

COMMENT LETTER

November 21, 2016

ICI Submits Comment Letter on PBGC Proposed Rule for Missing Participant Program (pdf)

November 21, 2016 Submitted Electronically Regulatory Affairs Group Office of the General Counsel Pension Benefit Guaranty Corporation 1200 K Street NW Washington, DC 20005-4026 Re: Proposed Rules on Missing Participants; RIN 1212-AB13 Dear Sir/Madam: The Investment Company Institute¹ appreciates the opportunity to comment on the Pension Benefit Guaranty Corporation's ("PBGC") proposed regulation (the "Proposal") to modify its existing program for missing participants.² PBGC's current missing participant program (the "Program") holds retirement benefits for missing participants of terminated single-employer defined benefit plans and helps participants find and receive benefits held for them. The Proposal would make the Program available to most terminated defined contribution plans.³ PBGC also proposes to create a new unified pension search database. As discussed in Part I below, the Institute strongly supports the Proposal and PBGC's Program. Indeed, as described in Part II, we urge PBGC to broaden the availability of the Program and extend its application to missing participants regardless of plan termination status. In Part III of the letter, we respond to PBGC's requests for comments about particular aspects of the Proposal. Lastly, Part IV provides additional comments in support of the Proposal. 1 The Investment Company Institute (ICI) is a leading global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's US fund members manage total assets of \$18.5 trillion and serve more than 90 million US shareholders. 2 81 Fed. Reg. 64700 (September 20, 2016). 3 In addition, PBGC proposes to make changes to its existing program as it applies to defined benefit plans and to establish similar programs for multiemployer plans covered by title IV and certain defined benefit plans that are not covered by title IV. Our comments focus solely on the expansion of the Program to defined contribution plans. Pension Benefit Guaranty Corporation November 21, 2016 Page 2 of 10 I. Introduction. The Proposal follows a Request for Information ("RFI") that PBGC issued on June 21, 2013 to gain an understanding of the demand for a PBGC-administered program for missing participants of terminating individual account plans, pursuant to the directive provided by section 4050 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").⁴ We responded to the RFI on August 20, 2013 ("Institute's RFI Response")⁵ and voiced our strong support for initiatives designed to locate participants of terminating individual account plans to facilitate the ability of such participants to obtain their unpaid

retirement assets in an expeditious manner. The retirement community broadly supports the general ideas behind the Proposal, according to comments from both the financial services industry as well as advocates on behalf of employer plans and plan participants.⁶ This Proposal, once implemented, will facilitate efforts to ensure that defined contribution plan participants are ultimately reunited with their unpaid retirement account balances needed for a secure retirement. Guidance from the Department of Labor (“DOL”) currently allows the transfer of missing participants’ assets from terminated plans to an IRA, to an interest-bearing federally insured bank account, or, through escheatment, to a state unclaimed property fund in the state of the participant’s last known residence.⁷ For a variety of reasons described in the Institute’s RFI Response, transferring assets to PBGC will surely result in a better outcome for the participant or beneficiary than 4 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 after final regulations are prescribed by PBGC. 5 The Institute’s RFI Response, along with other responses to the RFI, is available here:

<http://www.pbgc.gov/documents/Missing-Participants-in-Individual-Account-Plans-Comments.pdf> (the Institute’s letter is at pages 33 to 45). 6As PBGC noted in the preamble to the Proposal, “Commenters [to the RFI] embraced expansion of PBGC’s missing participants program to accept accounts from terminated DC plans and to include those owed money in a searchable database of missing participants and beneficiaries.” 81 Fed. Reg. at 64701. Commenters to the RFI in favor of expansion of the program included organizations such as AARP, Pension Rights Center, American Benefits Council, ERISA Industry Committee, Plan Sponsor Council of America, and the U.S. Chamber of Commerce. We also note that 2013 ERISA Advisory Council was also very 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.” See the Council’s 2013 Report, entitled “Locating Missing and Lost Participants.” GAO found that an expansion of PBGC’s program could be part of a comprehensive solution to problems related to missing and unresponsive participants. See “401(k) Plans: Greater Protections Needed for Forced Transfers and Inactive Accounts,” issued November 2014, and available at

