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August 20, 2013

Submitted Electronically: *reg.comments@pbgc.gov*
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC

Re: Missing Participants in Individual Account Plans -- Request for Information

Ladies and Gentlemen:

The Investment Company Institute[1] is pleased to provide the following comments in response to the Pension Benefit Guaranty Corporation's (PBGC) Request for Information (RFI) regarding the implementation of a program for missing participants of terminating individual account plans.[2] We understand that PBGC is conducting the RFI in order 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).[3]

The Institute strongly supports 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. Although the RFI appears to focus on a program whereby PBGC would provide services to assist terminating individual account plans, including services to locate missing participants, we understand, based on telephone conferences with PBGC staff, that this alternative is among several program design options being considered by PBGC pursuant to the mandate described in ERISA section 4050.

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $14.9 trillion and serve more than 90 million shareholders.

[2] 78 Fed. Reg. 27598 (June 21, 2013).

[3] 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.

With respect to the Institute's members that provide administrative or investment services to defined contribution plans, issues involving missing participants in terminating plans generally arise in the context of abandoned or orphaned plans,[4] terminated plans, and in active plans as well. As is discussed below, due to the distribution restrictions contained in the Department of Labor's (DOL) current abandoned plan program regulations, the Institute believes that it is in the best interest of missing participants of terminating individual account plans for PBGC to implement a program whereby the entity terminating the plan has the option to transfer the missing participant's account balance to PBGC upon the plan's termination.[5]

Set forth below please find our responses to the questions posed in the RFI, a description of the current DOL abandoned plan program and the challenges associated with the program's distribution restrictions, and the Institute's recommendations with regard to the features of a PBGC program for missing participants of terminating individual account plans.

I. <u>Responses to RFI Questions</u>

We have set forth our responses to each of the questions raised in the order presented in the RFI.

<u>RFI Question 1</u>: For pension consultants: Among individual account plans that you are familiar with, what proportion has participants they cannot find? Among such plans, what is the average number of participants the plan cannot find? In your experience, what is the average account balance, and what is the range of account balances for participants that cannot be found?

With respect to the Institute's members that provide administrative or investment services to individual account defined contribution plans, the challenges and complexities associated with locating missing participants are well understood. As noted in the preamble to DOL final regulations issued in

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[4] Pursuant to DOL Regulation section 2578.1(b), an individual account plan may be found to be abandoned when either no contributions to, or distributions from, the plan have been made for a period of at least 12 consecutive months immediately preceding the date on which the determination is being made, or other facts and circumstances (such as a filing by or against the plan sponsor for liquidation under Chapter 11 of the United States Code, or communication from participants and beneficiaries regarding distributions) known to the qualified termination administrator suggest that the plan is or may become abandoned by the plan sponsor; and following reasonable efforts to locate or communicate with the plan sponsor the qualified termination administrator determines that the plan sponsor no longer exists, cannot be located or is unable to maintain the plan.

[5] While Section 4050 of ERISA appears to focus on missing participants of terminating plans, the challenges associated with locating missing participants extend to active plans as well and we would encourage PBGC to ensure that any program it establishes covers missing participants in active plans as well.

2006 under which an entity meeting certain requirements may voluntarily act as a "qualified termination administrator"[6] (QTA) and terminate a plan that has been abandoned by the plan sponsor,[7] 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. The preamble further stated that DOL had opened over 1,500 civil cases involving defined contribution orphan plans as of September 30, 2005. Additionally, DOL stated that in the over 1,000 orphan plan cases it closed with results through that date, there were approximately 50,000 participants affected and $255 million in assets involved. In the preamble to its 2012 proposed amendments to the 2006 abandoned plan program,[8] DOL stated that the number of applications it received from potential qualified termination administrators to wind up plans had increased from 70 in 2007 to 331 in 2010. DOL recently announced that it had approved a process for JP Morgan Chase and ADP to terminate and wind up approximately 180 defined contribution plans affecting approximately 690 plan participants and beneficiaries and almost $3 million in assets. Further, the ERISA Advisory Council is currently examining issues associated with missing participants and the struggles associated with delivering benefits to participants who are lost or missing.[9]

Data from our members shows that the problems associated with locating missing participants in abandoned or orphaned plans continues to be significant. For example, one of our members has identified approximately 14,000 qualified individual account client plans that have likely been

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[6] 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.

