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BENEFITS BRIEF

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PBGC Issues Proposed Regulation Expanding Missing Participants Program

On September 20, the Pension Benefit Guaranty Corporation ("PBGC"), the agency that guarantees benefits under certain single- and multi-employer defined benefit pension plans, published a long-awaited proposed regulation relating to the Missing Participants Program under the Employee Retirement Income Security Act of 1974 ("ERISA") section 4050. 81 Fed. Reg. 64700. The proposal – authorized by the 2006 Pension Protection Act – enlarges the current program, which covers only terminated single employer defined benefit ("DB") pension plans covered by PBGC, to terminated defined contributions ("DC") plans, small professional service DB plans, and multiemployer plans covered by PBGC. In drafting the proposed regulation, PBGC consulted with the Department of Labor ("DOL") and the Department of Treasury.

In addition to vastly expanding the program in terms of the types of plans that are covered, PBGC's proposal clarifies the steps a plan administrator must take to conduct a "diligent search," which is generally a prerequisite to participation in the Missing Participants Program, and the rules regarding benefits transferred to and paid by PBGC.

Missing Participants Program Participation – In General

In 1996, PBGC created the Missing Participants Program. When an employer terminates its DB plan, it must make a diligent search to locate all of the participants. If the employer cannot find a participant, the employer can either buy an annuity for the participant or send the participant's funds to the PBGC. The PBGC holds the funds until the agency is able to locate the participant or beneficiary.

The proposed regulation would significantly expand the Missing Participants Program. In addition to covering single employer DB plans subject to Title IV of ERISA (*i.e.*, covered by PBGC's insurance program), the proposed regulation would require multiemployer plans to use the program. The proposed regulation would also open the program, on a voluntary basis, to DC plans and small (fewer than 25 participants) professional service DB plans, neither of which are insured by PBGC.[1] Plans must file the necessary information with PBGC within 90 days of the standard termination distribution deadline (for single employer plans) or the completion of benefit distributions (for all other plans).

[1] While PBGC has the authority to make reporting to PBGC of the disposition a missing participant's benefit mandatory for non-Title IV plans, PBGC declined to impose such a requirement at this time.

If a non-Title IV plan elects to participate in the program, the plan has the choice to be a "transferring" plan or a "notifying" plan. A transferring plan is a plan that transfers the missing participant's benefit to PBGC for payment by PBGC once the missing participant is located. [2] A "notifying" plan, on the other hand, is a plan that simply notifies PBGC of the disposition of a missing participant's benefit so that PBGC may connect the participant with his benefit. A transferring plan must transfer *all* missing participants' benefits to PBGC, while a notifying plan may notify PBGC of the disposition of some, but not all, of its missing participants' benefits.

Terminating Title-IV plans may choose on a participant-by-participant basis whether to transfer a participant's benefit to PBGC or buy an annuity and provide PBGC with information on how the participant can claim his benefit.

<u>Diligent Search Requirements</u>

In order to participate in the program, the plan administrator generally must conduct a "diligent search" for potential missing participants within 6 months before closing out the plan. While the current regulation generally requires the plan to seek information from the participant's beneficiaries and conduct a search using a commercial locator service, the proposed regulation provides more detail on the diligent search process. Specifically, with respect to DB plans, the proposed regulation requires the administrator to:

(1) Search the plan's records,
(2) Search the records of the participant's most recent employer and any retirement or welfare plan in which the participant participates,
(3) Follow up with each of the participant's beneficiaries identified in (1) and (2),
(4) Conduct no-fee internet searches, *e.g.,* through a search engine or social media site, and
(5) Conduct a search through a commercial locator service, defined as a "business that holds itself out as a finder of lost persons for compensation using information from a database maintained by a consumer reporting agency."

Where (2) and (3) are not obtainable due to other laws like HIPPA, the proposed regulation requires the administrator to do its best to find sources of information that may be readily accessible. PBGC is also reserving the right to limit, in the Missing Participants Program forms and instructions, the requirement of using a commercial locator service where it is not cost-effective to do so.

For DC plans, a diligent search must be conducted in accordance with the DOL's Field Assistance Bulletin No. 2014-01 ("FAB"). Similar to the proposed rules for DB plans, the FAB generally requires a plan fiduciary to (1) use certified mail when attempting to notify a participant of his benefit, (2) contact the participant's employer and fiduciaries of other employer plans, (3) contact the participant's designated beneficiaries, and (4) make use of free internet search tools. The FAB also advises that additional search steps may be required depending on the size of the participant's account balance and the cost of further search efforts.

<u>Benefit Transfer Amount</u>

Transferring plans and Title IV plans transfer to PBGC an amount covering the missing participant's benefit, as well as participation in the Missing Participants Program. This amount is comprised of three components.

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[2] The proposed regulation uses the term missing "distributee" instead of missing participant to capture participants *and* beneficiaries. We will use the more familiar term "participant" throughout this article, although it is generally meant to include missing beneficiaries, to the extent applicable.

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1. Benefit Transfer Amount

For DB plans, the benefit transfer amount is the amount of the participant's future benefit valued as of the benefit transfer date. DB plan benefits are valued using either the plan's assumptions or the PBGC missing participant assumptions, depending on whether participant or spousal consent to a distribution is required and whether a lump sum can be elected. The proposed PBGC assumptions, unlike the current regulation, require benefits to be valued as a straight life annuity beginning at an expected retirement age for participants not in pay status. To make calculating the benefit transfer amount easier, PBGC proposes to post an online spreadsheet where the plan actuary can input a participant's information and allow the spreadsheet to calculate the benefit transfer amount.

