Advisory Council on Employee Welfare and Pension Benefit Plans

Report to the Honorable Thomas E. Perez,
United States Secretary of Labor

Locating Missing and Lost Participants

November 2013

NOTICE

This report was produced by the Advisory Council on Employee Welfare and Pension Benefit Plans, usually referred to as the ERISA Advisory Council (the "Council"). The Council was established under Section 512 of ERISA to advise the Secretary of Labor. This report examines Locating Missing and Lost Participants. The content of this report does not represent the position of the Department of Labor ("DOL").

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ABSTRACT

The 2013 ERISA Advisory Council ("Council") examined the issues plan sponsors, fiduciaries, service providers, and other parties ("Plan Representatives") face in handling plan benefits payable to participants and beneficiaries who cannot be found or are nonresponsive ("Lost Participants"). The focus of the Council's examination was on both methods of maintaining contact with participants so they do not become Lost Participants and methods of finding participants once they become Lost Participants.

The Council learned from witnesses who testified that locating Lost Participants to pay them their benefits can be an administrative burden. Further, while there is DOL guidance on dealing with Lost Participants, that guidance is (i) focused on terminated defined contribution plans, (ii) presented in multiple sources rather than one central and cohesive resource, or (iii) outdated. Furthermore, there does not appear to be sufficient inter-agency coordination among the DOL, the Pension Benefit Guaranty Corporation, and the Social Security Administration to address overlapping issues surrounding Lost Participants. The Council makes several recommendations in this report regarding how to address each of these findings.

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I. EXECUTIVE SUMMARY

The 2013 ERISA Advisory Council ("Council") examined issues that plan sponsors, fiduciaries, service providers, and other parties ("Plan Representatives") face in handling plan benefits payable to participants and beneficiaries who cannot be found or are nonresponsive ("Lost Participants"). The Council focused on methods of maintaining contact with participants so they do not become Lost Participants and methods of finding participants once they become Lost Participants.

Plans of all sizes deal with the challenge of finding Lost Participants. The challenges are particularly great in large plans and industries with high employee turnover or a large number of seasonal employees. While the dollar amount of any single Lost Participant's benefit is typically small, the aggregate dollar amounts across all participants and beneficiaries can be large. Further, plan service providers often are in a position where they have many uncashed benefits checks attributable to many different plans across their customer base.

Closely connected to the Lost Participant issue is the problem of "lost pensions," which most often arises in the case of legacy defined benefit plans. As time goes by and plan sponsors change or plans are merged into other plans, retirees can lose track of the plans in which they participated. The Council heard testimony that participants and beneficiaries might be losing out on their pensions due to shortcomings in the retirement system whereby plan sponsors, plans and retirees lose contact with each other over the years. Many of the Council's recommendations are designed to help participants maintain closer contact with their benefits and also would help address the lost pension problem.

The Council heard witnesses from a variety of constituencies impacted by Lost Participant issues, including: plan sponsors, retiree advocacy groups, services providers, accountants, policy organizations, and related trade associations. The Council also heard testimony from representatives of governmental agencies including DOL, the Social Security Administration ("SSA") and the Pension Benefit Guaranty Corporation ("PBGC"). Testimony occurred during two days of public hearings held on June 4, 2013 and August 28, 2013.

Based upon this testimony and other information submitted to the Council, the Council formulated several recommendations focused on the DOL taking action in three areas: (i) developing industry best practices, (ii) updating and supplementing guidance addressing Lost Participant issues, and (iii) working with other governmental agencies to create a coordinated approach to addressing Lost Participant issues.

II. RECOMMENDATIONS

The Council recommends that the DOL take actions in three areas – development of best practices, additional legal guidance, and coordination with other government agencies.

A. Industry Best Practices

1. Develop and maintain suggestions for plan sponsors, plan administrators, plan fiduciaries and service providers for improving administrative practices in the following areas:

   a. keeping track of participants before they become lost;

   b. providing information to participants on the importance of keeping contact information up to date, providing alternate contacts that can be used when the participant is not responsive, and reminders to verify and update this information -- such as call center or web login reminders and plan benefit statements reminders;

   c. providing information to participants about the opportunity to consolidate assets through rollover to the current employer's plan or an IRA; and

   d. effective search methods for locating Lost Participants, including use of web search and commercial locator services.

B. Legal Guidance on Fiduciary and Other Issues

1. Update guidance for terminated plans under FAB 2004-02 or issue other guidance to provide or clarify the following:

   a. search options other than governmental locator programs (e.g., cost effective commercial locator services and other search vehicles) are appropriate under ERISA and should be accorded safe harbor status under ERISA, with a menu of approaches being acceptable;

   b. if the Pension Benefit Guaranty Corporation implements a lost participant program for terminated DC plans, compliance with the program also should be accorded safe harbor status under ERISA; and

   c. the guidance applies to both participants and beneficiaries.

2. Issue guidance addressing plan fiduciary obligations to locate missing and nonresponsive participants and beneficiaries in active and frozen defined contribution plans that parallels the guidance for terminated plans in FAB 2004-02. Such guidance should:

   a. Consolidate DOL's prior guidance in this area;

b. confirm that a plan may provide that the distribution amount of an uncashed benefit check may be returned to the plan's forfeiture account if a reasonable effort has been made to reach the participant/beneficiary; provided that the benefit (without earnings) will be restored if and when the participant or beneficiary claims the benefit;

c. allow a plan to presume that a participant/beneficiary who fails to cash a benefit check after a specified period of time may be treated as a lost participant/beneficiary; and

d. provide guidance on charging search costs to participant/beneficiary accounts, including the handling of small accounts where search costs may exceed the account value.

3. Extend the automatic rollover provisions in the safe harbor under DOL Regulation section 2550.404a-2 to:

   a. Lost Participants, including those who fail to cash benefit checks (regardless of the size of the account) that become payable to the participant upon attainment of the plan's normal retirement age or are otherwise distributable without the participant consent under Code Sec. 411 and the terms of the plan; and

   b. Lost beneficiaries (regardless of the size of the account or timing of the distribution).

4. Issue updated guidance on ERISA preemption of state abandoned property laws with respect to Lost Participants.

5. Issue guidance to clarify the status of assets used to satisfy benefit payment obligations while a benefit check remains uncashed, including:

   a. whether or not the uncashed checks and underlying amounts are plan assets;

   b. the appropriate accounting treatment for such, including monitoring and internal controls; and

   c. the appropriate reporting and disclosure requirements in the annual filing of the Form 5500.

C. Developing an Integrated Regulatory Regime

1. Work with other federal agencies with respect to programs aimed at Lost Participants, including suggestions and support for the following:

a. Enhance the current reporting system for information on terminated vested participants under Code section 6057;

b. Enhance the form letter, entitled "Potential Private Retirement Benefit Information," sent to terminated vested participants by the Social Security Administration, to include references to relevant agency publications and websites with information on lost participants;

c. Develop and implement the Pension Benefit Guaranty Corporation program for Lost Participants under ERISA section 4050 and establish a national plan registry; and

d. Promote federally funded pension counseling projects, such as including website links on relevant agency websites to the "Finding a Lost Pension" booklet.

