

Submitted to ebsa.opr@dol.gov

June 17, 2024

Mr. James Butikofer
U.S. Department of Labor
Employee Benefits Security Administration
Office of Research and Analysis
N-5718
200 Constitution Avenue NW
Washington, DC 20210

**Re: Proposed Information Collection Request Submitted for Public Comment;
Retirement Savings Lost and Found; OMB Control Number: 1210-NEW**

Dear Mr. Butikofer:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to submit comments on the “Proposed Information Collection Request Submitted for Public Comment; Retirement Savings Lost and Found,” (Proposal) released by the Employee Benefits Security Administration at the Department of Labor (DOL), and published in the Federal Register on April 16, 2024.¹ We have appreciated DOL and the other ERISA agencies working to expeditiously and efficiently implement the provisions of SECURE 2.0. Unfortunately, we think the Proposal misinterprets the Lost and Found database provisions and raises real concerns for plan administrators. As discussed below, ERIC urges the DOL to substantially narrow the information request to reflect statutory requirements and to work with the Internal Revenue Service to obtain data through less restrictive means.

By way of background, ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to millions of employees and their families, located in every state, city, and Congressional district.

ERIC member companies sponsor retirement plans, including both defined benefit and defined contribution plans, that are governed by the *Employee Retirement Income Security Act of 1974*, as amended (ERISA). Millions of workers and retirees participate in these plans. ERIC’s

¹ 89 Fed. Reg. 26934.

member companies spend considerable amounts of time, money, and effort to educate their workers and plan participants about retirement adequacy, holistic financial wellbeing, and their retirement benefits. Part of these efforts includes working hard to provide former employees with the benefits they've earned.

We supported including the Retirement Savings Lost and Found Database in the SECURE 2.0 Act as another potentially valuable way to ultimately reunite participants with their retirement benefits, which is a key priority for ERIC and our member companies. The statute is clear that the database should provide individuals *“only with the ability to search for information that enables the individual to locate the administrator and contact information for the administrator of any plan with respect to which the individual is or was a participant or beneficiary, sufficient to allow the individual to locate the individual’s plan in order to make a claim for benefits owing to the individual under the plan.”*² **Unfortunately, the Proposal unnecessarily complicates what was supposed to be a basic online database, raising serious privacy and administration concerns.**

Section 303 of SECURE 2.0 Authorizes DOL to Collect Limited Information on a Prospective Basis

Under Section 523(e), for plan years beginning after December 31, 2023, plan administrators are asked to provide the following information to the Department of Labor (DOL):

- the name of the plan,
- the name and address of the plan administrator,
- any change in the name of the plan,
- any change in the name or address of the plan administrator,
- information about the termination of the plan (if applicable),
- information about the merger or consolidation of the plan with any other plan or its division into two or more plans (if applicable),
- the name and taxpayer identifying number of each separated deferred vested participant whose benefit was fully paid out during the plan year,
- the name and taxpayer identifying number of a participant or former participant with respect to whom benefits were distributed under tax code section 401(a)(31)(B) during the plan year, as well as the name and address of the designated trustee or issuer and the account number of the individual retirement plan to which the amount was distributed, and
- the name and taxpayer identifying number of a participant or former participant to whom a deferred annuity contract was distributed during the plan year, the name and address of the issuer of such annuity contract and the contract or certificate number.

² Section 523(b) of ERISA, as added by Section 303 of SECURE 2.0.

The Proposal Unnecessarily Asks Plans for Much More Information than Permitted Under the Statute

The Proposal asks plan administrators for an overwhelming amount of information beyond what is specifically authorized for plans with deferred vested participants, including:

- Name, EIN, mailing address, and telephone number of the plan sponsor as reflected on the most recent Form 5500, if different than the plan administrator. If the plan had plan sponsors other than the plan sponsor on the most recent Form 5500, the names and EINs of the prior plan sponsors and include the date of change are requested.
- The date of birth, mailing address, email address, and telephone number of each separated vested participant.
- Nature, form, and amount of benefit of each separated vested participant.
- If the vested benefit of each such separated vested participant was fully paid in a form other than an annuity (i.e., lump sum payout) to the separated vested participant, provide the date and the amount of the distribution. If an annuity form of benefit, state whether the separated vested participant has begun receiving benefits, the date of the annuity commencement, and the monthly benefit.
- Date of birth, mailing address, email address, and telephone number of any separated vested participant of normal retirement age or older that is owed a vested benefit, and who has been unresponsive to plan communications about their benefits or whose contact information the plan has reason to believe is no longer accurate.
- Name, date of birth, mailing address, email address, telephone number, and SSN of any designated beneficiary of the separated vested participant.
- With respect to any participant whose benefit was transferred to the plan in the manner described in Line 9 of the Form 8955–SSA, the name and plan number of the transferor plan, including the date of transfer to the plan.
- Notably, while the statutory reporting is only prospective, the Proposal asks for information dating back to the date a covered plan became subject to ERISA or as far back as possible.