For DC plans, the benefit transfer amount is the amount available to the participant for distribution, which is generally the amount in the participant's retirement account as of the benefit transfer date, less any amount required under a QDRO or similar instrument. The plan administrator may also deduct from a participant's account administrative expenses, such as PBGC's fees.

2. Plan Make-up Amount

Unlike the current regulation, the proposed regulation breaks out the amount of missed benefit payments to a participant from the amount of the participant's future benefit (*i.e*., the benefit transfer amount). The plan administrator must transfer the amount of the missed payments plus interest, or the "plan make-up amount", due to a participant who is either in pay status or who is not in pay status but whose "required beginning date" (as defined in IRC 401(a)(9)(C)) precedes the benefit transfer date. The plan make-up amount, of course, is not applicable to DC plans.

3. Fees

In addition to the benefit transfer amount and the plan make-up amount, PBGC is proposing to require Title IV plans and transferring plans to pay a one-time fee to PBGC on the benefit transfer date. The fee would cover the costs of periodic searches for the missing participants, tracking missing participants' accounts, and processing benefit payments once the missing participants are located. The amount of the fee would be set forth in the forms and instructions and periodically reassessed, but PBGC is initially proposing a fee of $35 per participant, which would be waived for benefits in the amount of $250 or less. There would be no fee for notifying plans.

Benefit Payout

Under the proposed regulation, PBGC will continue to pay out benefits to missing participants whose plans transferred the benefit to PBGC, with the payout protocol based on the size of the benefit and the participant's marital status. Significantly, PBGC proposes to allow participants to retain early retirement subsidies and optional lump sum benefits and addresses survivor benefits.

The chart PBGC provided summarizing DB plan payout rules under the proposed regulation appears at Appendix 1, and the chart PBGC provided summarizing DC plan pay out rules under the proposed regulation appears at Appendix 2.

With respect to participants' benefits in notifying plans, PBGC clarifies in the proposed regulation that its role is simply to provide information to participants on how to claim their benefit and will not address issues regarding a participant's entitlement to a benefit.

Impact of the Proposed Regulation

The new rules would apply to plans terminating after calendar year 2017. If the proposed regulation is finalized, PBGC estimates that program participation would increase by approximately 10,955 missing participants per year, or from 200 to 3,300 plans.

PBGC's goal in the proposed regulation is to unite more plan participants with their benefits by creating a unified pension search database. But while the proposed regulation greatly expands the potential reach of the Missing Participant Program, it remains to be seen just how far that reach will go given the program is voluntary for DC plans and small professional service plans. For those plans that do voluntarily participate in the program, as well as for PBGC-covered multiemployer plans that have no choice, the proposed regulation imposes increased diligent search, benefit calculation and/or reporting requirements that need to be assessed and taken into account when closing out a plan. The changes would also increase the duties and options of Qualified Termination Administrators under the DOL's Abandoned Plan Program.

PBGC is accepting comments on its proposal through November 21.

Appendix 1-Summary of DB Plan Payout Rules

Circumstances	Proposed Regulation
Living participant with *de minimis* benefit	PBGC pays participant a lump sum.
Living participant with non-*de minimis* benefit; no living spouse	PBGC pays participant an annuity in form elected by participant or, if plan so provided and participant so elects, a lump sum.
Living participant with non-*de minimis* benefit; living spouse	PBGC pays participant a joint and 50 percent survivor annuity (or at participant's election with spousal consent, another form of annuity) or, if plan so provided and participant so elects with spousal consent, a lump sum.
Deceased participant; no surviving spouse	If participant died before required beginning date, PBGC pays no benefit; if participant died after required beginning date, PBGC pays qualified survivor(s)[3] missed payments from required beginning date with interest.
Deceased participant with *de minimis* benefit; living spouse	PBGC pays spouse a lump sum equal to value of survivor portion of joint and 50 percent survivor annuity (including missed payments).
Deceased participant with non-*de minimis* benefit; living spouse	PBGC pays spouse survivor portion of joint and 50 percent survivor annuity (including missed payments);

[3] Qualified survivors are identified by looking first to the provisions of any applicable QDRO, then to the plan's records to identify any relatives, limited to a spouse, child, parent or sibling.

Circumstances	Proposed Regulation
	except that if value of spouse's benefit is small (*i.e.,* less than $5K), PBGC pays spouse an equivalent lump sum.
Deceased participant; deceased surviving spouse	PBGC pays qualified survivor(s) of participant and spouse the missed payments participant and spouse would have received under a joint and 50 percent survivor annuity.

Missing Participants, 81 Fed. Reg. 64,700, 64,708 (proposed Sept. 20, 2016) (to be codified at 29 C.F.R. Part 4050).

Appendix 2-Summary of DC Plan Payout Rules

Circumstances	Proposed Regulation
Living participant with *de minimis* benefit	PBGC pays participant a lump sum.
Living participant with non-*de minimis* benefit; no living spouse	PBGC pays participant an annuity in form elected by participant or, if participant so elects, a lump sum.
Living participant with non-*de minimis* benefit; living spouse	PBGC pays participant a joint and 50 percent survivor annuity (or at participant's election with spousal consent, another form of annuity) or, if participant so elects with spousal consent, a lump sum.
Deceased participant with *de minimis* benefit	PBGC pays qualified survivor(s) a lump sum.
Deceased participant with non-*de minimis* benefit; no surviving spouse	PBGC pays qualified survivor(s) a lump sum.

Missing Participants, 81 Fed. Reg. 64,700, 64,708 (proposed Sept. 20, 2016) (to be codified at 29 C.F.R. Part 4050).