, value of account, valuation date and other relevant information in PBGC records. ** Tying to SSA records was suggested twice, also some concern about privacy laws ***Yes if recognized as an additional diligence step for fiduciary purposes.			

B. Diligent Searches

ERISA section 4050(b)(2) defines a missing participant as "a participant or beneficiary under a terminating plan whom the plan administrator cannot locate after a diligent search."

1. What requirements should be met to conclude that a "diligent search" has been made? Please use the table below to share your thoughts about what should be required, or be a permissible alternative or not required as part of a diligent search.

Description of Action	Should be Required	Should be Alternatives	Should not be Required
First class mail to last known address in plan records	10	0	0
Certified mail to last known address. **See * below**	3	3	5
1st class mail to last known address in *related* plan records (*HIPAA Concern*)	2	3	1
Mail to named beneficiary **	1	2	2
SSA letter forwarding service	3	3	2
Internet search tools	1	3	3
Commercial locator services	3	3	1
Use credit reporting agencies	1	4	2
* Responders noted certified mail was often refused. ** One response noted that mail to a beneficiary could invite fraudulent claims			

2. Should PBGC offer diligent search services for a fee? *[Ten] responses said yes, and [one] response said no. One responder indicated that the amount should be a flat fee not based upon the value of the assets.*

3. What do you believe would be a reasonable fee for such services? *One responder suggested that the fee should be based on cost accounting, similar to IRS user fees. Others suggested fees ranging from $3 to $35 per participant searched. One of the responses expressed concerns about PBGC providing diligent search services during the plan termination process. This responder noted that such services are currently provided by several small,*

private sector firms. It worried that the private sector firms would be unable to compete with PBGC due to perceptions in the market that PBGC, as a government agency, would necessarily provide higher quality services. Another commentator stated that the fee should not be greater than what is charged by commercial locators, and gave as an example $15-$20 per participant. Another responder stated $10 or less per participant. Another responder stated no more than 150% of the fee charged by private services.

4. Should PBGC post on its website the names of private sector companies that provide diligent search services? *Eight responses said yes (so long as such a listing is not an endorsement), and three responses said no.*

C. Problems Locating Participants & Beneficiaries

"Ps & Bs" refers to plan Participants and Beneficiaries

1. How often do plans with which you work have Ps&Bs they cannot find? *Responses ranged from "constantly," "often," "monthly" to "several times a year." One commentator noted that the issue is not about one plan but improving the address maintenance by recordkeepers. Another responder noted that individuals cannot be found only occasionally. A responder suggested the quality of plan administration records was a major factor, if better records less missing Ps & Bs.*

2. What is the average number of Ps&Bs these plans cannot find? *Responses seemed to vary depending upon the size of the plan, with some responders reporting from 1 to 10 missing participants and others estimating between 1 to 5% of participants. One response observed that roughly one-third of the participants in defined contribution plan terminations fail to act to have their accounts moved from the terminating plan.*

3. Account balances for those Ps & Bs – average & range of values. *There was a wide range of balances reported, but the greatest number of responses reporting balances below $25,000. One response reported the average account balance to be $22,231. Another response reported experience with "many with a six-figure balance." Additionally, three responders noted that the balances are usually below $5,000.*

D. Private Services?

1. What services are you unable to find from private sources? For example, small benefits or distribution options to match plan provisions? *Most responses did not understand or answer this question. One responder stated that this is not a big issue in DC plans, but is a problem for DB plans because its difficult to find annuities for small balances. Another responder said "you cannot locate relatives for deceased participants, nor small annuities.*

2. Why are the services unavailable? For example, not cost-effective to provide? *One response expressed concerns that the private sector service providers encourage automatic rollovers into their proprietary investment products. Another noted that the fees can appear large in relation to the account balances of lost participants. Another responder indicated that the services are already available in the private sector. One responder commented:"Relative searches for deceased participants are difficult due to the lack of any data basis showing relatives. Moreover, states differ dramatically in terms of death certificates—a prime source in some states for locating a relative. This might become a little easier over time as sources like Whitepages.com and a comparable sight start to show more and more people who live at a single address. However, when dealing with populations that live in apartments, it is almost impossible. Annuities can't be found for small accounts for obvious reasons. However, even if the agencies do provide regulations allowing for or encouraging annuity options in profit sharing plans I believe the chances of participants opting for such are miniscule."*

