TESTIMONY OF RICHARD P. McHUGH,
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ON BEHALF OF
THE PLAN SPONSOR COUNCIL OF AMERICA
BEFORE THE ERISA ADVISORY COUNCIL

LOCATING MISSING AND LOST PARTICIPANTS

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As a member of the Plan Sponsor Council of America's Legal and Legislative Committee and an employee benefits lawyer who has advised employers for over 30 years, I am pleased to appear before the Council to discuss certain issues relating to providing retirement plan benefits to missing and lost participants. The Plan Sponsor Council of America ("PSCA") is a nonprofit association that provides services, best practice information, and advocacy to defined contribution plan sponsors. Members have access to a broad range of resources and programs that address the varying needs of both small and large companies. Membership includes 1,200 companies ranging in size from Fortune 100 firms to small, entrepreneurial businesses.

We offer the following observations and recommendations as applicable to defined contribution plans.

Based on informal polling of our membership, missing and lost participants are not a major issue of concern for plan administrators in regards to the delivery of benefits.

Generally, in accordance with Section 411(a)(11) of the Internal Revenue Code (the "Code"), nonforfeitable account balances in excess of $5,000 may not be immediately distributed from a tax-qualified defined contribution retirement plan without the consent of the participant. Obviously, a participant making such a request is not missing or lost. Code Section 411(a)(11) permits such plans to require the immediate distribution of a terminating participant's account balance without such participant's consent where the balance in the account is less than $5,000. In turn, Section 401(a)(31)(B) of the Code requires that such mandatory distributions of more than $1,000 (but under $5,000) from a tax-qualified retirement plan be paid in a direct rollover to an individual retirement plan (an "IRA") if the distributee does not make an affirmative election to have the amount paid in a direct rollover to an eligible retirement plan, as defined elsewhere in the Code, or to receive the distribution directly.

Against this statutory background, in 2004 the Department of Labor (the "DOL") issued a very helpful "safe harbor" rule, contained in ERISA Regulation Section 2550.404a-2, regarding the designation of a business entity to receive direct rollovers required to be made under Code Section 401(a)(31). The safe harbor applies to on-going plans, and on its face appears to apply to participants only (and not to beneficiaries). Upon the satisfaction of specific conditions not specified herein, a plan fiduciary is deemed to have satisfied its fiduciary duties under ERISA both as to the selection of an IRA provider and the investment of assets in the resulting IRA. The DOL further indicated that mandatory distributions of less than $1,000 also would be covered by the safe harbor to the extent they were rolled into an IRA in a manner that complied with the above–specified conditions. In Notice 2005-5, the Internal Revenue Service provided useful guidance on the mechanics for setting up the IRAs under this scenario.

In addition, The DOL issued Field Assistance Bulletin 2004-02, which provides a helpful procedure for satisfying fiduciary obligations with respect to distributing account balances of missing and unresponsive participants (although not entirely clear, these rules also may apply to beneficiaries) when a defined contribution plan has been terminated.

To put these matters we review below in perspective, PSCA's 2012 Annual Survey of 2011 plan year experience reveals that 7.4% percent of defined contribution plans permit balances of any amount to remain in the plan. Fifty-one percent of plans transfer balances between $1,000 and $5,000 to an IRA and cash out balances below $1,000. Forty-two percent of plans allow amounts in excess of $1,000 to remain in the plan and cash-out amounts below $1,000. These statistics do not vary significantly by plan size.

In PSCA's view, the rules put forth in ERISA Regulation Section 2550.404a-2 and in the above-referenced Field Assistance Bulletin provide plan administrators with effective tools to address missing and lost participants in most, but perhaps not all, situations. PSCA would like to offer some recommendations to expand and or clarify the rules described herein.

Recommendations:

1. The DOL should extend the safe harbor rules under ERISA Regulation Section 2550.404a-2 to missing beneficiaries in addition to participants—regardless of the size of the accounts or the timing of the distributions. Since the restrictions of Code Section 411(a)(11) do not apply to beneficiaries, doing so should not create any conflicts under the Code.

2. The DOL should extend the safe harbor rules under ERISA Regulation Section 2550.404a-2 to distributions to missing or unresponsive participants, without regard to the size of the benefits, when benefits become payable after attaining the plan's normal retirement date. This expansion would apply to plans whether or not they contain mandatory distribution rules as permitted under Code Section 411(a)(11).

3. The DOL should clarify Field Assistance Bulletin 2004-02 to make certain that it also applies to missing beneficiaries in the context of a terminated plan.

4. As a practical matter, account balances of less than $1,000 continue to cause administrative headaches. Often, plan sponsors are unable to find IRA providers that will accept such small accounts. PSCA recommends that the DOL issue relief for plan sponsors who elect to escheat these small accounts to the states in which the affected participants are last known to reside.

5. The Secretary of Labor, as a Director of the Pension Benefit Guaranty Corporation (the "PBGC"), should ensure that the missing participant program for defined contribution plans is implemented by the PBGC. The Pension Protection Act of 2006 expanded the PBGC missing participant's program to terminating defined contribution plans. However, regulations needed to implement the program have not been proposed or implemented. Once implemented, and to the extent necessary, the DOL should issue guidance to make it certain that plan fiduciaries will be deemed to have satisfied their fiduciary obligations to the extent they elect to deposit plan assets into that program, and shall be released from future obligations with respect to those funds. In this regard, PSCA recommends that the DOL support a provision in H.R. 2127, the Retirement Plan Simplification and Enhancement Act of 2013, recently introduced by Rep. Richard Neal (D-MA) that would create a lost plan registry at the PBGC. This provision would result in another avenue though which former participants can track down plans in which they may have participated in the past.

6. While we believe that Field Assistance Bulletin 2003-3 provides that the costs associated with locating a missing or lost participant are permissible plan expenses that may be allocated to the accounts of the affected individuals that are the subject of the searches, clarification that this is permitted for on-going plans would be beneficial. We believe that Field Assistance Bulletin 2004-02 explicitly permits this treatment for terminating defined contribution plans.

Thank you for this opportunity to share our views with the Council. I look forward to your questions.