III. COUNCIL'S REVIEW OF LOST PARTICIPANT ISSUES

The Council heard testimony that covered a wide range of issues involving Lost Participants. However, a number of common themes emerged from the testimony that formed the basis for recommendations in three distinct areas. The Council's recommendations and this discussion are organized around the following broad major areas:

1. Industry Best Practices;
2. Legal Guidance on Fiduciary and Other Issues; and
3. Developing an Integrated Regulatory Regime.

Each of these areas is addressed in subsections A, B, and C below. At the end of each section, the Council made several observations that led to the recommendations in Section II of this paper.

In summary, the Council believes that there are straightforward steps that plans, participants and governmental agencies can take to ensure that participants remain connected with their benefits. For plans, the steps include maintaining and updating contact information and prompt searches for participants when the contact information is no longer valid. For participants, the steps include being responsible for keeping plans informed of their contact information or consolidating assets in their new employer's plan or an IRA. The government steps include DOL guidance on plan sponsor responsibilities with respect to Lost Participants and better coordination of DOL, PBGC and SSA programs designed to ensure that benefits are paid as intended.

The Council wishes to thank all of the witnesses for their insights and perspectives on the subject of Lost Participant issues. The breadth and depth of the testimony and expertise has contributed immeasurably to this report.

A. Industry Best Practices

The Council heard testimony from a variety of constituencies (employer, service provider, etc.) to get a better understanding of how Lost Participant issues are addressed in the marketplace. In this subsection, the Council grouped the testimony it received regarding industry practices into what the Council hopes will serve as a framework for the formulation of industry "best practices" that may be employed by Plan Representatives.

1. Methods for Minimizing the Occurrence of Lost Participants

Many of the witnesses testified that they implemented procedures designed to minimize the occurrence of Lost Participants. They also emphasized the importance of the participants' and beneficiaries' roles in assuring that the Plan Representatives are able to communicate with them, even after termination from employment. Some of the procedures presented to the Council are summarized below.

"Scrub" Data

In testimony by J. Spencer Williams, on behalf of Retirement Clearinghouse, Mr. Spencer indicated that "the best solution is one that keeps participant data as up-to-date as practical, with the least cost and with minimal manual intervention." He suggested that employers or service providers periodically "scrub" their participant data to determine which participants have inaccurate information. Rob Martorano, National Defined Benefit Practice Leader for Aon Hewitt, and Mary Steigerwalt of Risk Compliance Performance Solutions made similar recommendations.

A "scrubbing" of data generally involves the comparison of an electronic data file pulled from the plan's recordkeeping system to another source of data. The National Change of Address ("NCOA") database created by the U.S. Postal service is a common database for such comparisons. Also, for purposes of locating beneficiaries, plan data may be compared to the Social Security Administration Death Index. Ideally, the scrubbing process results in identifying differences in addresses between the plan records and these databases. Plan sponsors or service providers, like Aon Hewitt and Retirement Clearinghouse, then send postcards or some other confirmation mailing to determine if the address acquired from the database is valid. Opinions regarding how often the "scrubbing" should occur vary. The general consensus among the witnesses was at least annually, but Mr. Williams thought quarterly would be more effective. Aon Hewitt recommends a data scrub two times per year. The cost of "scrubbing" is very low and could be as little as thirty-five cents per participant, but the cost varies by the company that performs such services. As part of its Lost Participant service, AON Hewitt also creates an audit report designed to demonstrate the steps taken to identify and locate the Lost Participants. Mr. Martorano indicated this might be helpful in demonstrating compliance with ERISA's prudence requirements.

Maintain Multiple Points of Contact

Several witnesses highlighted the importance of providing alternate points or methods of contact in the event a participant is not responsive. Mr. Martorano stated that AON Hewitt, which is a record keeper, is able to maintain on behalf of its plan clients a variety of contact information. Ms. Vicki Blanton, Senior Benefits Counsel for American Airlines, Inc., testifying on behalf of the American Benefits Council ("ABC"), also noted that her employer maintains multiple addresses. Alternate points of contact may include a participant's home address, beneficiary's home address, alternate addresses (e.g., participant second homes), multiple phone numbers (e.g., home, work, and cell) for participants and beneficiaries, and multiple e-mail addresses (e.g., work and personal) for participants and beneficiaries. Importantly, the point of maintaining this type of information is not to send plan-related information to every address. Rather, such information would be sent to the primary address on the plan's records. However, the additional information may help ease the burden of locating the Lost Participant once the primary address proves to be invalid or a participant or beneficiary is nonresponsive (e.g., fails to cash a benefit check).

Regularly Update Contact Information

According to several witnesses, many Plan Representatives use their regular interactions with participants and beneficiaries in the normal course of running the plan to remind participants and beneficiaries to update contact information. Further, the Council learned that plan sponsors often communicate to their participants and beneficiaries that it is their responsibility to update the Plan Representative when contact information changes. One plan sponsor even makes that obligation clear in the plan document.

The Council heard testimony that many plan sponsors utilize their call centers to validate the participant's contact information on file such as address, phone number, and email. Mr. Thomas Emswiler, Director of Participant Operations and Policy at the Federal Retirement Thrift Investment Board, pointed to a very thorough process that the Thrift Savings Plan ("TSP") uses to minimize the occurrence of Lost Participants. The TSP flags a participant's account when an incorrect address is identified through the NCOA database. In the event that the participant calls the TSP's call center, service representatives see the flag and ask the participant to update his or her address. Aon Hewitt similarly flags participant accounts on its recordkeeping system. In addition, if a participant logs on to his account electronically, the participant will be asked to update his or her information. Ms. Allison Klausner, Honeywell, also testifying on behalf of ABC, confirmed the effectiveness of using the log-on process to update account information.

Ms. Klausner and Ms. Blanton also pointed to the printed benefit statement as a place to remind participants to verify contact information and to update as needed. Ms. Jane Smith of the Pension Rights Center even recommended that the DOL regulation governing participant account statements and notices of vested benefits require warnings to participants to maintain records and to stay in touch with their retirement plan. Finally, the TSP and Aon Hewitt often call participants once they are aware of a bad address or a participant has proven to be nonresponsive.

Provide Information about the Consolidation of Multiple Account Balances

Providing participants with information about the opportunity to consolidate multiple plan account balances through the rollover process may help reduce the number of Lost Participants. According to Mr. Williams, one of the major causes of Lost Participants is frequent job changing. In addition, employees change their residences several times throughout their lifetimes. Ms. Klausner also pointed to the nature of today's workforce as a contributing factor. As a result, employees participate in multiple defined contribution plans and they lose track of their accumulated benefits. As a result, contact information is not updated and a Lost Participant issue eventually arises. Often, participants leave their account with a prior employer because they are satisfied with the investment choices. However, in other circumstances, participants may not be aware that they have one or more account balances or that they could rollover their account balances into their new plan or an IRA.

Mr. Williams stated that "widespread adoption of 'automatic,' systematic and timely plan-to plan roll-ins would…address the root cause of system friction, and eliminate 90-

95% of the volume of lost and missing participants, and at the same time dramatically reduce cash outs and simplify management of their retirement savings for millions of Americans." Ms. Klausner stated that providing information about the rollover process could be helpful, but cautioned against going so far as to giving "advice," which the DOL will view as a fiduciary act.