<http://www.gao.gov/assets/670/667151.pdf>. 7 DOL Field Assistance Bulletin 2014-01. Pension Benefit Guaranty Corporation November 21, 2016 Page 3 of 10 escheatment to a state.⁸ This is particularly true for participants and beneficiaries with small account balances. The ability to locate such assets from a centralized location with a centralized database—in contrast to the myriad of systems of fifty states and the District of Columbia⁹—will facilitate a participant’s ability to locate and claim benefits. A transfer to PBGC will also help participants avoid adverse tax consequences because, unlike state escheatment, such transfers will not constitute a taxable distribution.¹⁰ Moreover, assets held by PBGC under the Program will continue to earn interest. The same is not true of account assets that escheat to a state. This is because, generally speaking, the account is liquidated when it escheats and, from that day forward, the owner of the account loses out on all future growth in the assets (e.g., appreciation, interest, dividends). Instead, all such future growth inures to the benefit of the state – not the account owner. Moreover, transferring assets of missing participants’ accounts into rollover IRAs will not completely prevent state escheatment because IRAs may be subject to escheatment,¹¹ and, even if not subject to escheatment, the principal balances of such assets can be depleted by account charges. II. PBGC Should Extend the Program’s Availability to All Missing Participants. The Proposal will have a positive impact on missing participants of terminating plans. The challenges associated with locating missing participants, however, extend to active plans as well. We encourage PBGC to further expand the Program to accept assets

on behalf of any missing participant regardless of plan termination status, as we and others (including AARP and American Benefits Council) commented in response to PBGC's RFI. Although the Pension Protection Act and section 4050 of ERISA specifically addressed terminating defined contribution plans, we believe that PBGC already has authority to also permit active defined contribution plans to participate in the Program. PBGC should, in conjunction with DOL, develop guidance allowing transfers to PBGC on behalf of 8 For additional comments regarding the comparison of state escheatment and the PBGC program contemplated by the RFI, see the American Bar Association response to the RFI, dated January 13, 2014 and the Institute's RFI Response. For more information about the application of state escheatment laws, see the Institute's Lost Property Resource Center, available at: https://www.ici.org/lost_property. 9 As noted in the Institute's RFI Response, recent changes to state abandoned property laws reportedly are focused more on helping states close large budget deficits than operating in the best interest of those owners who the states have alleged have abandoned their property. See, e.g., Walter Nagel, Donald Griswold, Jeremy Abrams, and Derek Young, "Are States (Es)Cheating You?", State Tax Notes (April 29, 2013). 10 In addition to a loss of tax deferred status, participants may be subject to the additional 10% early distribution penalty under section 72(t) of the Internal Revenue Code. 11 States generally do not require escheatment of IRAs until the account owner reaches age 70 ½ and the financial institution has not had contact with the owner for a certain period of time. Pennsylvania, however, recently removed the age restriction and now requires escheatment of IRAs after three years of no contact with the account owner, regardless of the age of the account owner. Pension Benefit Guaranty Corporation November 21, 2016 Page 4 of 10 missing participants in active plans. PBGC should be well situated to accept such assets, since it will already have a program in place for defined contribution plans. In 2013, witnesses who testified before the ERISA Advisory Council supported extending the Program in the manner described above. The witnesses noted that active plans of all sizes regularly face challenges in locating missing participants. In this respect, participants become missing for a variety of reasons. Drivers of missing participants include job changes, residential moves, death prior to retirement, and employer actions that result in a change in plan sponsor, such as mergers, sales, divestitures, and bankruptcies.12 While plan sponsors and service providers can take steps to minimize the number of missing participants, some participants will become missing despite best efforts to prevent it. The maintenance of accounts for missing participants increases administrative expenses associated with plans for active employees. DOL has issued very limited guidance applicable to missing participants in active plans, although it has issued guidance applicable to terminated plans.13 For terminated plans, Field Assistance Bulletin 2014-01 (the "FAB") provides guidance on how fiduciaries can fulfill their obligations under ERISA to locate missing participants and properly distribute the participants' account balances. The FAB allows the transfer of assets of missing participants to an IRA, to an interest-bearing federally insured bank account, or to a state unclaimed property fund in the state of the participant's last known residence. While the guidance is helpful, guidance is also needed to address missing participants in active plans. DOL has provided guidance that addresses an active plan's missing participants with account balances of \$5,000 or less. The automatic cash out rule permits a defined contribution plan to automatically distribute the account of a participant who terminates employment if his account balance is \$5,000 or less.14 If the account exceeds \$1,000 but does not exceed \$5,000, then the plan administrator, after notifying the participant, must roll over the cash out amount to an IRA. If the account balance is \$1,000 or less, then the plan may automatically send a check to the participant to cash out the account. DOL regulations provide a safe harbor for meeting fiduciary duties in connection 12 Testimony of J. Spencer Williams On Behalf of Retirement Clearinghouse on June 4, 2013 cites various statistics,

