



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”).<sup>1</sup>

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.

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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> ERISA § 404(a)(1).

654,421 defined contribution plans.<sup>3</sup> 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.<sup>4</sup>

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.

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<sup>3</sup> U.S. Dep't of Labor, *Private Pension Plan Bulletins: Abstract of 2010 Form 5500 Annual Reports* (Nov. 2012).

<sup>4</sup> 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").<sup>5</sup> This information is transmitted by the IRS promptly to the Social Security Administration.<sup>6</sup> 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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<sup>5</sup> This information is reported on Form 8955-SSA.

<sup>6</sup> 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.

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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.

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