[7] DOL's Final Abandoned Plan Program regulations are available here: http://www.dol.gov/ebsa/regs/fedreg/final/2006003814.pdf. Concurrent with the issuance of the final regulations, DOL issued a final class exemption that permits certain transactions associated with the abandoned plan program. The class exemption provides prohibited transaction relief for a financial institution acting as QTA to select and pay itself (or an affiliate) for rendering termination services to the plan. The final class exemption is available here: http://www.dol.gov/ebsa/regs/fedreg/notices/2006003815.pdf.

[8] The proposed regulatory amendments are available here: http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=26529. The proposed class exemption amendment is available here: http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=26530. The proposed amendments primarily focus on the ability of a chapter 7 bankruptcy trustee to act as a QTA and utilize the existing abandoned plan program to terminate, wind up and distribute benefits from such plans. The amendments also include technical changes to the current abandoned plan regulations not related to chapter 7 plans, but, rather to (1) the required notification by QTAs regarding whether they or an affiliate are the subject of an investigation, examination or enforcement action by the Department, IRS or SEC concerning their conduct as a fiduciary or party in interest to an ERISA covered plan; and (2) the distribution of account balances of deceased participants.

[9] *See:* 2013 ERISA Advisory Council Issue Statement "Locating Lost and Missing Participants" at: http://www.dol.gov/ebsa/pdf/2012ACIssueStatement3.pdf.

abandoned by plan sponsors (including 401(k) plans, profit sharing plans, money purchase pension plans and individual 401(k) plans), with approximately 16,000 participants, and assets of approximately $675.6 million. Another member, which has terminated abandoned plans under the DOL abandoned plan program, reported that 100 percent of the plans it terminated through the program had missing participants. Based on information received from our members, the average account balance attributable to such missing participants ranges from $12,303 to $42,380 and the account balances range from $2 to $72,304.

> ***RFI Question 2**: What if any services for missing participants in individual account plans are unavailable in the competitive private marketplace (for example, handling very small benefits or QJSA benefits)? Why are they unavailable (for example because it is not cost effective to provide them)?*

Our members are not aware of any services relating to the termination of individual account plans, including services to locate missing participants in such plans that are not currently available in the competitive private marketplace. Indeed, our members that serve as transfer agents to plans and investment companies that are registered with the U.S. Securities and Exchange Commission (SEC) are required by law to conduct searches for lost security holders.[10] Consequently, such members have long been accustomed to searching for lost account holders, including holders of retirement accounts, through search services that are widely available in the private marketplace. As is discussed below, however, what is needed is a PBGC program whereby account balances of missing participants of terminating individual account plans may be transferred to PBGC upon plan termination.

> ***RFI Question 3**: If PBGC provided services for missing participants' accounts in terminating individual account plans that were comparable to the services provided by the private sector and charged comparable fees, would you be likely to choose the PBGC program or the private sector program and why? Would it make a difference if PBGC provided a narrower range of services than typical private-sector providers?*

The Institute's members currently utilize several methods to locate missing participants in terminating individual account plans and some use external service providers. If PBGC could provide services more efficiently and at a competitive price point our members may use such services. However, as is further discussed below, our members do not believe that a PBGC program that solely provides

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[10] *See* Rule 17Ad-17 under the Securities Exchange Act of 1934. The rule requires that the transfer agent "conduct two database searches using at least one information database." In March 2013, this rule was revised, as required by the Dodd-Frank Act, to require all registered broker-dealers to conduct searches for lost security holders.

services to locate missing participants in terminating individual account plans is what is needed to assist missing participants of such plans in obtaining their unpaid retirement assets in an expeditious manner.

> ***RFI Question 4**: How would individual account plans' choice to use a PBGC missing participants program for such plans –rather than a private- sector service – be affected by (1) The level of fees PBGC might charge, (2) the minimum benefit size PBGC might accept, (3) optional or mandatory electronic filing, and (4) other possible program features?*

If PBGC could provide missing participant locator services more efficiently and at a competitive price point, our members may use such services, but, more importantly and as is discussed in detail below, we recommend that PBGC implement a program that provides more than only locator services for missing participants of terminating individual account plans.

As stated above, the Institute recommends that PBGC implement a program whereby account balances of missing participants of terminating individual account plans may be transferred to PBGC upon plan termination. As many missing participant's accounts in terminating individual account plans are small, PBGC's implementation of a minimum benefit requirement size in such a program would likely impact our members' willingness to utilize the program. Our members do not believe that an electronic filing requirement would have an impact on their choice to utilize a PBGC program.