E. <u>Preference for PBGC or Private Services?</u>

1. If PBGC services were comparable to private services at a comparable cost, would you be more likely to choose PBGC and why? *[Seven] responses said yes, [two] response said no. The other responses did not express a preference but expressed the belief that government services would be viewed as the best. One respondent noted that a smart administrator would prefer to have less options, as the fewer decisions a fiduciary has to make the better. One responder indicated that they were not likely to use the PBGC service as commercial providers go a good job of locating participants. One of the "no" responders stated that the PBGC has proven to be inefficient. Some responses suggested PBGC would be more trustworthy and safer.*

2. Would your answer change if PBGC offered a narrower range of services than private vendors? *All but one response said yes.*

F. <u>Effect of Program Limits</u>

1. What effect would the following have on your likelihood of using PBGC services:
   a. PBGC fees? *Significant effect [2],*
   b. Minimum benefit size PBGC would accept? *Significant effect, without qualification [1]; Would not use for small amounts*.
   c. Mandatory electronic filing with PBGC? *Significant effect [1]. One responder noted that electronic filing only works if the administrator may specify that the recordkeeper does all filings without the signature of the administrator.*
   d. Other possible program features (please specify)? *Several respondents acknowledged the need to limit liability for fiduciaries*

G. <u>Potential Impact on Private Sector Firms</u>

1. How many times each year do you use private sector firms to locate missing Ps & Bs for individual account plans? *150 times per year [1]. 12 times per year [1]. One or twice per year [2]. One to four times a year [1]. Refer clients to locator firms[1]. One responder stated that recordkeepers use them daily. One responder noted that the goal should be to get participants to act and that locating someone does not allow the plan sponsor to update the participant's information. Individuals need to confirm that they are the correct person and indicate what they want done with their assets. One commentator stated they don't use an private locators because of the costly fees. They just search for folks on the internet.*

2. What percentage of the matters identified in G1 involve terminating plans? *One responder noted they see only a few terminations that require assistance locating lost participants. Another responder indicated the missing participants are always in terminating plans.*

3. If PBGC establishes a missing participants program for terminating individual account plans, which of the following statements best describes how much you would use private sector firms to locate missing Ps & Bs?

   a. More than we currently do. *Yes [1]*
   b. The same as we currently do. *Yes [2]*
   c. Slightly less than we currently do.
   d. Significantly less than we currently do. *Yes [1]*

4. If PBGC's new missing participants program is open to all individual account plans (i.e., ongoing and terminating plans) what would your answer be to question G3? *One responder did not understand the question. One responder indicated that establishing such a program*

would be stepping on the toes of the private sector. Another responder stated that it would be best for the recordkeeper to become the exclusive means of disposing of unclaimed benefits, for terminated and active plans. One commentator stated that they would continue to use a commercial service even if the PBGC program were available. Another responder said they would use private services significantly less if the PBGC would accept balances of less than $5,000.

H. <u>Plan Size</u>

For purposes of these questions a "small plan" does **not** require an audit (i.e., under 100 participants).

1. What special concerns do small plans or their sponsors have regarding the treatment of missing Ps & Bs? *Size should not matter [5]. One responder noted that a small plan's administrator will not use any regime to find a lost participant unless all of the tasks are completed by the recordkeeper. One responder noted that small plans don't know about commercial and internet based services and may perceive that the fees are costly relative to the assets involved. One responder noted that locating benefits for small balances may not be cost efficient. Another commentator observed that there is a problem in complying with the plan document when locating lost individuals.*

2. What special concerns do large plans or their sponsors have regarding the treatment of missing Ps & Bs? *Potential future benefit responsibility. One commentator noted the most significant concern is having checks returned and that there should be a regular system for finding them. One commentator noted the issues are the same as small plans. Another commentator noted that large plans are more likely to have a lot of missing participants.*

the assets involved. One responder noted that locating benefits for small balances may not be cost efficient. Another commentator observed that there is a problem in complying with the plan document when locating lost individuals.

