

MEMO# 31026

January 16, 2018

PBGC Finalizes Regulations to Extend Missing Participant Program to Terminated Defined Contribution Plans

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January 16, 2018 TO: ICI Members
Pension Committee

Pension Operations Advisory Committee SUBJECTS: Operations
Pension

Transfer Agency RE: PBGC Finalizes Regulations to Extend Missing Participant Program to Terminated Defined Contribution Plans

On December 22, 2017, the Pension Benefit Guaranty Corporation (PBGC) issued final regulations (Final Rule) to modify its existing program for missing participants.[\[1\]](#) Prior to this modification, PBGC's missing participant program (Program), which holds retirement benefits for missing participants and helps participants find and receive benefits held for them, was limited to terminated single-employer defined benefit plans. The Final Rule expanded the Program, making it available to most terminated defined contribution plans.[\[2\]](#) It also creates a new unified pension search database. As described below, the Final Rule is largely unchanged from the proposed rule.

Background

As you may recall, the Pension Protection Act of 2006 amended ERISA section 4050 to allow terminating defined contribution plans to transfer assets of missing participants to PBGC, effective upon PBGC's prescription of rules for such a program. In 2013, PBGC issued a request for information (RFI) soliciting information to assist it in making decisions regarding the implementation of a program for missing participants of individual account plans.[\[3\]](#) In 2016, PBGC issued proposed regulations (Proposal) to modify its existing Program.[\[4\]](#) ICI provided a comment letter in response to the Proposal, indicating its general support, along with additional comments described below.[\[5\]](#)

Overview of Final Rule

The Final Rule is largely unchanged from the Proposal, as it applies to defined contribution plans. The Program is now available to and voluntary[\[6\]](#) for most terminated individual account defined contribution plans. ICI's response to the Proposal urged PBGC to broaden the availability of the program and extend its application to missing participants in active plans, noting that the challenges associated with locating missing participants extend to

active plans as well. However, PBGC declined to extend the Program to active plans.

Eligible plans^[7] may participate in the Program by electing to be a “transferring plan,” which would actually transfer benefit amounts to PBGC, or a “notifying plan,” which would send PBGC information about the benefits of missing distributees. A plan that elects to be a transferring plan will be required to transfer to PBGC benefits of all missing participants and beneficiaries who are entitled to a benefit. PBGC made this decision to avoid the possibility of “cherry-picking” which benefits are transferred (e.g., transferring only small accounts to PBGC). A notifying plan is permitted to provide information on less than all of its missing distributees.

The Program is available for abandoned plans that otherwise meet the requirements of the Program and PBGC will not impose any minimum amounts. This will allow a qualified termination administrator who is terminating a plan under the DOL abandoned plan program to transfer account balances of missing participants to PBGC, without regard to the size of the account.^[8]

The Final Rule applies to defined contribution plans whose date of plan termination is after 2017. Therefore, the Program will not be available for plans that terminated prior to 2018.

Definition of Missing Participant

In the Final Rule, PBGC provides a more detailed definition of “missing participant.” The Proposal simply defined “missing” for purposes of defined contribution plans, as a distributee that has not elected a form of distribution upon close-out of the plan. The Final Rule requires that one or more of the following three conditions be met upon close-out of the plan: (1) the plan does not know with reasonable certainty the location of the distributee; (2) the distributee has not elected a form of distribution in response to a notice about the distribution; (3) the distributee’s benefit is to be paid in a lump sum, but the distributee does not accept the lump sum (for example, the individual fails to cash a distribution check by the “cash-by” date or the check’s stale date).

Diligent Search Requirement

The Program requires both transferring plans and notifying plans to conduct a diligent search for the missing distributees before filing with PGBC. The diligent search requirements reflect guidance already established by DOL and followed by terminated defined contribution plans.^[9] In the preamble, PBGC notes that there may be some instances where a defined contribution plan knows that a participant is deceased but has little or no information about the participant’s beneficiary. In such cases, PBGC notes that it will take these facts into account in evaluating the plan’s fulfillment of the diligent search requirements for any such distributee.^[10]

The Proposal required that the diligent search be completed within six months before (i) transferring benefits to PBGC (in the case of a transferring plan) or (ii) making a final distribution (in the case of a notifying plan). PBGC modified the Final Rule to require that a diligent search be made within nine months before filing under the Program (for both notifying plans and transferring plans).

Filing

The PBGC filings required for defined contribution plans that elect to participate generally mirror the requirements for defined benefit plans with missing participants. PBGC has posted on its website forms and instructions for the expanded Program.^[11]

Under the Proposal, the deadline for filing was 90 days after all distributions (other than the missing participants' benefits under the Program) are completed. In the preamble to the Final Rule, PBGC responded to a question indicating that it expects that forms and any required payment would be sent simultaneously. In light of this fact, PBGC modified the Final Rule to require filing for defined contribution plans as of the later of (i) 90 days after the last distribution not subject to the missing participant regulations or (ii) one year after the plan's termination date.

