



AMERICAN BENEFITS  

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COUNCIL

TESTIMONY OF

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ON BEHALF OF THE

AMERICAN BENEFITS COUNCIL

FOR THE

ERISA ADVISORY COUNCIL

LOCATING MISSING AND LOST PARTICIPANTS

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Good morning. My name is Allison Klausner and I am the Assistant General Counsel – Benefits for Honeywell International Inc. (“Honeywell”). I am here today on behalf of the American Benefits Council (the “Council”). The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans. I serve on the Council’s Executive Board of Directors and, on behalf of Honeywell and the Council, I am actively engaged in numerous public policy discussions regarding important employee benefits issues that our nation must address and manage. Furthermore, I note that Honeywell, like many of the Council’s members, does business, and has employees working, in many countries outside of the United States of America. As such, together with the Council’s other members, I have the privilege and opportunity to gain knowledge and experience of the strengths and weaknesses of employee benefit systems from nations around the world and to apply such knowledge and experience to our discussion here today.

I am grateful that I have been invited today to testify with respect to connecting lost and missing participants and beneficiaries with employee benefits that become due and payable. As you know, I, as well as other Council members, have previously testified before you on numerous benefits issues, including those related to accumulation, investment, fees, leakage, education, advice and, ultimately decumulation or spend down of benefits. But, the truth is, these topics are of significance *only if* employers are able to connect people to their employee benefits. Thus, I am most pleased that the ERISA Advisory Council is holding this hearing and invited a dialogue on this very important issue. Without a doubt, regardless of what employee benefit plan or system is in favor at any given time, the plan or system is at risk of being deemed a failure if the end result is that individuals eligible to receive employee benefits cannot be found.

## **BACKGROUND**

Rules governing lost and missing participants need to reflect the workforce of today and tomorrow. Today, not only do individuals often change jobs, move between communities and experience restructured families, but employers also engage in numerous different and complicated corporate and business related transactions, such as acquiring and divesting businesses, that impact employees, as well as employee benefit plans, systems and service providers. It is in the context of this dynamic world which we need to evaluate what else needs to be done to help employers and employees: (1) what do we need to do with respect to benefits that are lost to participants and beneficiaries, (2) how do participants and beneficiaries become lost or missing and (3) what might be done to minimize the likelihood of benefits being disconnected from their rightful owners.

As we evaluate the standards of care for locating lost and missing participants or protect benefits from being separated from participants in the first place, we should keep in mind that there is significant value in doing so without imposing upon employers, plans sponsors, and plan service providers any additional risks of liability or administrative burdens and to reduce those liabilities and burdens where possible. The matter of lost participants is only one issue in a complex employer provided employee benefit system. For that reason, the Council encourages the Department, as it seeks to identify solutions relating to missing participants, to not seek solutions in isolation. Indeed, we encourage the Department to consider that plan sponsors are subject to a myriad of other regulatory mandates regarding lost participants, including the SEC's recently adopted rules on lost security holders and existing state insurance and unclaimed property regulators' requirements for locating beneficiaries. Furthermore, it is the Council's hope that, as the Department considers solutions, it be mindful of the fees and/or costs associated with such solutions. If a solution is too costly relative to the results – or likely results – then the solutions proffered may not be solutions in practice at all. This is especially true when handling small benefit amounts as search costs can rapidly deplete the benefit itself.

To guide the discussion of lost participants, I suggest we consider it in two parts – participants that are lost and those that may become lost.

#### **CURRENTLY “LOST” PARTICIPANTS**

Despite the best efforts of plan sponsors, plan fiduciaries and plan service providers (hereinafter collectively referred to as “sponsors”), currently there are indeed many lost participants and beneficiaries. And, as described in the “background” section above, there are many reasons why this may have occurred. But, once it has occurred, the question is what type of guidance from the Department of Labor could be helpful.

We would like to suggest that the Department develop safe harbors from which sponsors could choose, if they so desire, to manage the benefits of lost participants. We seek guidance from the Department that would provide a framework in which a range of solutions are available and which if any one is adopted would shield the sponsors from liability and the plans from disqualification. One possibility we suggest is to borrow from and expand a framework which is already in place, such as the Employee Plans Compliance Resolution System (or EPCRS) set forth in Revenue Procedure 2013-12. Under the EPCRS, if a sponsor fails to timely enroll an employee in a participant directed 401(k) plan (because in theory the participant is “lost” in the eligibility portion of the system due, perhaps, to a manual key stroke data entry error), when the person is “found” there are administrative correction methodologies that can be utilized to fully fix the error. And, upon following implementation of the fix, the sponsor is no longer subject to the risk of adverse outcomes for all the failures that flowed from the inadvertent late enrollment.

We understand that there are lost participant provisions in EPCRS, but only in the context of how to manage lost participants while correcting an operational error. Plan sponsors would welcome a broader application of the EPCRS lost participant guidelines and principles. For example, plan sponsors would be pleased to know that, *before* an error is made, there are safe harbor methodologies for handling the distribution of benefits in situations where the participants or beneficiary is unknown or lost.