2. What special concerns do large plans or their sponsors have regarding the treatment of missing Ps & Bs? *Potential future benefit responsibility. One commentator noted the most significant concern is having checks returned and that there should be a regular system for finding them. One commentator noted the issues are the same as small plans. Another commentator noted that large plans are more likely to have a lot of missing participants.*

July 17, 2013

Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW., Washington, DC 20005–4026

Delivered via email

Dear Sir/Madam,

It is not entirely clear from the RFI if PBGC is seeking comment only on qualified plan participants. Our involvement with QPs is limited as we utilize the services of a third-party entity to provide plan documents and program support. Most of our plans are sole proprietor plans or limited in overall size. When I first saw the RFI I had hoped the question would apply to the much broader question regarding individual retirement accounts. This is a much bigger issue as individual clients move all the time and their investment professionals lose touch with them, or inherit clients they don't know from another investment professional that may have left the firm. Many services such as Lexis Nexis can be employed to determine their current location (as long as they continue to be in the US). The real issue at hand is not as much tracking down the client, as getting them to respond to documentation requests. With current CIP requirements, and other federal regulations requiring photo IDs and proof of mailing, most clients simply don't want to be bothered. Even if the client is provided a prepared LOA ready for their signature, and a postage paid return envelope, it is the requirement for additional documentation that slows them down to a standstill.

Overall we experience approximately 20 clients per quarter that have moved and not notified us. Of these, 75% will return a LOA, photo ID, and proof of current mailing address from a piece of mail. Of the balance, while the clients may have been contacted, their failure to act forces their assets to be turned over the state of last residence as abandoned property. The only follow up at that point is to send a letter and a copy of their last statement showing the retirement assets being moved to an escheatment account. That may encourage 2 or 3 to finally take action. That leaves 1 or 2 that may never respond again. On average that leaves a failure rate of 5% - 10% of clients that lose their assets. My understanding for a QP is that this would go into some Forfeiture account. For an IRA however the assets are moved to an escheatment account waiting on client age limits to be attained.

Assets sizes range from accounts with an unpriced security with a zero market value, to $250,000 in net worth. Most accounts are in the $5,000 to $15,000 range. Clients that never respond tend to be in the $0 to $1,000 range. Obviously in following up on client accounts, those with more value are given greater consideration. Any account in which the value is less than what would be charged for a termination fee would receive less immediate focus.

For the PBGC to be truly effective in this arena, it should enhance the program to include any retirement account type, utilize the ability to track clients via the IRS, Homeland Security and USPS organizations, and any links to other federal or private organizations that track phone and email data, and provide indemnity to plan providers for utilizing that source data to update account contact information if additional documentation cannot be obtained from the client. The key data elements needed, based on a given social security number, are the current name, address, phone number (home/cell/business), and email if available.

While there are firms that have some or all of this data, one has to believe the government has all the necessary components to know where an individual is located based on IRS returns, aid assistance programs, passports, change of address filings with the USPS, etc. Cost would obviously be a relevant factor in the adoption of using such a service. Access would have to be limited to select individuals within accredited organizations with significant penalties for any abuse. While the PBGC could also post diligent search providers on their website as an alternative to the PBGC product, we believe the PBGC has the best chance via networking within the federal government of locating any individual. If the cost was appropriate, we would consider it if available to research clients within any retirement account type.

Sincerely,

Chris Harvey

From: Phyllis Rimkus
Sent: Tuesday, July 09, 2013 8:37:08 AM (UTC-05:00) Eastern Time (US & Canada)
To: RegComments
Subject: 401(k) comments

I saw your interest in starting a database to look for missing participants. That would be nice but the real solution is for you to let us just send you the money for missing and/or nonresponsive clients with balances under $1,000.

