



June 17, 2023

*Submitted via electronic mail to [ebsa.opr@dol.gov](mailto:ebsa.opr@dol.gov)*

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

**RE: Proposed Information Collection Request Regarding the Retirement Savings  
Lost and Found (ERISA § 523)**

Dear Mr. Butikofer:

The American Benefits Council (the "Council") appreciates the opportunity to comment on the U.S. Department of Labor's (department) proposed information collection request (ICR) with respect to establishing the Retirement Savings Lost and Found online searchable database (Lost and Found).<sup>1</sup> The Lost and Found was created by section 303 of the SECURE 2.0 Act of 2022 (SECURE 2.0) and is described in section 523 of the Employee Retirement Income Security Act of 1974 (ERISA).

The Council was proud to strongly support the enactment of SECURE 2.0, including the creation of the Lost and Found and the several other provisions that Congress included in SECURE 2.0 to help address the problem of missing and unresponsive retirement plan participants. We share with Congress and the department the very important goal of ensuring that workers and their beneficiaries receive the retirement benefits to which they are entitled. As discussed below, and in light of the Council's longstanding efforts to work with and recommend actions to the department regarding the issue of missing and unresponsive participants, we were disappointed by the tenor

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<sup>1</sup> 89 Fed. Reg. 26,932 (Apr. 16, 2024).

of the proposed ICR, which appears to place blame for missing and unresponsive participants on plan administrators. In addition, we offer below our specific comments and concerns with respect to various procedural and substantive matters related to the Lost and Found as described in the proposed ICR.

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.

## **THE NEED FOR WORKABLE GUIDANCE ON ADDRESSING MISSING AND UNRESPONSIVE PARTICIPANTS**

Before addressing the substance of the proposed ICR, we want to reiterate the Council's longstanding efforts to address issues regarding missing and unresponsive participants, as well as our longstanding concerns about the approach the department has taken with respect to dealing with these issues through unnecessary and unconstructive multi-year audits rather than working with the plan sponsor community to develop workable guidance.

Retirement plan administrators can find themselves with missing and unresponsive participants for a variety of reasons, many of which are beyond an administrator's control. Although the department briefly acknowledges in the proposed ICR that missing participants can occur for "many reasons," the department goes on to effectively scold plan administrators for "inadequate recordkeeping practices, ineffective processes for communicating with such participants and beneficiaries, and faulty procedures for searching for participants and beneficiaries for whom they have incorrect or incomplete contact information."<sup>2</sup> This unhelpful chiding is especially disappointing because, as the Council has highlighted for more than a decade, there is a critical need for a safe harbor from the department setting forth what plan sponsors must do to try to find missing participants.

On January 12, 2021, the department issued a "best practices" document for fiduciaries that laid out "red flags" the department states it had seen in investigations that indicate a problem with missing or unresponsive participants.<sup>3</sup> But this best

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<sup>2</sup> 89 Fed. Reg. 26,933.

<sup>3</sup> Available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance/best-practices-for-pension-plans>.

practices guidance does not help plan sponsors because it is inconceivable that any plan would do all of the best practices. To do so would impose unreasonable costs on the remaining participants. This leaves employers with no more help than they had before, only significant uncertainty in facing long and costly audits.

As we have noted in previous comments provided to the department, the Pension Benefit Guaranty Corporation (“PBGC”) has 80,000 missing participants, and its general approach has been to wait for the 80,000 missing participants to contact the agency. The department has, to our knowledge, exercised no oversight of the PBGC regarding this situation, generally leaving those 80,000 missing participants on their own.<sup>4</sup> The handling of this 80,000-participant issue at PBGC is inconsistent with the department’s approach toward private plan sponsors where there have been constant audits and during which some employers have been routinely asked to provide the same information or documents they have already provided to the same auditors years earlier.

If ever there were an issue on which the department and plan administrators could work collaboratively in pursuit of shared goals, it is the issue of missing and unresponsive plan participants. We continue to urge the department to work constructively with the plan administrator community to maintain the focus on reducing this mutual challenge rather than casting blame.