2. Searching for Lost Participants

Once a determination is made by a Plan Representative that a participant or beneficiary is "lost," Plan Representatives often make some effort to search for the Lost Participants. There does not appear to be a common understanding as to when or if a participant or beneficiary might be characterized as "missing" or "lost." However, at least one witness testified that a participant or beneficiary was identified as "lost" when he or she is due a benefit and notices sent regarding the benefit are returned as undeliverable or he or she is unresponsive. In other cases, a Plan Representative may make this determination earlier such as when a plan disclosure (e.g., plan notices, qualified default investment alternative notices, etc.) are returned by the U.S. Post Office as undeliverable. In any event, the Plan Representative will eventually determine that a Lost Participant issue has arisen and determine whether action must be taken. The witnesses told the Council about a number of ways a Plan Representative may conduct a search and related issues.

Tiered Approach to Search Methods

The Council heard testimony regarding effective procedures for locating Lost Participants. The witnesses from the Retirement Clearinghouse and Risk Compliance Performance Solutions (both companies that provide Lost Participant search services) described a methodical, tiered approach to performing searches. At each tier, the search process becomes less automated, but the level of detail involved in the search (and the cost) correspondingly increases. An example of a tiered search approach could look like the following:

1. Compare the plan's records related to the Lost Participants to the NCOA database. To the extent there is a conflict of addresses, an address confirmation is sent to the new address or both addresses.

2. Use a credit reporting bureaus (e.g., Experian, Equifax, and TransUnion).

3. Use a commercial locator service (e.g., LexisNexis).

4. Perform manual searches using popular search engines (e.g., Bing, Google, etc.) or even industry specific databases (e.g., IMBD).

Richard McHugh, partner at Porter Wright Morris & Arthur LLP testifying for the Plan Sponsor Council of America ("PSCA"), also described search methods that reflect those set forth in DOL Field Assistance Bulletin 2004-2, which is summarized in the next section. In the event a participant or beneficiary cannot be located after sending a notice by regular mail, the Plan Representative often will do the following:

1. Send a notice to the most recent address on the Plan's records using certified-return receipt mail.

2. Check the records of other employer-sponsored plans (e.g.. health insurance, life insurance, defined benefit plan) to find more current information.

3. Identify and contact the participant's named beneficiary or contingent beneficiary.

4. Use a commercial locator service or a government letter forwarding service.

Mr. Martarano described a Lost Participant search service in which Aon Hewitt partnered with Risk Compliance Performance Solutions ("RCPS") in order to provide a Lost Participant locator service to its clients. That service also provides for different levels of search. For example, Ms. Steigerwalt noted that RCPS experienced considerable success using LexisNexis to find the phone numbers of plan participants. RCPS then called the Lost Participants in order to get new contact information.

One or more of the steps described above may be adequate under a given set of facts and circumstances. The plan fiduciary is responsible for making the determination whether adequate steps were taken.

Decline in Use of Federal Government Locator Services

Notably, government locator services no longer appear to be a cost-effective method for locating Lost Participants. Previously, after e-mail and the U.S. mail proved ineffective, a popular alternative was to use the IRS Locator Service, which was a method specifically approved by the DOL in its Lost Participant guidance. However, in August 2012, the IRS eliminated that program. The IRS based its decision on the fact that "several alternative missing person locator resources, including the Internet, have become available" since 1994, when the locator service was first made available for use in locating Lost Participants. The IRS also noted that the SSA continues to maintain its program that Plan Representatives can use for locating Lost Participants. However, multiple witnesses testified that the SSA's program, which currently charges a $35 per participant fee and takes several months, is not a viable alternative for locating most Lost Participants because it is prohibitively expensive for most searches.

Changes in Technology

The Council also heard testimony that today's technology has resulted in other search methods becoming more effective. This includes web search tools, commercial locator services and credit reporting companies. Mr. Spencer and Ms. Steigerwalt testified that the use of commonly available Internet search engines (e.g., Google, Bing, Yahoo!, etc.) provide information that allowed them to locate the missing or lost participant. Mr. Williams testified that Retirement Clearinghouse had great success in using IMDB.com, a database that includes information regarding actors and similar professionals, in locating Lost Participants in a plan covering people in the entertainment business.

Mr. McHugh testified that the use of USA People Search or People Finders has proved to be successful. These Internet services are far less expensive than the SSA program, as the fee charged is usually a flat fee based on the number of participants being searched rather than on a per participant basis.

Special Circumstances

Several of the witnesses noted that certain plan-related events often triggered an effort to search for Lost Participants. Those events included plan terminations, implementation of de-risking strategies, and changes in record keepers. Under these circumstances, Plan fiduciaries were more inclined to undertake Lost Participant searches that were more extensive and costly.

Payment for Locating Lost Participants

Interestingly, most of the witnesses testified that the plan sponsor was paying for Lost Participant searches. This is the case even though ERISA permits the use of plan assets to pay for searches under certain circumstances. Several witnesses testified that they believed that passing on the costs to the plan (and thus the participants) was not appropriate because the cost was too high. Mr. Martorano noted that he saw more willingness to allow for payment from plan assets in the case of a defined contribution plan. Ms. Steigerwalt stated that she typically saw payments from defined contribution plan assets only if there was money in the forfeiture account or if the plan was terminated.

3. Strategies used in the United Kingdom and Australia

The Council also invited John Turner, Director of the Pension Policy Center, to discuss how other countries address Lost Participant issues. Mr. Turner has studied how many other western countries deal with the inter-related issues of Lost Participants (i.e., the plan cannot find the participant or beneficiary) and “lost pensions” (i.e., the participant cannot find the plan). His testimony focused on the United Kingdom and Australian pension systems as, in his view, their programs fit into a voluntary employer-sponsored benefit plan regime like the one we have in the U.S.

The United Kingdom has a single pension registry. Plan administrators are responsible for registering and notifying the registry of changes of pension plan status such as a plan termination, and changes in names and addresses. The registry provides a single source of information for participants who are trying to find their pension. Participants make an inquiry to the registry by submitting the name and last known address of their former employer. The pension registry then responds to the participant and provides contact information for the plans. The government is not involved after supplying this information to the participant. It is up to the individual to follow up and contact the pension plan after receiving information from the pension registry.

Australia, on the other hand, has approached the problem from a different perspective by establishing a lost members' register. In the event that a written communication to a participant in a pension plan comes back as undeliverable or the plan otherwise has lost contact with the employee, the pension plan is required to report detailed information on

employees with whom the plan has lost contact. A participant can contact the registry either by the web or in person, and the participant is given the pension plan contact information from the registry. If the pension plan has two pieces of mail returned, the plan must register the participant as lost with the pension registry. If a participant has been lost for more than twelve months and the amount of the benefit is valued at $2,000 Australian dollars or less (to be increased to $6,000 Australian dollars by December 31, 2016), the pension account is transferred to the pension registry, where an account is maintained for the participant and interest is credited at the rate of inflation. When individuals leave Australia, they are given a form notice explaining how to claim a pension. As a result of recent government efforts, it is estimated that the number of lost pensions was reduced by 30%.