There are many uncashed checks out there for small amounts which create a lot of paperwork for nothing. It's not always a case of not being able to find the participants. They just don't want to deal with the paperwork. And starting an IRA for under $1,000 just ends up with the account disappearing after a while due to fees.

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Treasury Services Group, LLC's response to
The Pension Benefit Guaranty Corporation's June 21, 2013 Request for Information regarding Missing Participants in Individual Account Plans

July 8, 2013

Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW., Washington, DC 20005–4026

Delivered via email and US Mail

Dear Sir/Madam,

Treasury Services Group, LLC, a Service Disabled Veteran Owned Small Business, appreciates the PBGC's diligence in maintaining the Missing Participant program, and we applaud its initiative in expanding the program as proposed in this Request for Information and as outlined in the Pension Protection Act of 2006.

We are pleased to be able to present comments and answers as requested in the RFI. As a leader in the Unclaimed Property industry, we have significant experience with the closely-related activities of the States' attempts to collect, catalog, publicize, and return various forms of unclaimed property. As this is the most similar Governmental function to that proposed in the Missing Participants program, and as the management of TSG has operated one of the most successful unclaimed property programs in history, we are uniquely qualified to offer insight.

First and most importantly, this proposal is indeed a worthwhile endeavor. Any step towards preserving and returning the property of lost owners:

a. **Is good government.**

Expanding the Missing Participants program will safeguard more owners' assets against loss, mismanagement, and drawdown through plan-imposed dormancy fees. In all industries, accounts with lost owners are notoriously the most "at risk," so an independent Agency's management will serve as a valuable consumer protection. We routinely see private companies charging exorbitant dormancy fees which, while legal, are not in consumers' best interest. Through escheat the States play an important role in protecting those accounts, and a PBGC plan would provide a similar function.

b. **Is beneficial for the National economy.**

Returning property to the owner generates multiplied value via recirculating through the economy, versus sitting dormant in a pension account. Some States routinely return 50-60% of property received each year, much of which would otherwise remain permanently unclaimed.

c. **Can be centralized effectively and efficiently within the PBGC.**

The States have perfected this system through escheat programs, and most States absorb the entire cost of program management through the interest generated by the pool of reported funds. Staffing requirements are minimal, with some States maintaining robust claims, auditing, and management programs with as little as three to five employees per $100 million held in trust.

We believe that Congress intended better, centralized control of this challenge with the legislation in 2006. The model that the states have effectively utilized can be replicated at the federal level. In this response, we plan to show the PBGC staff some ideas and models that warrant replication.

<u>Responses to selected questions posed in the RFI:</u>

How would you view the value of a single database of missing participants in terminated individual account plans, maintained by PBGC?

In the general experience of the States, the establishment of a single national database has proven to be exceptionally valuable. The National Association of Unclaimed Property Administrators sanctions the national database of 40 States' unclaimed property records. This site is simply a compiled duplication of the States' individual websites, but its centralized features make it an attractive option for claimants. The site receives 175,000 searches per day on average, with more than 524,000,000 searches since inception.

Similarly, a single PBGC database would provide the benefits of:

a. A single search, rather than multiple components for claimants to review individually.
b. A more "marketable" brand—one website name and phone number that can be advertised and promoted anywhere.
c. Added legitimacy of PBGC's name and .gov address, providing valuable Government to Citizen (G2C) information to a variety of interested parties.
d. The PBGC, as a Government agency, would have additional resources in locating owners and heirs to better locate missing participants. Access to the Social Security Administration and IRS databases would almost guarantee the ability to locate the missing participant's current address or next of kin, so a PBGC database would be vastly superior to the private equivalent.
e. A simple, inexpensive setup. The database could be as basic as an interactive searchable list that updates automatically from the PBGC's internal system. States have inexpensively developed their own databases and interfaces to manage vast quantities of records. Either leases from States or else or other off-the-shelf solutions would be available to the PBGC for immediate, cost-effective implementation.