## **PROCEDURAL AND SUBSTANTIVE CONCERNS WITH THE PROPOSED ICR**

As noted above, the Council strongly supported congressional efforts to address the issue of missing participants through several SECURE 2.0 provisions, including the creation of the Lost and Found. Congress very intentionally and appropriately established the precise parameters for the Lost and Found within section 523 of ERISA to aid individuals in their “search for information that enables the individual to locate the administrator” of plans with respect to which the individual is or was a participant or beneficiary.<sup>5</sup> In doing so, Congress carefully balanced the need for any new information collection requirements from plan administrators with other important goals, such as safeguarding and protecting the privacy of participant data and minimizing administrative burdens. With that congressional intent in mind, the Council

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<sup>4</sup> The only step forward in this area was facilitated not by the Department’s national office, but rather by the 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.

<sup>5</sup> ERISA § 523(a)(1)(A).

has several concerns with the proposed ICR, including that we believe several aspects of the proposed ICR conflict with or exceed the scope of section 523 of ERISA.

### **1. The Voluntary Nature of the Proposed ICR Significantly Exacerbates Data Sharing and Contractual Concerns.**

Effective with respect to plan years beginning after December 31, 2023, ERISA requires plan administrators to submit to the department certain information the statute requires for the Lost and Found “at such time and in such form and manner *as is prescribed in regulations*” (emphasis added).<sup>6</sup> In issuing the proposed ICR, not only has the department not followed the statute’s directive to promulgate regulations setting forth administrators’ data submission requirements, but the department has also proposed to collect information from administrators on a *voluntary* basis in order to populate the Lost and Found.

The voluntary nature of the proposed ICR raises important questions about the extent to which plans and service providers are likely to share the requested information with the department:

- **Liability if the department has a data breach.** Employers and service providers generally do not disclose employees’ personal information *except as required by law*. So, the disclosure of such information on a voluntary basis raises serious liability issues in the case of a data breach at the department.<sup>7</sup> That alone will cause many or most plans not to provide sensitive employee information voluntarily.
- **Liability even if the department has not had a breach.** There are various privacy laws, and there is some lack of clarity regarding whether those laws would prohibit voluntary disclosure of employees’ information without some form of employee consent. The proposed ICR does not address that, which is another reason why plans are unlikely to provide the data. The proposed ICR also fails to address the statutory requirement and safeguard that the department allow any individual to contact the department to opt out of inclusion in the Lost and Found,<sup>8</sup> providing one more reason why plans are unlikely to share the requested information.

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<sup>6</sup> ERISA § 523(e).

<sup>7</sup> As one example of why plan sponsors and administrators may be concerned by the potential for a data breach within the Department, *see* OFFICE OF INSPECTOR GENERAL FOR THE U.S. DEP’T OF LABOR, SEMI-ANNUAL REPORT TO CONGRESS 31-32 (Vol. 91 Oct. 1, 2023 – Mar. 31, 2024) (stating, among other concerns, that “[s]ecuring 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.”).

<sup>8</sup> ERISA § 523(c)(2).

- **Voluntary submission of employee information would violate the department’s own cybersecurity guidance.** The department has cautioned employers not to entrust employee information with third parties without an extensive investigation into the third party’s cybersecurity systems. Yet here the department is effectively asking employers to violate its own guidance by assuming that the department has sufficient protections in place.<sup>9</sup>
- **Voluntary submission of employee data could possibly be used in the department’s missing participant audits against the employer.** SECURE 2.0 prohibited the department from using information collected under the department’s authority from being used in audits against employers. That SECURE 2.0 provision does not technically apply to the voluntary submissions. The proposed ICR does not address this concern.

Because we expect that our concern with the voluntary nature of the department’s proposed ICR is likely to significantly compromise the content, and thus effectiveness, of the Lost and Found, we encourage the department to withdraw the proposed ICR and instead engage in a notice and comment rulemaking process as required by the statute.

## **2. The Scope of the Requested Reporting in the Proposed ICR Far Exceeds the Reporting Contemplated by the Statute.**

### *a. Historical plan information.*

Section 523(e) of ERISA expressly provides for information collection from plans effective with respect to plan years beginning after December 31, 2023 and specifies the content of the reporting that the department, by regulation, shall require of plan administrators. Importantly, the statute does not contemplate requiring administrators to report the plan-related information described in Internal Revenue Code section 6057(b)(1)-(4) or 6057(a)(2)(A)-(B) on a retroactive basis, let alone as far back as to the date a covered plan became subject to ERISA. We believe this omission of historical plan information from the statutory requirements for the Lost and Found was intentional and judicious on the part of Congress. The re-creation of historical plan data by administrators would in many cases be exceedingly challenging and time-consuming, and for some plans it will be impossible to produce. For these reasons and the reasons noted above, we strongly doubt that many plans would be able to provide such data voluntarily, knowing the risks involved to both themselves and their employees.