With respect to fees associated with locating missing participants in terminating individual account plans, we note that the current DOL abandoned plan program addresses the expenses a QTA may incur in terminating an individual account plan. Specifically, DOL regulations require that expenses incurred by a QTA in terminating an individual account plan be "reasonable." The regulations further provide that expenses are considered reasonable if they are necessary to wind up the affairs of the plan and distribute benefits to the plan's participants and beneficiaries, are consistent with industry rates for such or similar services (based on the experience of the QTA), and are not in excess of rates charged by the QTA (or an affiliate) for the same or similar services provided to customers that are not plans terminated under the abandoned plan program, if the QTA (or an affiliate) provides the same or similar services to other customers.

> ***RFI Question 5**: What impact would a PBGC missing participants program for individual account plans have on private-sector benefit processing firms?*

The concerns raised by our members that have presented obstacles to their participation in the abandoned plan program are described below. Several of these issues can be addressed by the implementation of a PBGC program whereby an entity that has elected to serve as a QTA has the option to transfer defined contribution plan assets of missing participants to PBGC upon termination

of the plan. Inclusion of a PBGC program of this type as a distribution option within the current DOL abandoned plan program would likely increase our members' willingness to participate in the DOL program.

> ***<u>RFI Question 6</u>: How would you view the value (such as convenience and reliability) of a single database of missing participants' benefits in terminated individual account plans, maintained by PBGC, compared to the burden on plans to provide the data and the burden on PBGC to maintain the database? How would the comparison change if plan reporting of data were voluntary rather than mandatory, making the database less comprehensive? What information should be in the database?***

PBGC's maintenance of a single database of missing participant's benefits in terminated individual account plans would be of great value to such participants, as it would provide them with the ability to seek information regarding their benefits from a single source – PBGC. In many circumstances where a plan has been abandoned by the plan sponsor, it is difficult for a participant to obtain information regarding the plan from the plan sponsor (who has likely ceased operating) and the participant may not have any information regarding the plan's recordkeeper, trustee, or investment service providers. In addition, missing participants in terminated and even active plans may have terminated from employment from the plan sponsor many years in the past and therefore have lost contact with the plan sponsor. A PBGC maintained database of missing participants' benefits in terminated individual account plans combined with a marketing campaign to make the public aware of a PBGC website where participants could easily locate lost retirement accounts would enable participants to determine if they have an account in a simple and effective manner.

In order for a PBGC database to be effective, it must be comprehensive. The Institute would support a mandatory reporting program only if such mandatory reporting was part of an overall PBGC program whereby entities that have elected to serve as a QTA under the DOL abandoned plan program regulations have the option to transfer defined contribution plan assets of missing participants to PBGC upon termination of the plan and such transfer is included within DOL's abandoned plan program fiduciary safe harbor.

In order to assist missing participants in locating their retirement accounts, the database should include the name of the former plan sponsor, the date of the plan termination, the name and contact information of the entity acting as the QTA, contact information for the investment service provider (if applicable), and the missing participant's name, social security number and account balance.

> ***<u>RFI Question 7</u>: ERISA section 4050(b)(2) defines a missing participant as "a participant or beneficiary under a terminating plan whom the plan administrator cannot locate after a***

diligent search." What "diligent search" requirements should apply for individual account plans? Should PBGC offer diligent search services for a fee or post on its Web site the names of private sector companies that provide diligent search services?

The PBGC program should provide that a "diligent and reasonable search" correspond to the search methods contained in DOL Field Assistance Bulletin (FAB) 2004-02.[11] FAB 2004-02 addresses the obligations of a plan fiduciary under ERISA with respect to locating missing participants of a terminating defined contribution plan and includes the following required search methods:

- Use of certified mail;
- Checking related plan records;
- Checking with the designated plan beneficiary; and
- Use of a letter-forwarding service.[12]

FAB 2004-02 states that, in addition to the above search methods, a plan fiduciary should consider the use of internet search tools, commercial locator services, and credit reporting agencies to locate a missing participant, and depending on the facts and circumstances concerning a missing participant, it may be prudent for a fiduciary to use one or more of these search options. The FAB further states that if the cost of using these services will be charged to the missing participant's account, plan fiduciaries will need to consider the size of the participant's account balance in relation to the cost of the services when deciding whether the use of such services is appropriate.[13] As discussed above, some of our members who are subject to SEC requirements utilize the database search procedures required by SEC Rule 17AD-17 (which includes requirements for locating lost security holders) to locate missing participants in terminating defined contribution plans.