There is similar overreach with respect to plans that distributed benefits under 401(a)(31)(B) and annuities. The Department of Labor simply does not need this much information in order to build the database described in Section 303 of SECURE 2.0, which again was designed to provide participants enough information to locate their plans.

DOL Should First Coordinate with IRS to Obtain Data

Much of the data needed for this Lost and Found database is already provided to the Internal Revenue Service on the Form 8955-SSA. That means the database could be rather easily established without further costs or burdens to plan administrators. However, in the Proposal, DOL asserts that IRS has declined to provide the data needed to establish the database.

The Department had planned to use data that plan administrators submitted to the Internal Revenue Service (IRS) on Form 8955-SSA (Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits). However, citing concerns under section 6103 of the Internal Revenue Code (Code), IRS has now indicated that it will not authorize the release of this data to the Department for the purpose of communicating either directly with participants and beneficiaries about retirement plans that may still owe them retirement benefits or indirectly through the Retirement Savings Lost and Found online searchable database. Accordingly, the Department is proposing to request plan administrators to voluntarily furnish the information specified below directly to the Department.³

It is unclear why much of the requested information could not be provided by the IRS using data provided on the Form 8955-SSA. We understand the IRS has expressed taxpayer privacy concerns under section 6103 of the Tax Code, but it is difficult to understand why much of the information could not be provided in a redacted or modified form, or some other arrangement reached. Additionally, to the extent that the IRS' reticence is attributable to a perceived intent to conduct proactive outreach to participants using this data (which the statute does not authorize), DOL should clarify it does not intend such communications. We strongly urge the DOL and IRS to coordinate to reach an information sharing agreement.

If Data is Needed from Plan Administrators, Requests Must Track the Statute

It appears that the Department is attempting to build a database of participant and plan information that goes far beyond what was authorized by the Lost and Found provisions of SECURE 2.0.

The amount of information requested raises serious privacy and data security questions.⁴ For example, DOL simply does need to know the nature, form, and amount of the benefits owed in order to help a participant locate a plan administrator. Furthermore, providing this information to DOL is risky for plan participants and beneficiaries. After all, the DOL Inspector General has criticized the Department's information security program. In its most recent semiannual report to Congress, the Inspector General noted:

[w]e continue to have concerns with the Department's information security program in the following areas:

- *cybersecurity oversight,*
- *supply chain,*
- *cloud/third-party,*
- *end user/remote security, and*
- *emerging technology and security requirements, such as Artificial Intelligence and zero trust architecture.*

³ Proposal at 26933-34.

⁴ The Proposal does not consider potential state privacy law implications for plan administrators.

Securing the Department's information systems remains a concern as we continue to identify recurring deficiencies in the Department's efforts to manage and implement security controls throughout its information security program. While the Department has moved information systems to its IT shared services model to improve management and security of the systems, the Department has not adequately implemented information security controls and technology tools required to manage and monitor IT security. Further, we are still concerned that the remaining systems that are not part of the IT shared services environment are not receiving the governance and oversight required to sufficiently secure all of DOL's data and information systems.⁵

The Proposal acknowledges that the statute requires the DOL (in consultation with Treasury) to “take all necessary and proper precautions to ensure that individuals' plan and personal information maintained by the Retirement Savings Lost and Found online searchable database is protected...”⁶ However, the Proposal includes only vague assurance that it will “hold the data specifically required by section 523(e) of ERISA secure, verify the identity of participants and beneficiaries seeking access to the data, and limit disclosure to carry out the purposes of section 523 of ERISA.” The Proposal does state that “Multiple security measures will be in place to protect plan participant and beneficiary data (i.e., Social Security numbers) in the Department's Lost and Found online searchable database. A public user will have no access to sensitive data. Government access to the data will also be strictly controlled, which will be encrypted both at rest and in transit. The database will implement extensive logging and monitoring mechanisms, and sensitive data masking techniques will be implemented to mask personally identifiable information.”⁷

What is missing from these statements is a comparison of these security measures with the measures that plan administrators use every day to keep their participant data safe. Does DOL consider itself bound by industry best practice standards for data security? The Proposal includes no analysis of the potential costs of administering this expanded database full of very detailed, specific information. Additionally, DOL needs to articulate the process that will be used to notify and make whole plan administrators and plan participants in the event of a data breach and subsequent fraudulent activity, and DOL must specifically indemnify plan administrators who provide information to DOL in the case of a breach.

Additionally, since the goal of the Lost and Found database is to promote reuniting participants with benefits, Plans should not report information with respect to cashouts that are made for the purpose of transferring the assets to an employee's new employer plan through an auto-portability network.

Finally, the Department simply has not articulated how much of the requested information will provide marginal assistance helping a participant find the contact information for the plan

⁵ Office of the Inspector General, U.S. Dep't of Labor, “Semiannual Report to Congress: October 1, 2023-March 31, 2024, available at <https://www.oig.dol.gov/public/semiannuals/91.pdf>, 32.

⁶ Proposal at 26934, citing SECURE 2.0 Sec. 303(c).