Interestingly, while the UK and Australia have different systems in that one is focused on the registration of plans while the other is focused on the registration of participants, both systems have a common component. Both countries use technology to create a centralized database designed to help assure participants and beneficiaries are connected with their plan benefits. Mr. Turner also testified that technology is the key to solving the Lost Participant/lost plan problem.

Council Observations

The workforce today has become more transient. Former employees often leave a balance in a retirement plan that goes unclaimed because the employee has forgotten about it, passed away, or because the employer no longer has a current address on file. Additionally, employer actions with regard to the plans such as terminations, mergers and spin-offs and business transactions involving the employer such as mergers, sales, divestitures, or bankruptcies can contribute to participants becoming lost or missing. Such changes to the plan or plan sponsor (e.g., changes to the plan sponsor's name or address) appear to increase Lost Participant issues. However, there are a number of steps that can be taken to minimize the number of Lost Participants and to locate those participants who do become lost.

In listening to witness testimony, reviewing statements submitted by witnesses, and considering its own research and experience, the Council gathered a considerable amount of information regarding approaches to address Lost Participant issues. The Council has several observations based upon such information.

- There are a number of different approaches to addressing Lost Participant issues. Factors considered in what approaches may or may not be taken include (i) the cost of locating the Lost Participant, (ii) the number of participants involved, (iii) the amount of the benefits involved, and (iv) whether the participant or beneficiary is required to take a distribution from the plan.

- Most Plan Representatives initially use the least expensive techniques such as first-class mail and electronic notification via e-mail, in order to comply with their fiduciary responsibilities. Some fiduciaries at that point might follow up with certified-return receipt mail and, if that is unsuccessful, determine if a

more intensive search is required. The level of search will depend on the facts and circumstances.

- The SSA locator service is prohibitively expensive and not widely used by plan sponsors or service providers. Now that the IRS Letter Forwarding Service cannot be used to locate Lost Participants, plan sponsors and service providers do not have a low-cost alternative available through the federal government to resolve Lost Participant issues. Further, DOL guidance on locating Lost Participants appears to suggest that if a government locator service was used, the plan fiduciary met its obligations under ERISA. Any sense of security achieved by using a government locator service is now gone, as the only alternative is prohibitively expensive.

- Advances in information technology make available a considerable range of options to plan sponsors and service providers to locate Lost Participants. The best example of this is the use of popular search engines available on the Internet at little or no cost. Private locator sources, many of which use a combination of sources to locate Lost Participants, may be used when other methods fail. We believe it is important to emphasize that the use of this type of technology is now in the mainstream of our society and has proven reliable and effective. The DOL should seriously consider promoting the value of this technology as the primary method for locating Lost Participants.

- Plan representatives may employ processes and procedures to help reduce the number of Lost Participants. These procedures emphasize regular contact with participants throughout the entire period of plan participation (not just when the participant is an employee) and maintenance of appropriate records throughout this period.

- Many times, the first indication that a participant is lost or missing is when benefit statements or other required communications are mailed to the participant and are returned as undeliverable with no forwarding address. Also, benefit payment checks for mandatory cash outs or mandatory required distributions are returned or are not cashed. It should be noted that often mail is not returned because the current resident throws away the mail. By contrast, email that is undeliverable generally provides the sender with a bounced email notification.

Based upon the testimony, the Council made a recommendation in Section II of this report that the DOL provide information to Plan Representatives, participants and beneficiaries regarding "best practices" on how to minimize Lost Participant issues and to resolve those issues once they occur.

B. Legal Guidance on Fiduciary and Other Issues

At the suggestion of Joe Canary, Director, Office of Regulations and Interpretations, Employee Benefit Security Administration, U.S. Department of Labor, the Council

reviewed a number of sources of DOL guidance that address Lost Participants. Further, the Council reviewed several provisions of the Internal Revenue Code ("Code") and related guidance because the DOL sources addressing rollovers of Lost Participants' benefits were closely tied to these Code provisions. The Council summarizes the relevant DOL and tax-related provisions below for the purpose of determining whether those sources adequately address all Lost Participant issues.

1. U.S. Department of Labor – Locating Lost Participants & Distributions

Field Assistance Bulletin 2004-2

Field Assistance Bulletin 2004-2 (the "FAB") addresses the fiduciary responsibilities for (1) locating missing participants of a terminated defined contribution plan; and (2) distributing an account balance when efforts to communicate with a missing participant fail to secure a distribution election. In the FAB, the DOL states that a plan fiduciary has the responsibility to try and locate a missing participant before distributing the benefit from the terminating plan. Notably, because the FAB addresses terminating plans, there is some focus on getting the benefits out of the plan in order to be able to wind down the plan and trust.

The FAB provides for a number of search alternatives, one or more of which may be employed by the plan fiduciary to locate missing participants and beneficiaries. The fiduciary, in complying with ERISA's fiduciary duty provisions, should determine which of the following steps should be taken and if more than one should be taken.

- Use certified mail – return receipt requested.
- Check records of other plans offered by the sponsor.
- Check with the participant's designated beneficiary.
- Use either the Internal Revenue ("IRS") or Social Security Administration ("SSA") Letter-Forwarding Service.

The FAB states that a plan fiduciary may determine that it would be prudent to use other search options "in addition to" those listed above. Such other search options include "Internet search tools, commercial locator services, and credit reporting agencies to locate a missing participant." In the FAB, the DOL notes that if the cost of using these services will be charged to a participant's account, the fiduciary should "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." Notably, the FAB does not make this point with regard to the governmental letter forwarding programs.

The FAB also states that if the plan fiduciary is unable "to locate participants or otherwise obtain directions concerning the distribution of their benefits," there are a number of options that the fiduciary might have with regard to effecting the distribution and thus allowing for the winding up of the terminated plan and trust. The FAB directs the plan fiduciary to consider the following options in the order described below:

- <u>Individual Retirement Plan Rollovers</u>: The DOL states that the plan fiduciary "must always consider distributing missing participant benefits into individual

retirement plans (i.e., an individual retirement account or annuity)." This is the "preferred distribution option because it is more likely to preserve assets for retirement purposes than any of the other identified options." The FAB points to DOL's safe harbor regulation for selecting the individual retirement plan custodians and trustees and the investment option when the vested account balance is $5,000 or less and the plan provides for a "cash out" distribution. The DOL notes that this regulation, which can be found at 29 C.F.R. § 2550.404a-2, could be applied in the context of a DC plan termination even if the account balance was larger than $5,000.

- Federally Insured Bank Accounts: If the fiduciary is unable to find an individual retirement plan trustee or custodian to take the rollover, transferring the account balance to an interest bearing federally insured bank account in the name of a missing participant is permissible if the participant would have an unconditional right to withdraw funds from the account. The fiduciary should consider the interest rate paid on the account and bank charges in determining whether such a transfer is prudent and otherwise in compliance with ERISA.

- Escheat to State Unclaimed Property Funds: As an alternative, plan fiduciaries may also consider transferring missing participants' account balances to state unclaimed property funds in the state of each participant's last known residence or work location. The FAB states that this option is a possibility if the individual retirement solution will not work. However, the FAB does not appear to require the fiduciary to attempt a transfer to a federally insured bank account prior to escheating.

In the FAB, the DOL rejected the resolution of causing a distribution by withholding for federal income tax purposes the entire distribution and sending it to the Treasury.