We therefore recommend that PBGC, in the implementation of its program, model its definition of a "reasonable and diligent search" on FAB 2004-02 and provide the administrator of a terminating defined contribution plan with the flexibility to use internet search tools or commercial locator services, taking into consideration the size of the participant's account balance in relation to the cost of the services when deciding whether the use of such services is appropriate.

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[11] A copy of FAB 2004-02 is available here: http://www.dol.gov/ebsa/regs/fab_2004-2.html.

[12] We note that the FAB references both the IRS and Social Security Administration letter-forwarding services. Effective August 31, 2012, the IRS announced it will no longer provide a letter-forwarding service to locate missing or lost participants. *See* IRS Revenue Procedure 2012-35, available here: http://www.irs.gov/pub/irs-drop/rp-12-35.pdf.

[13] The Institute has previously recommended that DOL include in its abandoned plan program a *de minimis* exception for very small accounts where the cost of locating a participant would deplete the account balance.

With respect to PBGC providing search services for a fee, or posting on its Web site private sector companies that provide diligent search services, as is discussed below, we believe that a program whereby account balances of missing participants in terminating defined contribution plans may be transferred to PBGC upon plan termination is in the best interest of such participants, as opposed to a program whereby PBGC only provides search services or the names of other entities providing such services.

<u>RFI Question 8</u>: What special concerns do small plans or their sponsors or participants have regarding the treatment of missing participants in individual account plans?

The difficulties our members experience associated with locating lost participants in terminating individual account plans are generally unrelated to the size of the plan. However, we understand that small plans may tend to be abandoned by the plan sponsor more often than large plans due to the economic fragility of small employers.

II. The Distribution Restrictions in DOL's Current Abandoned Plan Program Present Obstacles for Missing Participants and Service Providers

The current DOL abandoned plan program is a voluntary program that allows a financial institution holding the assets of a plan which appears to have been abandoned by its sponsor to act as a QTA, terminate the plan, and distribute benefits to the plan's participants and beneficiaries. 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. This includes notifying DOL prior to and after terminating and winding down the plan, locating and updating plan records, calculating benefits, notifying participants of the termination and their rights and options, distributing benefits, and filing a final report.

The abandoned plan program also includes a fiduciary safe harbor with respect to the distribution options regarding missing participants.[14] Upon determining that a participant is missing, a QTA is required to roll over the account balance to an individual retirement account (IRA), or to an inherited IRA maintained by an entity eligible to serve as an IRA trustee or issuer. In the case of a distribution which is $1,000 or less and where the amount is less than the minimum amount required to be invested in an IRA offered by the QTA to the public at the time of the distribution, the QTA may distribute the account to either (1) an interest-bearing federally insured bank or savings association account in the name of the participant or beneficiary; (2) the unclaimed property fund of the state in

[14] DOL regulation section 2550.404a-3(b)(2) provides that a missing participant is a participant who has failed to elect a form of distribution within 30 days of the furnishing of the required Notice of Plan Termination by the QTA.

which the participant's or beneficiary's last known address is located; or (3) an IRA offered by a financial institution other than the QTA. DOL's fiduciary safe harbor for distributions from terminating individual account plans does not extend to the selection and monitoring of any service provider necessary for the winding up of the plan or to the reasonableness of compensation paid for such services.

Except with respect to a distribution to a state unclaimed property fund, a QTA must enter into a written agreement with the transferee that provides that (1) the distributed funds are invested in an investment product designed to preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with liquidity (except in the case of a distribution to a federally insured bank or savings association); (2) the investment product selected seeks to maintain a stable dollar value equal to the amount invested in the account and is offered by a state or federally regulated financial institution; (3) fees and expenses attendant to the transferee plan or account, including investments of such plan or account, shall not exceed the fees and expenses charged by the provider of the plan or account for comparable plans or accounts; and (4) the participant or beneficiary shall have the right to enforce the terms of the contractual agreement establishing the account. Finally, both the QTA's selection of a transferee plan or account and the investment of funds cannot result in a prohibited transaction,[15] unless such transaction is exempt from ERISA's prohibited transaction rules.

The distribution restrictions included within the DOL abandoned plan program regulations present challenges and obstacles for missing participants and service providers. With respect to missing participants, the restrictions raise issues involving state unclaimed property laws and make it difficult for a missing participant to obtain his or her account balance after the plan is terminated.