including: that (1) Census data suggests that the average American will move almost 12 times over the course of a lifetime; (2) Americans will change jobs about 7.4 times, on average, over the course of a 40-year career (according to Employee Benefit Research Institute); and (3) mortality tables show that, on average, more than 16% of plan participants will die between the ages of 40 and 65. 13 As described below, DOL has issued guidance relating to non-responsive participants who terminate employment with an account balance of \$5,000 or less. 14 Internal Revenue Code section 401(a)(31) and 411(a)(11). Plans are not required to cash out small account balances. Rather, such cash out procedures, which are intended to ease the burdens of plan administration relating to small accounts, may be adopted and specified in the plan document. Pension Benefit Guaranty Corporation November 21, 2016 Page 5 of 10 with these automatic distributions.15 When checks of \$1,000 or less are sent to participants, they are often never cashed. No guidance exists that is applicable to missing participants with account balances in excess of \$5,000, or to missing participants in active plans generally. The retirement community needs additional guidance from DOL regarding the handling of benefit checks that are not cashed. These amounts technically may no longer be plan assets under ERISA. Current DOL guidance permits a terminating plan to escheat such outstanding checks to the state. Some defined contribution plans address this situation through the use of a forfeiture account. A plan may allow for the forfeiture of missing participant account balances (including both uncashed checks and accounts that remain unclaimed once the participant has reached the plan's normal retirement age).16 The plan sponsor must restore these amounts if the participant or beneficiary makes a claim for the forfeited benefit in the future. The plan may use forfeited amounts to pay for plan expenses or to reduce or add to employer contributions, but may not allow forfeited amounts to accumulate in the plan. Generally, the plan must use or allocate forfeitures during the plan year in which the forfeiture occurs. Because the plan must deplete the forfeiture account, yet will be required to pay out the account balance if the participant is eventually located, this option does not appeal to many plan sponsors. In many cases, it is preferable for administrative efficiencies and to ensure that the forfeited assets are ultimately returned to the participant if such amounts were sent to PBGC. Noting the challenges associated with locating missing participants and the limitations of current DOL regulations and guidance, the 2013 ERISA Advisory Council recommended that DOL "[i]ssue 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 [the predecessor to FAB 2014-01]."17 The 2013 ERISA Advisory Council also recommended that DOL issue guidance that explicitly allows an active plan to presume that a participant or beneficiary who fails to cash a benefit check after a specified period of time may be treated as a lost participant or beneficiary. The Institute similarly has urged DOL to either clarify that FAB 2014-01 may be used with respect to missing participants in active plans18 or issue parallel 15 29 CFR 2550.404a-2 (Safe harbor for automatic rollovers to individual retirement plans). These rules were not created for the purpose of addressing missing participants. However, an automatic rollover only occurs when a participant is non-responsive and takes no affirmative action in response to the notice that precedes the distribution. 16 Treas. Reg. section 1.411(a)(4)(b)-6. 17 See page 2 of the Council's report entitled "Locating Missing and Lost Participants." Note that FAB 2004-02 is the predecessor guidance to FAB 2014-01. Changes reflected in FAB 2014-01 include (1) the discontinuance of both the IRS's and the Social Security Administration's letter-forwarding services to locate missing participants; (2) the expansion and improvement of internet technologies; and (3) DOL's issuance of final regulations on its abandoned plan program. 18 In its 2013 report entitled "Locating Missing and Lost Participants," the ERISA Advisory Council noted that it "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 Pension Benefit Guaranty Corporation November 21, 2016 Page 6 of 10 guidance applicable to active plans. The DOL guidance should specify that assets of missing participants (in both active and terminated defined contribution plans) may be transferred to PBGC under its Program.¹⁹ We ask that PBGC coordinate with DOL in this area and that PBGC revise its Proposal to clarify that it will accept all such amounts upon the issuance by DOL of guidance specifying the Program as a suitable transfer vehicle for missing participant accounts. We also agree with the ERISA Advisory Council recommendation and urge PBGC to modify the Program to accept distributions from a plan in the form of a check which remains uncashed in such circumstances.