The Council notes that the FAB only applies to terminated defined contribution plans. The specific application of the FAB to terminating plans raises the question whether, in the view of the DOL, all of the guidance in the FAB (including distribution options after unsuccessful attempts to locate the participant or beneficiary) can be the basis for addressing Lost Participants in a non-terminated plan. The Council heard testimony that plan fiduciaries typically look at the FAB for guidance on addressing such issues for non-terminated plans. However, at least one witness requested that the FAB be extended to non-terminated plans as well. Also, the Council received testimony that it is not clear (i) whether all of the guidance in the FAB can be applied to lost beneficiaries and (ii)what part of the guidance applies to non-terminated plans.

Automatic Rollover Safe Harbor Regulations – Final Rule

In September of 2004, the DOL issued final regulations, 29 C.F.R. § 2550.404a–2, regarding the automatic rollover of cash out distributions from a defined contribution plan to an individual retirement plan. The DOL issued that regulation in response to a change in the tax code applicable to mandatory cash distributions ranging from $1,000 to $5,000. If a plan provides for a mandatory cash out, the Code requires the plan to send a

notice to the participant stating that the participant is required to receive a distribution and, if the participant does not respond to the notice, the cash out distribution will be automatically rolled over to an IRA.

That regulation sets forth certain requirements related to notice and investment of IRA assets that, if met, would create a safe harbor under ERISA's fiduciary provisions in connection with the rollover distribution. In the preamble to the regulation, the DOL noted that some commenters to the proposed safe harbor rule suggested that the safe harbor be extended to distributions of benefits to missing participants in a terminated defined contribution plan. However, the DOL did not extend the safe harbor to missing participants because "these issues are beyond the scope of this safe harbor initiative on mandatory rollover distributions." Furthermore, the regulation, at least on its face, does not address beneficiaries.

The Council received testimony from Mr. McHugh that the DOL regulation has shortcomings. The regulation appears to address only mandatory distributions prescribed by the Code to plan participants. However, from a plan administrator's standpoint, the real challenge is addressing mandatory distributions pursuant to the terms of the plan to beneficiaries. Many plans immediately require distributions to beneficiaries upon the death of the participant. Unlike mandatory cash outs to participants, the amount of the distribution may substantially exceed $5,000. However, the DOL regulation does not appear to provide safe harbor protection to a plan fiduciary that caused such a distribution to be rolled over to an IRA. In fact, the preamble states that the DOL regulation is not intended to address Lost Participant issues. Furthermore, as discussed below, the DOL's regulations that address rollovers in a Lost Participant situation only apply in the context of a plan termination.

Termination of Abandoned Individual Account Plans - Final Rule

In April of 2006, the DOL issued regulations, 29 C.F.R. § 2578.1 and 29 C.F.R. § 2550.404(a)-3, and a related prohibited transaction class exemption, specifically addressing the distribution of benefits from a terminated defined contribution plan when a participant or beneficiary was missing or nonresponsive. More specifically, the DOL issued final regulations addressing the distribution of participant account balances from (i) a defined contribution plan that was abandoned by the plan sponsor (and terminated as part of the DOL's abandoned plan procedures) and (ii) any defined contributions plan that was terminated. The DOL noted in the preamble to those regulations that the final safe harbor regulation related to distributions from any terminated defined contributions plan "codifies those parts of Field Assistance Bulletin 2004–02 (September 30, 2004) relating to the distribution of assets to an individual retirement plan from terminating individual account plans in those instances where a participant or beneficiary fails to make a distribution election."

The regulations create a safe harbor under ERISA's fiduciary duty provisions. In both regulations, the DOL provides that in the event notices informing plan participants or beneficiaries about the plan termination and their plan benefits were returned as undeliverable, the plan fiduciary is required to "take steps to locate and provide notice to the participant or beneficiary" before making a distribution from the plan. Such "steps"

would include those in FAB 2004-02. However, if after taking such steps the plan fiduciary cannot locate the participant or beneficiary, the plan may distribute the participant or beneficiary's account balance (regardless of the size of the account balance).

In the case of any terminated defined contribution plan, a distribution to a missing or nonresponsive participant or spousal beneficiary could be made to an individual retirement plan established on behalf of the missing or nonresponsive participant/beneficiary if certain requirements were met. In the case of a non-spouse beneficiary, the law at that time did not allow for rollovers by such beneficiaries. Thus, the distribution amount could be transferred to an account (other than an individual retirement plan) maintained by a financial institution that can offer individual retirement accounts (e.g., most banks). The DOL concluded that in the case of any terminated defined contribution plan, whether terminated in the normal course or through the abandoned plan program, the rollover could be completed under the safe harbor even if the amount of the account balance exceeded $5,000. In 2007, the DOL updated this regulation to reflect a change in the Code allowing for rollover distributions to "inherited IRAs."

In addition, the DOL added a *de minimis* exception for account balances under $1,000. In the case of an abandoned plan that was terminated as a part of the DOL's abandoned plan program, the regulations provide for a *de minimis* exception whereby the financial services company would not be required to cause a rollover distribution to an IRA. Rather, such amounts could be transferred to an interest-bearing bank account or state unclaimed property fund. The DOL added this exception in response to comments to the proposed regulation that financial institutions would not want to utilize the abandoned plan program if it was required to take such rollovers into its own IRA product or find another provider that would take them.

This regulation only applies to terminated defined contributions plans. Therefore, the safe harbor is not available in the event the plan is not terminated, but a distribution event has otherwise occurred; even if the distribution is otherwise mandated by the terms of the plan and/or the Code.

2. Internal Revenue Service

As noted above, the DOL regulations related to Lost Participant rollover distributions are closely tied to Code provisions that allow or require such rollover distributions. The Code imposes limits on the ability of a plan to immediately distribute a participant's benefit. These limits impact what steps a plan can take to pay out benefits attributable to Lost Participants. Furthermore, the Code mandates when a plan must begin making distributions. It is unclear how this requirement can be met for benefits payable to Lost Participants.

Sections 411(a)(11) and 401(a)(31) of the Code generally provide that a plan cannot distribute a participant's benefit upon his or her termination from employment before normal retirement age if the vested benefit is greater than $5,000. However, if the participant's vested accrued benefit is less than $5,000, the plan may provide for the

mandatory distribution of the participant's vested accrued benefit upon termination from employment. These are often called "cash out distributions" or simply "cash outs." However, if the plan provides for such cash outs and the vested accrued benefit is at least $1,000, the plan must notify the participant about the pending cash out and, if the participant is non-responsive, the plan administrator is required to rollover the cash out distribution to an individual retirement plan. It was this rollover requirement that led to the DOL's safe harbor regulations discussed above under "Automatic Rollover Safe Harbor Regulations – Final Rule." For vested accrued benefits of less than $1,000, the plan can simply pay out the distribution to the participant without providing the rollover option. Notably, the $5,000 limit and the automatic rollover provisions do not apply to beneficiaries.

