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August 19, 2013

BY EMAIL ([reg.comments@pbgc.gov](mailto: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.

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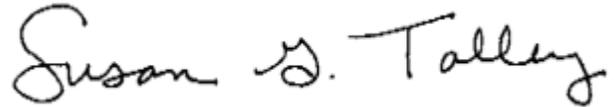
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Very truly yours,

A handwritten signature in black ink that reads "Susan G. Talley". The signature is written in a cursive style with a large, prominent "S" at the beginning.

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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> Instead, defined

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<sup>1</sup> 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. . . .”

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

<sup>3</sup> 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.<sup>4</sup>

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<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> The Internal Revenue Service (“Service”) has also provided useful guidance on the mechanics for setting up the IRAs under this scenario.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> The Safe Harbor Rule for nonconsensual distributions

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<sup>4</sup> See Rev.Rul. 89-87, supra.

<sup>5</sup> 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.

<sup>6</sup> See 26 U.S.C. § 411(a)(11); ERISA § 203(e).

<sup>7</sup> Id.

<sup>8</sup> 26 U.S.C. § 401(a)(31)(B).

<sup>9</sup> Notice 2005-5.

<sup>10</sup> Treas. Reg. § 1.411(a)-11(e)(1).

<sup>11</sup> 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:<sup>12</sup>

- 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.

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<sup>12</sup> 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.<sup>13</sup>

## 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.<sup>14</sup> 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.<sup>15</sup> 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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<sup>13</sup> 29 C.F.R. § 2550.404a-3(c) and FAB 2004-02.

<sup>14</sup> 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?

<sup>15</sup> The Advisory Council's work is available on the DOL website at [http://www.dol.gov/ebsa/aboutebsa/erisa\\_advisory\\_council.html#1](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.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

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<sup>16</sup> 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](http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html#1).

<sup>17</sup> 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.

<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

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

<sup>22</sup> ERISA § 4050(b)(1); 29 C.F.R. § 4050.4.

<sup>23</sup> 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.<sup>24</sup>

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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<sup>24</sup> 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](mailto: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 <i>related</i> 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? <b>See * below</b>			
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. <b>See * below</b>	3	3	5
1st class mail to last known address in <i>related</i> plan records ( <i>HIPAA Concern</i> )	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. Preference for PBGC or Private Services?**

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. Effect of Program Limits**

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. Potential Impact on Private Sector Firms**

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. Plan Size**

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.*