



July 16, 2024

Submitted electronically via regulations.gov

U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Avenue NW, N-5655
Washington, DC 20210

RE: Abandoned Plan IFR (RIN1210-AC04)

Dear Sir or Madam:

The American Benefits Council (the "Council") appreciates the opportunity to respond to the request for comments included in the U.S. Department of Labor's (DOL) interim final rule (IFR) updating its Abandoned Plan Program.

The DOL's IFR requests comments on a range of issues that occur when participants in terminating and abandoned plans are missing or otherwise fail to provide directions to plan administrators as part of the termination process. As discussed more fully below, the Council believes that these missing participant issues for terminating and abandoned plans again highlight the need for workable missing participant guidance for plan sponsors. Additionally, in response to specific questions posed by DOL as part of its IFR, the Council: (1) opposes any regulatory changes that would make the Pension Benefit Guaranty Corporation's ("PBGC's") missing participant program the exclusive destination for missing participant accounts from terminating defined contribution plans; and (2) believes that qualified termination administrators ("QTAs") should always be permitted to rely on DOL's e-delivery safe harbors when sending notices to participants and beneficiaries.

The Council is a Washington, D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

TERMINATING PLAN ISSUES HIGHLIGHT NEED FOR WORKABLE GUIDANCE

As the Council has expressed to DOL on numerous occasions, we remain very concerned about DOL's failure to provide a fiduciary safe harbor detailing the specific steps that plan fiduciaries may take in order to fully satisfy any obligations that they have to search for missing or nonresponsive participants. In the case of ongoing plans, DOL has only issued a set of "best practices" that provide virtually no help because of their lack of clarity and because no employer could or should take all the steps described in the best practices guidance.¹ In the case of terminating plans, which is the focus of the IFR and its request for comments, DOL Field Assistance Bulletin 2014-01 prescribes a minimum list of search steps that all fiduciaries must take before distributing assets from terminating plans, along with a list of additional search steps that plan fiduciaries "should consider" depending on the size a participant's account balance and the cost of further search efforts.²

In both contexts, DOL's missing participant search guidance is inadequate because it fails to provide safe harbor protections to plan sponsors that may, in the absence of clear guidance, unnecessarily exhaust significant resources to locate missing participants. This guidance is especially needed due to the multi-year audits that DOL has been conducting in this area, without consistency among the standards being applied. Accordingly, as DOL is evaluating its rules regarding missing participants in the context of terminating plans, the Council is again urging DOL to provide workable missing participant guidance for plan sponsors, including fiduciary safe harbors for ongoing and terminating plans.

PBGC'S MISSING PARTICIPANT PROGRAM

The IFR asks whether PBGC's missing participant program should be used as a replacement for all other distribution options under the fiduciary safe harbor described in Labor Regulation section 2550.404a-3 in the case of plans that are eligible for the PBGC Program.³ In response to this question, the Council opposes any regulatory

¹ Employee Benefits Security Administration: Missing Participants - Best Practices for Pension Plans (January 12, 2021), available at: <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance/best-practices-for-pension-plans>.

² Employee Benefits Security Administration: Field Assistance Bulletin 2014-01 (August 14, 2014), available at: <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2014-01.pdf>.

³ Labor Regulation section 2550.404a-3 currently provides a fiduciary safe harbor for use in making distributions from terminated defined contribution plans on behalf of participants and beneficiaries who fail to make an election regarding a form of benefit distribution, including "missing" and

changes that would amend the fiduciary safe harbor described in Labor Regulation section 2550.404a-3 to make the PBGC program the exclusive destination for missing participant accounts distributed from terminating defined contribution plans. Instead, the Council believes that there should be flexibility to choose among the currently available distribution options, which include, but are not limited to, the PBGC program. It should be permitted, for example, to transfer missing participants accounts from a terminating defined contribution plan to an IRA, state unclaimed property fund, or interest-bearing bank account, as permitted by existing guidance, rather than the PBGC's missing participant program.