Notwithstanding the general prohibition against "cash out" distributions of participant benefits in excess of $5,000, a plan may provide that a participant is required to receive a distribution after termination from employment upon reaching the later of age sixty-two or normal retirement age as defined by the plan. Further, Section 401(a)(9) of the Code requires that a plan begin making required minimum distributions from the plan after the participant terminates employment in the year following the year in which the participant attains age 70-1/2. There are also minimum required distribution rules applicable to spouse and non-spouse beneficiaries.

3. Interconnection between DOL and IRS Guidance

The DOL guidance on dealing with Lost Participants and the IRS guidance related to plan distributions are very much inter-connected. If a plan provides for cash outs of under $1,000, the plan's service provider will cause a distribution and generate a check for a relatively small amount of money. At that point, the plan administrator may become aware of a bad address because the check, sent via regular mail, is returned to the trustee as undeliverable. This clearly raises a Lost Participant issue and indicates the plan fiduciary should begin some kind of search process. However, in some cases those checks are not returned and simply go uncashed. At this point, the plan has no idea whether the lack of response indicates the participant received the check and simply did not cash it or whether the participant never received the check. A question then arises as to what may be done with the funds underlying that uncashed distribution check. These funds are typically held in a bank checking or other depository account. In addition, these accounts may be specific to the plan and treated as part of the trust assets or may be held outside the trust, which is typically the case when omnibus accounts are used.

When a check remains uncashed, the plan fiduciary must decide what to do with the funds underlying the uncashed check. Since the participant is subject to the cash out rule, re-establishing the participant's account within the plan allows the participant to effectively negate the cash out provision simply by failing to negotiate the check. Therefore, a common practice is to transfer those amounts to the plan's forfeiture account after the plan fiduciary has taken reasonable steps to attempt to locate and notify the participant or beneficiary. At that point, the distribution amount returned to the plan is treated just like any other forfeiture under the plan's terms. If the participant later requests his or her benefit amount, the plan will pay the benefit without adjustments for investment gains or losses that might have been earned from the date of forfeiture to the

participant. A description of this procedure should be included in the plan document and summary plan description. The Treasury regulations, 26 C.F.R. § 1.411(a)-11, support forfeiture under these circumstances.

If the plan provides for cash outs of amounts in excess of $1,000 and up to $5,000, a notice must be sent to the participant asking whether the participant would prefer an immediate cash distribution or a rollover to an IRA. If the participant does not respond, the plan administrator is required to rollover the account to an IRA. However, in the event the notice is returned as undeliverable, the plan administrator may not be able to effect the rollover to an IRA and still rely on the DOL safe harbor discussed above under "Automatic Rollover Safe Harbor Regulations – Final Rule." As discussed above, the DOL specifically did not address the use of the safe harbor in the context of Lost Participants. Since that time, the DOL's regulations only focus on distributions to Lost Participants in the event of a plan termination.

Similar issues arise when a distribution is required to be made from the plan either because the plan requires a distribution at age 62 or normal retirement age, or the plan requires a distribution by reason of the required minimum distribution requirements at age 70-1/2. At that point, certain distribution notices, such as a tax notice required under Section 402(f) of the Code, may be returned as undeliverable, preventing the distribution from being made. Thus, the distribution cannot be made. If the plan is unable to make distributions mandated by the Code and the terms of the plan, the plan runs the risk of jeopardizing its tax-qualified status because the plan is not being administered pursuant to its terms, which is defined as an "operational failure" by the IRS. The Council heard testimony from the PSCA and American Benefits Council that plan fiduciaries are put in a difficult situation when they face the required distribution for Code purposes; but the DOL has not issued direct guidance on the fiduciaries' responsibilities in these circumstances.

Furthermore, if the distribution is made and the distribution check goes uncashed, a question arises as to what should happen to the distribution amount. While returning the distribution amount to the plan as described above for cash outs might be an option, this seems less palatable when the plan and the Code require the distribution. Rollover to an IRA might be an option (to the extent the rollover is otherwise permitted under the Code). Unfortunately, as noted above, the DOL's safe harbor rollover guidance only applies to terminated plans.

4. DOL Guidance on Preemption, State Abandoned Property Laws, and Lost Participants

Every state has enacted laws that require the holder of property that has been abandoned to transfer such property to the state. On several occasions, and as noted by Mr. Canary in his testimony, DOL has issued guidance indicating its view that ERISA Section 514(a) preempts application of these state abandoned property laws to plan benefits. The earliest guidance is in Advisory Opinion 78-32A, where DOL stated that ERISA preempts an Illinois abandoned property law specifically applicable to property held in a fiduciary capacity. In Advisory Opinion 79-31, DOL similarly stated that ERISA preempts a California law providing that employee benefit trust distributions escheat to the state if

the owner has not indicated an interest in the benefit within seven years after the distribution becomes payable. The DOL most recently expressed its view in Advisory Opinion 94-41A, where DOL concluded that ERISA preempts application of a Texas unclaimed property law to a defined contribution plan. The DOL stated:

> It is the view of the Department of Labor (the Department) that, if the above-quoted section of the Texas Unclaimed Property Statutes were applied to require the Plan to pay to the State amounts held in the Terminated Employees' Account, or in other accounts of the Plan, pursuant to the procedures described above, then such application of the section would be preempted under section 514(a) of ERISA. Such an application of the State escheat law would directly affect the core functions of the Plan by reducing, through the escheat, the amount of plan assets held in trust for the benefit of all participants and beneficiaries of the Plan. Moreover, because the statute at issue is not a law regulating insurance, banking or securities, it is not saved from preemption under section 514(b)(2).

Numerous witnesses indicated that plans uniformly treat benefits of Lost Participants as not subject to state abandoned property laws. This preemption of state law allows plans to follow uniform procedures with respect to benefits of Lost Participants regardless of the state of residence. It appears that state abandoned property administrators respect ERISA preemption and do not attempt to subject benefits of participants in ongoing plans to escheatment.

Some witnesses suggested that DOL could provide guidance that would permit plans to turn over property on a voluntary basis to state abandoned property authorities as a method of handling the accounts of missing participants. Most members of the Council do not support this approach because the resulting patchwork of state and federal regulation would introduce further complexity that is unlikely to result in uniting participants with their benefits.

The Council also noted that there is no guidance on ERISA preemption in the context of benefits of missing participants in terminated plans. If the PBGC implements its missing participant program for terminated DC plans, the issue of ERISA preemption may become moot. However, in the absence of such a program, the question of application of ERISA preemption to benefits in terminated DC plans remains unresolved.

5. DOL Guidance - Plan Asset and Accounting Treatment of Uncashed Benefit Checks

Many DC plan record keepers use omnibus accounts to process distributions to participants. When a participant takes a distribution, the participant’s account in the plan is liquidated and the funds are transferred to an omnibus account that is used to effect payment to the participant. Typically, assets remain in the omnibus account only for the period of time it takes the participant to negotiate payment of the check – usually a matter of just a few days. However, if a participant is lost, unresponsive or otherwise does not negotiate the check, the assets remain in the account until steps are taken to return the funds to the plan. Although the DOL provided guidance, FAB 2002-3, on the handling of

float associated with omnibus accounts, there is currently no legal guidance on the status of these assets while they remain in the omnibus account.