Recent changes to state abandoned property laws have been reported to be more focused on helping states close large budget deficits that have resulted from the recent economic climate than operating in the best interest of owners who have allegedly abandoned their property.[16] Indeed, the manner in which abandoned property laws operate in many states enable states to supplement their general revenues with abandoned property. This is because, if a shareholder's account is deemed abandoned after the applicable dormancy period (*i.e.,* the length of time that must elapse before

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[15] ERISA prescriptively identifies certain types of transactions between a plan and a so-called "party in interest" to the plan that would violate ERISA's prohibited transaction provisions, including, for example, the designation by a QTA of itself or an affiliate as the provider of an individual retirement plan or other account established for the benefit of a missing participant. DOL class exemption 2006-06 provides prohibited transaction relief for a financial institution acting as QTA to select and pay itself (or an affiliate) for rendering termination services to the plan, if certain conditions are met.

[16] *See, e.g.,* Walter Nagel, Donald Griswold, Jeremy Abrams, and Derek Young, "Are States (Es)Cheating You?", State Tax Notes (April 29, 2013).

property is deemed abandoned by law -- which generally ranges from 3-7 years), the shareholder's property escheats to the shareholder's state of residence. Upon escheatment, generally speaking, the property is liquidated and the proceeds are deposited into the state's general revenue fund. While the accountholder may still claim his or her property from the state after escheatment, the value of that property will not reflect any earnings or appreciation that might have otherwise accrued after the account is escheated.

For example, assume a missing participant has an account balance of $1,000 or less and that amount is less than the minimum amount required to be invested in an IRA offered by the QTA. The QTA may then transfer the account balance to an interest-bearing federally insured bank or savings association account in the name of the participant or beneficiary. If, for example, the address on the account is in Delaware or California (each has a three-year dormancy period), and if the "missing participant" for whom the account was established has not affirmatively contacted the financial institution in a three-year period, the account must be escheated to the state, where it is liquidated in short order. In the event the participant reappears after escheatment occurs, he or she must undertake an arduous process to obtain the claimed property. Moreover, the property that will be returned after a claim is validated is the value of the account on the date the state liquidated it, not the value when the accountholder claims it, which could be several years later. The ability to transfer missing participant assets to PBGC upon plan termination would better protect a participant's assets, thereby providing a significant benefit to a lost participant seeking to obtain his or her retirement savings after termination of the plan, regardless of how much time passes between the plan being terminated and the participant being located. Combined with an effective marketing campaign making the public aware of PBGC's role in holding the assets of missing participants of terminated individual account plans, the participant would simply and easily contact PBGC to obtain his or her benefits.

State escheat requirements would also apply to assets held in an IRA (assuming the QTA is able to locate a provider willing to accept a small account with no future contributions). Although each state unclaimed property law varies, we understand that most states require the escheatment of IRA assets when the participant reaches 70½ if there has not been any contact with the shareholder for the state's period of dormancy.[17] In the context of an abandoned plan, it is likely that the employer has ceased operating and the participant will have no information about his account, the asset custodian or other service providers, thereby increasing the likelihood that there will be no contact with the IRA shareholder during the state's period of dormancy.

With respect to our members' willingness to participate in the DOL abandoned plan program, while some of the Institute's members have agreed to act as a QTA and wind down individual account

[17] Internal Revenue Code section 401(a)(9) generally requires a participant to commence distributions from his account by April 1 of the year following the calendar year he reaches age 70½.

plans pursuant to the program, concerns with certain aspects of the program have impacted the willingness of other members to participate.[18]

Institute members continue to be concerned about potential ongoing liability after the abandoned plan is terminated and the assets are distributed, particularly with respect to missing participants. Specifically, our members are concerned that the QTA could have continuing liability subsequent to the winding up of affairs of the plan for subsequent actions taken by the transferee of the assets. For example, the QTA might be considered to have a responsibility to monitor the efforts of the transferee bank or savings association to locate the missing participant or ensure that the fees associated with the account remain unchanged (*i.e.*, that the fees continue to be charged against earnings only).[19]

The limitations imposed on QTAs relating to the transfer of accounts balances of missing participants are also of concern to our members. In particular, the requirement that a QTA may only transfer account balances of missing participants to an interest-bearing federally insured bank or savings association account, or to a state unclaimed property fund if the amount to be distributed is less than $1000 *and* the account balance is less than the minimum amount required to be invested in an individual retirement plan product offered by the QTA to the public at the time of the distribution raises additional concerns. Many financial service providers offer low minimum balance requirements for IRAs as a service to plan clients with mandatory cashout provisions or to attract new IRA investors who will likely be actively contributing to the account. If no new contributions are made to the account, as is likely with a missing participant, the cost of maintaining the IRA could quickly erode the value of the assets.