As we have noted in previous comments provided to DOL, the PBGC has 80,000 missing participants, and its general approach has been to wait for the 80,000 missing participants to contact the agency. Before DOL expands that PBGC program, the department needs to acknowledge this problem at PBGC and take steps to address it, since this problem is far worse than in the case of the private sector companies that are being audited. Moreover, as Chair of the PBGC, DOL is responsible for this problem.⁴ Given these circumstances, it is not difficult to understand a decision to send missing participant accounts to an IRA provider, rather than sending such amounts to the PBGC.

In considering potential destinations for missing participant accounts in ongoing and terminating plans, the Council appreciates that each of the existing options have their own strengths and weakness, and that some options are better suited than others for particular circumstances. Accordingly, in addition to opposing any regulatory changes that would make the PBGC program the exclusive destination for missing participant accounts from terminating plans, we are also urging DOL to preserve all of the potential destinations for missing participant accounts that are recognized under current DOL guidance. Plans sponsors should have the flexibility to determine the option that works best for them and their plans. Additionally, to the extent that other

"nonresponsive" participants. Under these rules, relief is generally conditioned on any benefits owed to missing or nonresponsive participants being transferred from a terminating plan to IRAs established on behalf of the participants. In the case of a distribution by a QTA, however, if the account is \$1,000 or less, and the amount is less than the minimum amount required to open an IRA with the QTA, a QTA may rely on the safe harbor by distributing a missing participant's account to: (i) an interest-bearing federally insured bank or savings association account; or (ii) a state unclaimed property fund. Through Field Assistance Bulletin 2021-01, DOL announced a temporary enforcement policy that essentially extends the fiduciary safe harbor in Labor Regulation section 2550.404a-3 to also include transfers from terminating plans to PBGC's missing participant program.

⁴ The only step forward in this area was facilitated not by the DOL's national office, but rather by the PBGC Participant and Plan Sponsor Advocate, in cooperation with the Chicago EBSA Regional Office in 2017, years after the missing participant issues arose. This effort led to an agreement between PBGC and EBSA regarding missing participants. As recognized by the Advocate, however, more work needs to be done. The agreement only generated \$11 million of benefits being paid in fiscal year 2022, leaving 80,000 missing participants unpaid.

destinations are permitted by ERISA, we encourage DOL to periodically review its guidance to ensure employers are aware of all of their options.

E-DELIVERY FOR ABANDONED PLANS

As part of the IFR, DOL is requesting comments on whether QTAs are able to rely on DOL's e-delivery safe harbors. The Council is concerned about the inclusion of this question in the IFR as it suggests that the e-delivery safe harbors are somehow unsuitable for participants and beneficiaries in abandoned plans. The Council wholly rejects this notion. In fact, we believe that there are many circumstances in which participants and beneficiaries in abandoned plans will be much more likely to receive electronically delivered documents from QTAs than documents delivered in paper. Moreover, we believe that e-delivery is a useful tool in the case of abandoned plans as electronic delivery can generate cost savings that help to preserve plan assets for participants and beneficiaries.

The Council believes that DOL's 2002 and 2020 e-delivery safe harbors include appropriate safeguards for participants and beneficiaries that are designed to ensure that they are able to access the notices and disclosures that are sent to them. These safeguards apply equally to participants and beneficiaries in ongoing and terminating plans alike. In fact, for participants who may have changed physical addresses, we believe there are many circumstances in which participants and beneficiaries in abandoned plans will be much more likely to receive electronically delivered documents from QTAs than documents delivered in paper. For example, while participants may change their physical mailing address and fail to update their contact information with the plan administrator, individuals regularly retain the same email address throughout their lifetime and can easily set up permanent email forwarding in the event that they change their primary email address. By comparison, traditional paper mailings sent to physical addresses cannot benefit from these same attributes.⁵

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Thank you for considering the Council's comments on DOL's IFR regarding its recent amendments to its Abandoned Plan Program. If you have any questions or if we

⁵ As the DOL's own Compliance Assistance Release No. 2021-01 noted in the case of its Terminated Vested Participants Project for Defined Benefit Pension Plans, the DOL's 2020 electronic delivery safe harbors "give plans a new tool to communicate more effectively with terminated participants and beneficiaries."

can be of further assistance, please contact me at 202-289-6700 or by email at dhowland@abcstaff.org.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Howland". The signature is fluid and cursive, with a large initial "D" and a prominent "H".

Diann Howland
Vice President, Legislative Affairs