III. Response to Request for Comments Regarding Specific Aspects. In addition to strongly supporting the Proposal, we respond to PBGC's request for comment on particular aspects of the Program below.

Transfer of Assets. A defined contribution plan that elects to transfer assets to PBGC under the Program would be required to turn over benefits for all missing distributees of that plan. PBGC identifies a concern about the possibility of "cherry-picking" accounts as the reason for this provision.²⁰ For example, a defined contribution plan might selectively use the Program by turning over all of its small accounts to the PBGC while turning over larger accounts to private-sector institutions that charge asset-based fees. PBGC invited comments on the validity of its concerns about cherry-picking and on its proposed solution for dealing with those concerns. The Institute knows of no evidence suggesting that the PBGC's concerns regarding "cherry-picking" are warranted. We nonetheless do not object to this provision if PBGC believes that it will increase the viability of the Program.

Timing of Diligent Search Requirement. PBGC's Proposal requires that a plan make a diligent search for the missing participant during a six-month period before the assets are transferred or the last distribution is made from the plan. PBGC invited comments on the appropriateness of this requirement and suggestions for alternative approaches. The Institute does not object to this requirement.

Payment of Benefits. The rules for distributions made to individuals who claim benefits from defined contribution plans under the Program would reflect the current qualified joint and survivor rules. The form of payment would depend on the marital status of the participant, whether the participant is alive at the time of payment, whether the participant has spousal consent to elect a form 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.²¹ As noted below, the preamble to the Proposal indicates that DOL intends to review its existing guidance and to consider transfers to PBGC in lieu of rollovers to IRAs. See 81 Fed. Reg. 64701. 20 81 Fed. Reg. 64703. Pension Benefit Guaranty Corporation November 21, 2016 Page 7 of 10 other than a joint and 50 percent survivor annuity, and whether the benefit exceeds \$5,000. PBGC does not, however, address payout rules for participants who become missing after they are already in pay status or for situations involving missing beneficiaries because PBGC considers these circumstances to be "sufficiently uncommon" that the regulations need not address them. PBGC requests comments on whether the regulation should address these circumstances and if so, how.²¹ We agree with PBGC that, at this point, it is not necessary that the regulation address these situations. PBGC has significant experience managing the Program with respect to defined benefit plan benefits. Because PBGC has made the determination not to address these payout rules based on its prior experience with missing participants, we defer to PBGC on this point. After the Program is expanded and after PBGC has experience with missing participants in defined contribution plans, it may find that such circumstances are more common than anticipated. If that happens, PBGC can amend the regulation again based on its experience under the expanded Program.