Implementation of a program whereby a QTA could, as a distribution option, transfer the account of a missing participant to PBGC (without regard to the account balance) would both alleviate the obstacles described above and likely lead to increased participation in the abandoned plan program. In particular, it would (1) eliminate concerns regarding continuing fiduciary liability to monitor the

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[18] Some of our members are unwilling to serve as a QTA because they do not believe they meet the regulatory requirements to do so. The abandoned plan regulations require that, in order to act 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. As we have discussed with DOL, in a self-trusteed plan, the financial institution may merely act as a recordkeeper and therefore not "hold" the assets of the plan in a legal sense. A summary of other concerns raised by our members presenting obstacles to their participation in the program is included in the Institute's comment letter in response to DOL's proposed 2012 abandoned plan program regulation amendments, which is available here: http://www.dol.gov/ebsa/pdf/1210-AB47-0003.pdf.

[19] DOL class exemption 2006-06 includes specific conditions for the provision of termination services and the receipt of fees. One of the conditions is that fees and expenses attendant to the individual retirement plan or other account, with the exception of establishment charges, may be charged only against the income earned by the individual retirement plan or other account.

subsequent actions and fees of the transferee as PBGC would be the transferee, and (2) alleviate the current problems described above associated with a QTA being required to transfer the account balance to an IRA if the balance is less than $1,000, but the QTA offers IRA products to the public in an amount less than $1,000.

III. <u>The Institute's Recommendations Regarding Features of a PBGC Individual Account Missing Participant Program</u>

Based upon discussions with our members, we recommend that PBGC implement a program for missing participants of terminating individual account plans with the following features:

- The program should provide that a QTA terminating a plan under the DOL abandoned plan program may, after the conduct of a diligent search (as is described above) transfer account balances of missing participants to PBGC, without regard to the account balance or whether the balance is less than the minimum amount required to be invested in an individual retirement plan product offered by the QTA to the public at the time of the distribution.[20]

- The program should model its definition of a "reasonable and diligent search" in a manner that corresponds to the applicable provisions of FAB 2004-02 and provide the administrator of a terminating defined contribution plan with the flexibility to use internet search tools or commercial locator services, taking into consideration the size of the participant's account balance in relation to the cost of the services when deciding whether the use of such services is appropriate.

- PBGC should coordinate with DOL so that the PBGC program would be included within the abandoned plan program fiduciary safe harbor provisions, and the program should provide that, subsequent to a transfer to PBGC, the QTA shall have no subsequent liability with regard to the missing participant's account.

- The program should specify that it is applicable to 401(k) plans, ERISA-covered 403(b) plans, money purchase pension plans, and profit sharing plans. Many of our members have informed us that the same issues present with respect to missing participants in terminating 401(k) plans are present with respect to missing participants of these other defined contribution plans.

As discussed above, the Institute does believe it necessary for PBGC to implement an individual account missing participant program that provides only "locator" services as such services are generally

[20] As discussed at footnote 5, *supra*, we encourage PBGC to extend the program to respond to the challenges associated with missing participants in active plans as well.

available in the commercial marketplace. This type of program alone would not serve to remedy the difficulties detailed above, as it would not serve to increase further service provider participation in the DOL abandoned plan program, simplify the process for missing participants to obtain their retirement benefits, or ensure that such benefits have not been escheated to the state at the time they seek to obtain them.[21]

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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 Howard Bard at 202-326-5810 (howard.bard@ici.org) or the undersigned at 202-326-5920 (david.abbey@ici.org).

Sincerely,

/s/ David M. Abbey

David M. Abbey
Senior Counsel, Pension Regulation

cc: Joseph Canary, Department of Labor, EBSA
Jeffrey Turner, Department of Labor, EBSA

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[21] Further, we believe that restricting the PBGC program to a "locator" service only may be inconsistent with the intent of ERISA section 4050. The Technical Explanation of the Pension Protection Act prepared by the staff of the Joint Committee on Taxation explains that ERISA section 4050 is intended to extend the PBGC defined benefit missing participant program (in accordance with regulations) to defined contribution plans, defined benefit programs that have no more than 25 active participants and are maintained by professional services employers, and the portion of defined benefit pension plans that provide benefits based upon the separate accounts of participants and therefore are treated as defined contribution plans under ERISA. *See* Technical Explanation of H.R. 4, The "Pension Protection Act of 2006," As passed by the House on July 28, 2006 and as Considered by the Senate on August 3, 2006, available here: http://www.jct.gov/x-38-06.pdf.