In our vision, the framework would allow a plan sponsor to choose an administratively simple method for handling distribution of benefits in the context of a lost or missing recipient, and upon completion of the implementation of such method, relieve such sponsor of any further administrative obligations and risk of fiduciary or other liability. Indeed, it is the continuing administrative obligations and the continuing risk of liability that, without clear guidance, leads sponsors to become paralyzed and do nothing or, even worse, to make choices/decisions that are designed with good intentions but which make no sense whatsoever from the perspective of common sense. For example, perverse results can arise when a plan sponsor is faced with the need to distribute benefits when the whereabouts of a deceased participant's beneficiary is unknown. In an attempt to satisfy the plan's distribution timing rules, plan benefits may be issued to a deceased individual, knowing he's dead, because the beneficiary cannot be located or the service providers are unable to facilitate getting the required documents signed and returned to timely distribute the deceased participant's benefits to his/her beneficiary.

As a way of helping to resolve these types of problems, perhaps the Department could provide sponsors with relief from the required minimum distribution timing rules so that plan benefits are not issued to deceased participants or to participants and beneficiaries at addresses known to be wrong and/or out of date. Likewise, perhaps the Department could provide safe harbor relief in situations where plan sponsors know that a participant is missing but the plan sponsor learns after the distribution occurred that the missing participant is actually deceased.

The Department may not be privy to plan sponsors' treasure chest of war stories, but I assure you that virtually all plan sponsors have more than a handful. Consider another example, a war story if you will, whereby, after a plan sponsor issues a distribution in the name of a lost participant in the form of a single life annuity, the plan sponsor learns that the missing participant was dead and that no annuity should have been purchased at all. Had the plan's distribution timing rules been waived while the participant was "lost," no annuity would have been purchased and the tedious, contentious work that occurred thereafter to "unwind" the illegitimately purchased annuity could have been avoided.

Another area in which plan sponsors would enjoy having the Department provide enhanced guidance and protection is in the context of the investment of defined

contribution plan assets in participant directed 401(k) plans. Today, plan sponsors are not certain if there is a point in time when a lost participant's investment election should be treated as null and void. Indeed, given that there may be a long passage of time during which a participant or beneficiary is lost and, during such time investment fund choices may change and the investments may be subject to significant volatility, this is an area in which sponsors, weary of both touching and not touching the plan assets in a participant directed account of a lost or missing participant, would welcome guidance as to when the lost participant's assets can be transferred into a plan's default investment fund vehicle. Perhaps the guidance could be issued in the form of a safe harbor and, if the plan sponsor follows the safe harbor, the sponsor could be insulated and protected from any risk of liability associated with such change in the investment of assets to the default investment procedures.

Finally, we note that plan sponsors are uncertain as to what to do with the benefits attributable to unlocatable persons in the context of terminated plans. We are not referring to "orphan plans" – but rather plans that were sponsored by an ongoing entity (or perhaps a prior business that merged into the ongoing entity). In this context, it would be quite helpful if the terminated plan's remaining assets, even those attributable to lost participants and which are subject to the rules regarding protected benefits (such as QJSAs), could be merged into an employer's existing plan, stripped of the protected benefits.

The bottom line is, in terms of help from the Department, the Council's members would welcome additional support in a meaningful framework that would enable sponsors to avoid any complex rules which interfere in common sense solutions.

Next, we would like to turn our attention briefly to what the Department may be able to do to support plan sponsors to not lose track of participants. Essentially, what efforts can be made with regard to those who are not yet lost but who easily could become missing?

#### **NOT YET "LOST" PARTICIPANTS**

Employers seek to enter into a cooperative relationship with employees, service providers and government agencies to build stronger relationships geared toward not losing track of participants and beneficiaries. In the current world of electronic communication and social media – with the amazing wealth and breadth of networking tools -- it almost seems absurd that a participant or beneficiary could become lost or that sponsors could claim with sincerity that participants and/or beneficiaries cannot be found. Yet, regardless of the vast electronic communications available to virtually all persons connected to the delivery of employer provided benefits, persons do become disconnected from their benefits.

In this regard, expansion of the rules regarding the use of electronic disclosure and communication could support the goal of no new lost or missing participants. If, for example, plan sponsors can rely on electronic communication for distributing required disclosure materials, we will have better access to and improved mechanisms to facilitate maintaining up to date records. At this time, the regulations don't support the ability of employers to communicate by electronic media, in lieu of paper, with a broad group of employees. Yet, most employees (if not virtually all of them) have access to and utilize electronic communications in their everyday life and without issue.

In summary, it would be extremely helpful in our efforts to reduce the number of future lost participants if the Department could continue working on establishing a legal environment in which employers can broaden the electronic communication tools available to their employees.

## CONCLUSION

On behalf of the American Benefits Council and all of its member companies, I thank the ERISA Advisory Council for addressing this important issue. It would my pleasure, as well as the pleasure of the Council, to continue this dialogue with the Advisory Council and to collaborate in the development of specific proposals that the Department may consider to handle the benefits of lost and missing participants and to cultivate a legal environment that minimizes the likelihood of losing participants who currently are not lost.