



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 ERISA¹ 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).

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

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,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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).