Typically, checks that go uncashed represent distributions of small account balances or residual amounts allocated to participants after they have already taken the bulk of their account in an earlier distribution. As discussed above, cash out distributions of $1,000 or more that have not been requested by the participant are automatically rolled over to an IRA. All other distributions before retirement age are distributed only with participant consent so are unlikely to remain uncashed. However, in the case of distributions after retirement age, including minimum required distributions after age 70-½, it is possible that checks for significantly larger amounts will remain uncashed. In any case, uncashed checks can accumulate over time and represent a significant amount for larger plans.

The lack of certainty over the status of assets associated with these uncashed checks has been of increasing concern to the accounting industry. DOL regulations require the auditor to form an opinion on whether the plan's financial statements are presented fairly, in all material respects, in accordance with the applicable reporting framework. However, if the status of assets in omnibus accounts is unclear, plan management does not know how or when to report the assets on the plan's financial statements. James Haubrock, testifying on behalf of the American Institute of Certified Public Accountants, indicated that practice varies in this area and recommended that DOL issue guidance on both the plan assets status of uncashed checks and reporting on IRS Form 5500.

Council Observations

The Council believes that while FAB 2004-2 and the other guidance issued by the DOL in relation to Lost Participants issues serves as a useful guide for plan fiduciaries, the DOL could unify and clarify that guidance in order to make it more helpful to plan fiduciaries in resolving Lost Participant issues. The Council identified several areas where the DOL guidance could use updating, consolidation, or clarification:

- FAB 2004-2 (i) does not address certain Internet search tools that have become part of the mainstream such as search engines available through Internet service providers and (ii) does not specifically address whether the guidance applies to beneficiaries. Further, the focus on the governmental letter forwarding programs is out of date with the elimination of the IRS program, leaving only the SSA program, which is prohibitively expensive.

- FAB 2004-2 does not address searches for and distributions to Lost Participants related to non-terminated plans. Many plan fiduciaries apply the principles in the FAB in attempting to locate Lost Participants in non-terminated plans. However, the applicability of the guidance in the FAB on handling distributions to Lost Participants is not readily apparent in a non-terminated plan. In the latter situation, not all participants and beneficiaries are entitled to a distribution and the plan fiduciaries are not attempting to remove all assets from the plan as part of the plan wind down process.

- Plans may be in a position where there are a number of beneficiaries required to receive an immediate cash out distribution from the plan. However, if the beneficiaries cannot be located or are unresponsive, the current DOL safe harbor regulations addressing rollovers of mandatory cash out distributions to IRAs do not apply in the event the plan administrator wishes to cause a rollover to an IRA on behalf of such beneficiaries.

- Plans may be in a position where the plan terms and the Code require a distribution to a participant (e.g., upon reaching normal retirement age or age 70-½). However, the DOL does not have regulations that address whether such distributions may be rolled over to an IRA (to the extent otherwise permitted under the Code). The DOL regulation that provides for a safe harbor only applies to defined contribution plans that are terminated. Therefore, plan fiduciaries are put in the difficult position of making distributions to meet the Code requirements, but no clear path on how to do so and meet the ERISA fiduciary requirements.

- The existing guidance on ERISA preemption of state abandoned property laws is dated and does not address preemption in all contexts, including application of the rules with respect to benefits associated with terminated plans.

- The lack of guidance on the plan asset status of funds held in omnibus accounts has resulted in varied accounting practices and inconsistent reporting on Form 5500.

Based upon our analysis, observations, and witness testimony, the Council made several recommendations in Section II of this paper regarding how the DOL can improve its regulatory and sub-regulatory guidance that touches on Lost Participant issues.

C. Developing an Integrated Regulatory Regime

The Council looked at other programs and agencies of the federal government to identify whether those agencies and the DOL could better coordinate their activities in order to resolve Lost Participant issues. The Council surmised that certain mechanisms may already exist within the current retirement system that could be used to resolve Lost Participant as well as lost pension issues. Additionally, the Council heard testimony regarding a number of legal requirements and programs that may be helpful in resolving Lost Participant issues or minimizing the occurrence of Lost Participants. These issues include reporting of terminated vested participants under Code Section 6057, the PBGC's lost participant pension registry and government-funded pension counseling programs.

1. Code Section 6057 Reporting of Pension Benefits of Terminated Vested Participants to Internal Revenue Service and Disclosure through Social Security Administration

Code Section 6057(a) requires the administrator of a pension plan subject to ERISA's vesting provisions to file a registration statement with the Secretary of Treasury. The

registration statement sets forth: (i) certain information related to the plan, (ii) plan participants who separate from serviced covered by the plan and are entitled to deferred vested retirement benefits, and (iii) the nature, amount and forms of deferred vested retirement benefits in which the plan participants are entitled. Code Section 6057(b) provides that any plan administrator required to register under Section 6057(a) shall, within the time prescribed by regulation, also notify the Secretary of Treasury of any change in the name of the plan or the names and address of the plan administrator, the termination of the plan, or the merger or consolidation of the plan with any other plan or its division into two or more plans.

Until January 1, 2009, pension plan administrators complied with reporting obligations under Code Section 6057(a) by filing Schedule SSA to the Form 5500. The reporting requirements of 6057(b) are met by completing certain questions on Form 5500. On the form, the plan administrator was required to identify the plan sponsor (Question 2a), the plan sponsor's employer identification number (Question 2b), the plan administrator (Question 3a), and the plan administrator's employer identification number (Question 3b). Furthermore, if the name and/or the employer identification number of the plan sponsor had changed since the last Form 5500 filing, the plan administrator was required to report the plan sponsor name, employer identification number, and the plan number from the last From 5500 filing.

Starting January 1, 2009, the DOL's final regulation requires the filing of electronic Form 5500s and the Schedule SSA was eliminated. On March 3, 2011, the IRS issued Announcement 2011-21, which provided that for purposes of Code Section 6057(a) reporting [initial disclosure of terminated vested participants], pension plan administrators would use new IRS Form 8955-SSA to replace Form 5500 Schedule SSA. For purposes of Code Section 6057(b) [disclosures of changes of address, and identity of the pension plan], plan administrators were instructed to continue using Form 5500.

Code Section 6057(d) requires the Secretary of Treasury to transmit copies of any statements, notifications, reports or other information obtained by the Secretary under Section 6057, to the SSA. The SSA is required to notify a participant that he or she may be eligible to receive a pension benefit on a form letter titled "Potential Private Retirement Benefit Information." The notification is generally triggered by the participant's becoming eligible for social security benefits. This form letter directs the participant to the toll-free phone number of EBSA and its address in Washington, as well as a toll-free phone number of the SSA if the participant has a problem locating the pension plan.

Based upon the Council's review of this regulatory regime, the Council believes that the current system of reporting information on terminated vested participants is not optimal. First, the system does not adequately keep a record of a legacy plan which has been the subject to changes, such as a plan merger into a consolidated plan. A participant in a legacy plan which has been merged likely may not be notified by the SSA that the plan has been merged and about post-plan merger changes in the address or plan administrator. Second, a terminated vested participant may be reported by the plan administrator on the Form 8955-SSA and receive a distribution shortly thereafter. Years later when the former participant applies for Social Security benefits, he will receive the

form letter stating that he "may" have a pension. Unnecessary confusion for participants and administrative expense for plans could be avoided if the Code Section 6057 information is updated for plan distributions. A correction of both of these problems would likely require modifications in Form 5500 and Form 8955-SSA.