Effect on Small Plans. PBGC notes in the

preamble that it believes that the expanded missing participant program will be particularly helpful to small defined contribution plans and it invites comments on this assessment.²² The Institute agrees with PBGC's conclusion. While both large and small plans alike experience difficulties associated with locating lost participants, small plans may tend to be abandoned by the plan sponsor more often than large plans, due to the economic fragility of small employers. IV. Additional Comments in Support of Proposal. Although PBGC did not specifically request comments on the items discussed below, the Institute wishes to express its support regarding the PBGC's handling of agency coordination, the proposed level and assessment of fees, and the voluntary nature of the information filing under the Program. Agency Coordination. The Institute greatly appreciates PBGC's coordination with both DOL and IRS²³ in crafting its Proposal to expand the Program. It is vital that abandoned plans and qualified 21 81 Fed. Reg. 64707. 22 See 81 Fed. Reg. at 64711. PBGC made this determination for purposes of compliance with the Regulatory Flexibility Act. PBGC also requested comments on the appropriateness of its decision to use plans with fewer than 100 participants as the size standard to evaluate the impact of the Proposal on small entities. The Institute agrees that plans with fewer than 100 participants presents an appropriate threshold for assessing the effect on small entities. 23 As noted in the preamble, after PBGC consultations with IRS and Treasury, IRS informed PBGC that it anticipates that a defined contribution plan would not fail to be a qualified solely because it transfers appropriate amounts to PBGC in accordance with this Program. 81 Fed. Reg. 64701. Pension Benefit Guaranty Corporation November 21, 2016 Page 8 of 10 termination administrators winding up such plans in accordance with DOL regulations be able to utilize the PBGC Program. Regulations issued by DOL regarding defined contribution plans that have been abandoned by the plan sponsor allow a financial institution that meets certain requirements to voluntarily act as a qualified termination administrator ("QTA"),²⁴ to terminate a defined contribution plan that has been abandoned by the plan sponsor, and to distribute assets to the plan's participants and beneficiaries.²⁵ Upon the voluntary assumption of such role, a QTA is required, upon deeming a plan to have been abandoned, to wind up the affairs of the plan in accordance with the regulatory provisions of the abandoned plan program. In such a role, the financial institution is often in a position where it needs to distribute accounts applicable to missing participants. Under the Proposal, PBGC not only allows QTAs to participate by transferring assets of missing participants to PBGC, but PBGC strove to harmonize its Program with DOL's guidance for terminated defined contribution plans. The Program requirements under the Proposal reflect the guidance already established by DOL and provide that compliance with DOL guidance will satisfy PBGC requirements.²⁶ Under the Proposal, for example, a search of defined contribution plans conducted in accordance with DOL guidance also satisfies PBGC's diligent search requirements.²⁷ PBGC's definition of "missing" also reflects the guidance in DOL's regulations.²⁸ Further, in response to the Proposal, DOL said that it would review two pieces of its guidance (the Safe Harbor for Distributions from Terminated Individual Account Plans²⁹ and the Abandoned Plan Regulations³⁰) in light of PBGC's Proposal. We commend the Agencies for this interagency coordination, which is essential to making both PBGC's and DOL's programs as effective as possible for participants and as usable as possible by our member companies. The PBGC and DOL programs have potential synergies. Implementation of the Proposal would likely lead to increased participation in DOL's abandoned plan program. In the Institute's RFI Response, we described potential obstacles to our member companies' participation in DOL's 24 In order to serve as a QTA, an entity must be eligible to serve as a trustee or issuer of an individual retirement plan within the meaning of Internal Revenue Code section 7701(a)(37) and hold assets of the plan. 25 29 CFR 2578.1 (DOL Abandoned Plan Regulations). DOL issued the regulations due to the increase in the number of requests for assistance from participants who were unable to