⁷ *Id.* at 25935.

administrator beyond what plans already do today to find and service missing participants. For example, specific information relating to amounts of benefits is not relevant to finding plan administrator contact information.⁸ In addition, some participants and beneficiaries may not want DOL to maintain this information about their deferred vested benefits. The statute requires DOL to “allow any individual to contact the Secretary to opt out of inclusion in the Retirement Savings Lost and Found.” However, the Proposal does not provide for any opt-out mechanism.

The Proposal’s Thinly Veiled Threats Are Counterproductive and Lack Basis

Likely because it anticipates plans will be reluctant to take the risk of turning over this data, the Proposal appears to demand compliance with this “voluntary” request, *or else*. The Proposal states:

“Although this proposed ICR is voluntary, the Department notes that, in addition to the specific grant of authority in section 523(e) of ERISA, mentioned above, the Department has general authority to investigate and collect information under other sections of ERISA, including sections 504 and 505 of ERISA, as well as to verify participants’ and beneficiaries’ identities under the Retirement Savings Lost and Found online searchable database. The Department further notes that, although this proposed ICR does not impose any new recordkeeping requirements, the Department expects plans that follow best practices will already have much of this additional information on file.”

The Proposal states that the DOL “believes that it is united with plan sponsors and administrators in the goal of making sure that workers and their beneficiaries receive the retirement benefits they earned and were promised.”⁹ ERIC member companies work every day to accomplish this goal. Given the DOL’s acknowledgment, it is unfortunate and counterproductive that DOL chose to immediately threaten plan administrators with an investigation if they do not comply with a voluntary request connected to (but far broader than) a statutory provision that the industry actually supported.¹⁰

These threats are particularly troubling given the enormous scope of the request. For example, the Proposal asks for data going back “as far as possible,” specifically referencing the date the plan first became subject to ERISA.¹¹ Additionally, while plan administrators likely have much or most of the information included in the request, it is possible that the information will not be contained in the format that DOL will request. That means plans, and ultimately plan participants, will bear the costs of building the necessary systems to compile and provide this data (much of which, again, might be obtained in some form using Form 8955-SSA if IRS and

⁸ Similarly, we think plans should not be required to provide information regarding cashouts that are made for the purpose of transferring the assets to an employee’s new employer plan through an auto-portability network. Those cashouts are transferred to another employer plan, and are of a different nature than other cash outs.

⁹ *Id.* at 26933.

¹⁰ *E.g.*, Letter from The ERISA Industry Committee to Members of Congress, available at <https://www.eric.org/wp-content/uploads/2022/10/retirement-legislation-october-letter-FINAL.pdf> (Oct. 22, 2022) (urging enactment of SECURE 2.0, specifically referencing support of a Lost and Found database).

¹¹ Proposal at 26934.

DOL can successfully coordinate an information sharing agreement). These costs could be substantial given the request to go back “as far as possible” or to the date the plan first became subject to ERISA.

This threat to launch investigations also is inconsistent with section 303(f)(1) of SECURE 2.0, which states that the DOL “*may use or disclose information collected under this section only for the purpose [of assisting an individual to locate the individual’s plan]*” and “*may disclose such information only to such employees of the Department of Labor whose official duties relate to*” that purpose.¹² Threatening plan administrators that the data provided or not provided would somehow be relevant in an investigation is not only in tension with the statute, but it more practically will make plan administrators circumspect about their voluntary participation, especially given the extraordinary breadth of the request to provide data “as far back as possible.”

DOL also suggests it can request this data pursuant to section 505 of ERISA (relating to regulatory authority). This citation is ironic because SECURE 2.0 directed the Lost and Found data information gathering to be accomplished through “regulations,” not the method that the DOL has chosen.¹³ More pointedly, the Department would need to demonstrate that it has a statutorily authorized reason to formally require this additional reporting and would need to comply with cost-benefit analysis requirements. That means the DOL would carry the burden of showing the tangible benefits of requiring additional information beyond what is authorized for collection in the statute. Additionally, DOL would need to explain how all of this information is necessary for purposes of identity verification, as authorized by the statute. DOL has not attempted such an explanation in the Proposal.

Conclusion

Plan sponsors look forward to continuing to work with members of Congress and the regulatory agencies to responsibly and creatively find ways to reunite participants with lost benefits. We urge DOL to redraft its Information Collection Request to more appropriately fit the statutory authority it received in SECURE 2.0 and abandon this more onerous Proposal.

¹² SECURE 2.0 Section 303(f).

¹³ Sec. 303(e) (stating “...*the administrator of a plan...shall submit to the Secretary, at such time and in such form and manner as is prescribed in regulations...[the authorized data]*”) (emphasis added).

Sincerely,

Andy Banducci

Cc:

Lisa Gomez, Assistant Secretary, Employee Benefits Security Administration
Michael Branson, Office of Management and Budget
Helen Morrison, Benefits Tax Counsel, Department of the Treasury
Rachel Leiser Levy, Associate Chief Counsel, IRS