2. PBGC Lost Participant Pension Registry

For years, the PBGC has provided a lost participant program for participants and beneficiaries in terminated, single employer defined benefit pension plans, as required by ERISA Section 4050. That program is not applicable to defined contribution plans. However, the Pension Protection Act of 2006 provides for the PBGC's implementation of a program to accommodate terminated defined contributions plans and multiemployer plans. To date, the PBGC has not implemented this program. On June 21, 2013, the PBGC issued an RFI in which it solicited comments from the public regarding interest in a terminated defined contribution plan program and other information.

Under the existing PBGC program, if the plan has a "missing participant," such a plan is required to transfer the benefit to the PBGC. Furthermore, the PBGC maintains a website which can be searched by a person who believes he or she may be entitled to a pension benefit that has been transmitted to the PBGC under its missing participant program. In addition, the website refers the public to the PBGC publication "Finding a Lost Pension," which was a joint project of the PBGC and the Pension Action Center. This publication is written in layperson's language on how to find a lost pension. The publication includes a list of EBSA offices and pension counseling programs funded by the Division of Aging of the United States Department of Health and Human Services.

Ms. Deborah Murphy, Senior Counsel in the Office of the General Counsel of the PBGC, testified that the PBGC was reviewing the comments it received through the aforementioned RFI. She noted that there was public interest in a missing participant program for terminated defined contribution plans as well as for active defined contribution plans. The commenters stated that, in developing such a program, the PBGC should coordinate its activities with the DOL and the SEC as they both have rules related to Lost Participants. Ms. Murphy drafted the current PBGC regulation on lost participants for terminated single employer defined pension plans and indicated that she will be involved with the drafting of any regulations implementing the expansion of the PBGC pension registry for terminated defined contribution plans which was provided for by the Pension Protection Act. Ms. Murphy testified that some plan administrators do not perform an adequate search before a benefit of a lost participant is turned over to the PBGC under its current program and that she believes the current PBGC standard is higher than that required under applicable law. Accordingly, the PBGC likely will require a high level of searching for a lost participant before a benefit or account is turned over to the PBGC.

In general, the Council is supportive of a PBGC-sponsored program made available to terminated defined contribution plans as set forth in the Pension Protection Act. Such a program would be helpful in alleviating some of the administrative burdens associated with resolving Lost Participant issues. However, close coordination between the DOL and the PBGC is necessary to make this program useful.

3. Pension Counseling Programs Funded by HHS under the Older Americans Act of 1965

Section 215 of the Older Americans Act of 1965, as amended, provides that the Administration on Aging of the United States Department of Health and Human Services is authorized to award grants to eligible entities "to establish and carry out pension counseling and information programs that create or continue a sufficient number of pension assistance and counseling programs to provide outreach, information, counseling, referral, and other assistance regarding pension and other retirement benefits. . . ." The Pension Action Center in Boston Massachusetts is one of six funded pension counseling programs. Currently, 29 states have a pension counseling project funded by Section 215 of the Older Americans Act. The Pension Action Center partnered with the PBGC in drafting the publication "Finding a Lost Pension" discussed above.

Ms. Ellen Bruce, Director of the Pension Action Center, testified that in 2004 she and John Turner published a paper which estimated that lost pension participants in the United States had over $100 billion in unclaimed benefits. Ms. Bruce testified that a participant may become lost to a pension plan as a result of corporate mergers, bankruptcy and shut downs which can occur in the intervening years between employment termination and an application for retirement benefits. Similarly, Ms. Jane Smith, Policy Analyst for the Pension Rights Center, testified that a participant may become lost due to changes in an employer's name, merger, spin-off or shut down. Ms. Bruce testified that a lost participant inquiry is frequently initiated when a participant receives a "you may have a pension" letter from SSA.

Ms. Bruce encouraged the enhancement of the PBGC's current missing participants and related registry as indicated in the Pension Protection Act of 2006. Ms. Bruce also recommended expanding the pension counseling programs under Section 215 of the Older Americans Act to include all fifty states. She testified that such programs have a record of success. Ms. Smith further explained that the Pension Rights Center supports an amendment to ERISA Section 4051 introduced by Congressman Neal (H.R. 2127), which would provide for a lost plan pension registry. On the registry, a plan sponsor would record the history of plans (including plan mergers, changes in sponsor, etc.). The PSCA also testified that it supported this amendment. Mr. McHugh noted that the registry could make the SSA's notification process stemming from the Form 8955-SSA more useful, as the recipients of that notice could then go to the registry. In the event that this amendment was enacted, Ms. Smith recommended that the DOL should revisit existing regulatory guidance on due diligence searches for lost participants to include use of the expanded PBGC registry.

Council Observations

Based upon its own research and witness testimony, the Council identified several areas under current law that may provide significant safeguards to address Lost Participant issues. Many of those safeguards involve agencies other than the DOL and included the IRS, PBGC and the SSA. Further, the Council learned that the issues of Lost Participants and "lost pensions" are closely related. With regard to the Lost Participants, the plan sponsor still exists and is well aware that it has one or more participants entitled to a

benefit who cannot be located or who are not responsive. In the "lost pension" scenario, the participant believes that he or she is entitled to a pension, but cannot locate the employer for any number of reasons. Presumably, by taking actions to reduce the number of "lost pensions," some Lost Participant issues can be resolved and vice versa.

The Council also made several other observations:

- Code Section 6057(a), (b), and (c) do not appear to be effective in assuring that plans and plan participants stay connected, particularly over long periods of time.

- There does not appear to be a great deal of coordination among the DOL, IRS, SSA and PBGC in addressing Lost Participant and "lost pension" issues.

- Additional efforts could be made to expand the availability of pension counseling programs and making participants and beneficiaries aware of these programs.

- The DOL should work closely with the PBGC in the PBGC's development of a defined contribution missing participant program or similar programs to assure that each agency is establishing consistent standards for locating Lost Participants.

Based upon our analysis, observations, and witness testimony, the Council made several recommendations in Section II of this paper regarding how the DOL, Treasury, IRS, and SSA can better coordinate their activities so as to help minimize the occurrence of Lost Participants (and the related occurrence of "lost pensions"), and its regulatory and sub-regulatory guidance that touches on Lost Participants issues. The Council asks that DOL share this paper with these agencies in order to promote inter-agency cooperation on these issues.

IV. CONCLUDING OBSERVATIONS

After hearing witness testimony, reviewing written statements, and conducting its own research, the Council believes that there are useful steps which plans, participants and governmental agencies can take to ensure that participants remain connected with their benefits. For plans, the steps include maintaining and updating contact information and prompt searches for participants when the contact information is no longer valid. For participants, the steps include being responsible for keeping plans informed of their contact information or consolidating assets in their new employer's plan or an IRA. The government steps include DOL guidance on plan sponsor responsibilities with respect to Lost Participants and better coordination of DOL, PBGC and SSA programs designed to ensure that benefits are paid as intended. The Council recognizes that no single step will solve all Lost Participant problems. However, the Council hopes that through the combined efforts of plans, participants and governmental programs, both the administrative burden and the incidence of Lost Participants will be greatly reduced.