obtain money in their individual retirement accounts as a result of the inability of service providers or participants to locate anyone with authority under the plan to authorize benefit distributions. 26 Field Assistance Bulletin No. 2014-01 on Fiduciary Duties and Missing Participants in Defined Contribution Plans provides guidance about required search steps and options for dealing with the benefits of missing participants in terminated defined contribution plans. 27 PBGC would require that the diligent search be made during a six-month period before the assets are transferred or the last distribution is made from the plan. The Institute does not object to the timing of this requirement. 28 See 29 CFR 2550.404a-3 and 2578.1. 29 29 CFR 2550.404a-3. 30 29 CFR 2578.1. Pension Benefit Guaranty Corporation November 21, 2016 Page 9 of 10 abandoned plan program. These include concerns regarding continuing fiduciary liability to monitor the subsequent actions and fees of the transferee, concerns that members do not meet the regulatory requirements to serve as a QTA, and concerns regarding the limitations imposed on QTAs relating to the transfer of account balances of missing participants. Many of those concerns would be addressed by implementation of PBGC's Proposal. Inclusion of the PBGC Program as a distribution option within the current DOL abandoned plan program would likely increase our members' willingness to participate in the DOL program. Similarly, DOL's program would likely cause PBGC's Program to be used with greater frequency. Fees. PBGC proposes to charge participation fees under the Program that are intended to cover (and not exceed) PBGC's cost of running the Program. PBGC proposes to charge a one-time \$35 fee for each individual whose benefits are transferred to PBGC. PBGC would not charge a fee for transferred amounts of \$250 or less or for "notifying plans" who only send information to PBGC.³¹ We generally agree that this fee structure is appropriate and necessary to sustain the Program and will not hinder the use of the Program. With respect to the threshold amount for charging the fee, however, we believe that it should not exceed more than five percent of the account balance and therefore suggest that the threshold be increased to \$700. Because these fees will typically be paid out of the missing participant's account, PBGC must ensure that the level of fees it charges does not become excessive. The current DOL abandoned plan program permits only "reasonable" expenses incurred by a QTA in terminating an individual account plan.³² The participation fees that PBGC proposes to charge generally appear to meet this standard. Information Filing. Plans that transfer assets of missing participants to a financial institution instead of to PBGC may, on a voluntarily basis, submit to PBGC the information necessary to connect the individual with that financial institution. These plans are not required to provide information to PBGC, and plans who opt to provide it may provide information for fewer than all of the plan's missing distributees. PBGC plans to use this information to create a new comprehensive search database, with the goal of making it more likely that missing persons will receive their benefits.³³ The Institute agrees with and supports PBGC's decision to implement a voluntary reporting program. PBGC notes in the preamble that it anticipates providing flexibility in filing requirements to ensure that abandoned plans and other plans that might not have full sets of records are able to use the 31 PBGC would adjust these fees from time to time, after estimating its projected costs and projected usage of the Program and providing the required public notice. 81 Fed. Reg. at 64706. 32 29 CFR 2578.1.(d)(2)(v). 33 PBGC correctly recognizes the importance of creating the database in a way that will protect individuals' privacy. 81 Fed. Reg. 64702. Pension Benefit Guaranty Corporation November 21, 2016 Page 10 of 10 Program.³⁴ The Institute appreciates this flexibility and supports the policy that where there are good faith efforts, technical roadblocks should not impede the effort to connect missing participants with their plan account balances. * * * * Thank you for considering our comments on this matter. The Institute is available to provide additional information and clarification regarding these issues and would welcome the opportunity to meet with you to discuss our comments. Please do not hesitate to contact

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cc: Joe Canary, Department of Labor, EBSA Jeffrey Turner, Department of Labor, EBSA 34
See Footnote 11 at 81 Fed. Reg. 64702.

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