Fees

Under the Program, PBGC will charge fees for participation that are intended to cover PBGC's cost of running the Program. PBGC will charge a one-time \$35 fee for each individual whose benefits are transferred to PBGC. PBGC will not charge a fee for transferred amounts of \$250 or less or for notifying plans who only send information to PBGC. In ICI's response to the Proposal, we suggested that the threshold amount should be increased to \$700, so that the fee will never exceed more than five percent of the participant's account balance. PBGC declined to change its initial fee structure, but noted in the preamble that it will review both the amount of the fee and the fee structure to determine what is appropriate based on PBGC's actual experience with the expanded Program.[\[12\]](#)

Payment of Benefits

The rules for distributions made to individuals who claim benefits from defined contribution plans under the Program are generally unchanged from the Proposal and reflect the current qualified joint and survivor annuity rules. A participant whose benefit at the time of transfer does not exceed \$5,000[\[13\]](#) will receive a lump sum payment. A participant whose benefit exceeds the de minimis amount will receive an annuity, a joint and 50 percent survivor annuity if the participant is married, unless the participant has spousal consent and elects to receive a lump sum or another form of benefit. Where the participant has died and the spouse claims the benefit, the benefit will be paid as a straight life annuity, unless the spouse elects a lump sum. When the participant has died and there is not a surviving spouse, the beneficiary will receive a lump sum.

PBGC Reliance on Submitted Information

The Proposal explicitly allowed PBGC to audit plan and plan sponsor records if there is reasonable cause to suspect substantial non-compliance. PBGC has removed this provision in the Final Rule and now includes a provision indicating that PBGC will rely on determinations made and information reported by plans in connection with the Program.[\[14\]](#) In the preamble, PBGC explains this change, noting its general lack of authority over defined contribution plans.[\[15\]](#)

Search Database

One of PBGC's primary goals is to make it more likely that that missing participants will receive their benefits. Therefore, PBGC will provide a unified unclaimed pension database of information about missing participants and their benefits from terminated defined benefit and defined contribution plans. The public will be able to easily search the database to determine whether PBGC has information about benefits being held for them. The database will have robust features to protect individuals' private information. Periodically, PBGC will perform searches for missing participants.

endnotes

[1] The Final Rule, published at 82 Fed. Reg. 60800 (December 22, 2017), is *available at* <https://www.gpo.gov/fdsys/pkg/FR-2017-12-22/pdf/2017-27515.pdf>. PBGC's press release is *available at* <https://www.pbgc.gov/news/press/releases/pr17-12>.

[2] The change also extends the Program to terminated multiemployer plans covered by Title IV of ERISA and makes the Program available to terminated professional service plans with 25 or fewer participants. PBGC also made a number of changes to the Program as it relates to defined benefit plans.

[3] The RFI, published at 78 Fed. Reg. 37598 (June 21, 2013), is *available here*: <https://www.gpo.gov/fdsys/pkg/FR-2013-06-21/pdf/2013-14834.pdf>. See ICI Memorandum No. 27337, dated June 27, 2013, *available here*: https://www.ici.org/my_ici/memorandum/memo27337. In response to the RFI, ICI provided a comment letter indicating its general support, but urging that the Program be expanded more broadly. See ICI Memorandum No. 27481, dated August 21, 2013, *available here*: https://www.ici.org/my_ici/memorandum/memo27481.

[4] The Proposal, published at 81 Fed. Reg. 64700 (September 20, 2016), is *available at* <https://www.gpo.gov/fdsys/pkg/FR-2016-09-20/pdf/2016-22278.pdf>. While PBGC declined to allow active plans to participate in the Program under the Proposal, it generally responded favorably to the other suggestions in ICI's response to the RFI.

[5] See ICI Memorandum No. 30412, dated November 22, 2016, *available here*: https://www.ici.org/my_ici/memorandum/memo30412.

[6] In the preamble to the Final Rule, PBGC states that while it decided to keep reporting voluntary for defined contribution plans, it will reevaluate the decision after plans and PBGC gain actual experience with the Program. "This will allow PBGC to use experience to determine the need for and costs of a mandatory requirement weighed against the completeness of the unclaimed pension search database." 82. Fed. Reg. 60800, at 60803.

[7] Section 4050.201(a) of the Final Rule describes eligible plans and is essentially unchanged from the Proposal. Church plans and governmental plans are among the plans excluded. 403(b) custodial accounts are specifically included, as are individual accounts that are part of defined benefit plans (e.g., employee contributions held in an individual account under a defined benefit plan).

[8] DOL's abandoned plan program can be found at 29 CFR 2578.1. DOL's program provides a mechanism for service providers to voluntarily take over and terminate plans believed to be abandoned by the plan sponsor.

[9] DOL Field Assistance Bulletin 2014-01, *available here*: <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2014-01>, is the current DOL guidance on fiduciary duties and missing participants in terminated defined contribution plans. For a description of this guidance, see ICI Memorandum No. 28318, dated August 18, 2014, *available here*:

https://www.ici.org/my_ici/memorandum/memo28318. For DOL's safe harbor for distributions from terminated individual account plans, see 29 CFR 2520.104b-1(b)(1). PBGC notes in the preamble that DOL intends to review this regulation as well as its regulations regarding abandoned plans, to coordinate its rules with the PBGC Program. See 82 Fed. Reg. 60801. ICI's response to the RFI specifically requested this coordination, to ensure that a Qualified Termination Administrator would not have subsequent liability under DOL's rules regarding the missing participant's account.

[10] 82 Fed. Reg. 60800, at 60806. Note that Final Rule section 4050.207 allows PBGC discretion to grant waivers to Program requirements, as appropriate.

[11] The forms and instructions are *available at* <https://www.pbgc.gov/prac/missing-participants-program>.

[12] 82 Fed. Reg. 60800, at 60804.

[13] The Final Rule refers to ERISA section 203(e)(1) and Internal Revenue Code section 411(a)(11).

[14] See Final Rule section 4050.205(e) and section 4050.203(d) of the Proposal.

[15] 82 Fed. Reg. 60800, at 60811.