What "diligent search" requirement should apply for individual account plans?

We recommend the adoption of a plan substantially similar to the Security and Exchange Commission's rule on Lost Securityholders and Unresponsive Payees (17-ad17), which requires that stock transfer agents and broker dealers perform two searches (within one year of the owner's mail being returned or failure to negotiate a check, and again within six months of the first mailing) using a national database containing at least 50% of the nation's adults. Two mailings are required based upon these search results, with the net result being that the best available attempt is made to locate and reach the owner.

This system has the benefits of being widely known and recognized within the financial industry, already refined through the SEC's rulemaking process to be most efficient, and is as thorough as pension plans could reasonably be expected to search. We recommend adoption of a similar set of parameters.

Among [individual account] plans, what is the average number of participants the plan cannot find?

In financial property types covered by State unclaimed property laws, we typically find a 1% "slippage" rate (accounts with missing owners) for recent property—checks written within the past decade, etc, and a 2-4% slippage rate among long-term custodial accounts (annuities, life insurance, college savings plans, etc). Given the nature of pension plans: the long term between employment and collection of a pension, the prohibitions against "cashing out" plans early, and the historical lack of regulation or incentive for plans to attempt to reunite lost owners with their pensions, we believe that the percentage of lost owners will average 3-5%.

If PBGC provided services for missing participants' accounts in terminating individual plans…would [plans] be likely to choose the PBGC program…"

In our opinion, this would be an attractive option for plans and holders of missing owner accounts. Quite simply, there's a lot of confusion regarding undeliverable custodial accounts, and enrollment in a PBGC plan would provide built-in compliance with all Federal laws. As long as fees remain near the market/private firm rate, the guaranteed indemnification of participating in the Missing Participants program would make it the most attractive option.

Again, we appreciate the opportunity to address these issues, and we welcome any additional questions you may have.

Respectfully Submitted,

Alex Kauffman

Alex Kauffman
President, Treasury Services Group, LLC

From: Cathy.Batson@leicaus.com
Sent: Wednesday, July 03, 2013 2:28 PM
To: RegComments
Subject: Missing Participants of Pension Plans

As administrator of my company's pension plan, I have used the letter forwarding program that the IRS offered, and was sorely disappointed that they no longer offer this service. This seemed like a 'safe' and reliable system, given that SSN's are involved.

I would very much like to see a program offered that would address this issue. There are numerous companies out there that offer this service, but I am somewhat reluctant to use them as I am not confident in sending them our participants' SSNs. I don't know how legitimate they are. If one program could be offered through ONE agency or whatever that is connected to the IRS or any other group that would have normal access to SSNs, I would be much more comfortable using them. With so much identity theft going on, its hard to know which agency to trust and which to not trust.

Thank you for giving me the opportunity to voice my thoughts on this matter.

Cathy Batson, Benefits Manager
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Norcross, GA 30092
Phone: 770-326-9524
Toll-free: 800-663-0354
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FAX: 770-326-9585 (confidential)

From: Michael Ferrell <ferrell116@gmail.com>
Sent: Wednesday, July 03, 2013 11:39 AM
To: RegComments
Subject: 401K plan

I all ready have a 401K plan at my part-time job. You can take my name off your list so I'll be getting more important mail. Thanks, Michael

From: Phil <phicen@aol.com>
Sent: Tuesday, July 02, 2013 4:44 PM
To: RegComments
Subject: 401k

Re: Philip Cenci

Yes, sounds like a good thing.

Sent from Phil's iPod

From: swulf3@gmail.com
Sent: Tuesday, July 02, 2013 8:28 AM
To: RegComments
Subject: Missing money

The gov already has a site for missing money where the participant can look for his or her missing money. Perhaps this same site that individual companies use can also be used. It would be handy for you to be able to find those missing participants rather than just dismissing them.

Ps it's missingmoney.gov

Sent from my iPad