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<sup>9</sup> <https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/tips-for-hiring-a-service-provider-with-strong-security-practices.pdf>.

Even if we disregard the cost and liability issues, building a Lost and Found with partial and/or inaccurate data, particularly from a historical plan perspective, risks creating a tool that is even *less* helpful to individuals than simply including a clear message that the data in the Lost and Found is intended to be accurate with respect to a plan and its administrator as of plan years beginning in 2024 and later. For example, an individual searching for information on an old benefit may simply abandon their search if they do not locate it within the Lost and Found while under the impression that robust historical data is included in the database. The department risks this result even by simply accepting on a voluntary basis historical data from administrators who are comfortable confirming the accuracy of such data; again, an individual who cannot locate their information in the Lost and Found will have no way of knowing whether the Lost and Found has incomplete historical data or whether their recollection of an old retirement plan benefit is mistaken.

*b. Expanded participant and beneficiary information.*

In addition to our concerns regarding the department's requests for historical plan information, we are also concerned by the proposed ICR's request for data on individuals that similarly exceeds the data described in the statute. In this regard, the statute contemplates that regulations issued by the department would only require plan administrators to provide the name and taxpayer identifying number of terminated vested participants whose benefits were distributed during the plan year, together with certain limited additional information such as whether an annuity was distributed to such individual and the name and address of the annuity issuer. The proposed ICR, however, proposes to request significantly more information than what is listed in the statute, such as the date of birth, mailing addresses, email addresses, and telephone numbers of separated vested participants, similar information for designated beneficiaries, and the identification of those separated vested participants who have been unresponsive to plan communications or whose contact information the plan has reason to believe is no longer accurate.

Here again, Congress very carefully considered what participant and beneficiary information was necessary to fulfill the purpose of the Lost and Found while minimizing concerns regarding administrative burdens and data privacy. To fulfill the Lost and Found's purposes of "allow[ing] an individual to search for information" regarding their plan and "allow[ing] the Secretary to assist such an individual in locating any such plan," it should be sufficient to allow the individual or department to simply perform a search by name and/or taxpayer identifying number. The more personal information the department requests beyond what is necessary, the greater the potential liability if such data is compromised. And the greater the possibility that plans will not provide any information.

### **3. Beginning the Lost and Found Data Collection Before the End of the 2024 Plan Year is Inconsistent with the Statute.**

The statute requires the department to “establish” the Lost and Found not later than December 29, 2024. At the same time, the statute contemplates that department regulations would require plans to provide information to the Lost and Found “[e]ffective with respect to plan years beginning after [December 31, 2023],” that is, plan years beginning in 2024 and later. In the proposed ICR, however, the department proposes that plan administrators would first provide the information requested for the Lost and Found with the 2023 Form 5500. As the department knows, the 2023 Form 5500 is used to report information for 2023 plan years – one plan year earlier than the plan year for which Lost and Found reporting is contemplated under section 523 of ERISA.

We encourage the department to postpone any proposal to collect data from plan administrators for the Lost and Found until after the conclusion of a plan’s 2024 plan year.<sup>10</sup> As described in the preceding paragraph, Congress clearly contemplated separate timelines with respect to the “establish[ment]” of the Lost and Found and the start of plan administrator reporting. In our view, meeting the statutory deadline of December 29, 2024, to “establish” the Lost and Found does not mean that the database must be fully populated with data by that date.

### **4. Issuing an “Initial” Request for Voluntary Information Increases the Risk of Imposing Unnecessary Costs and Administrative Burdens on Plans.**

The department states in the proposed ICR that it is seeking voluntary participation from plan administrators “[a]s an initial matter.”<sup>11</sup> We read the department’s statement as indicating that the department is contemplating or leaving open the possibility of issuing multiple iterations of data requests with respect to the Lost and Found. Because issuing multiple iterations of data collection requests, whether voluntary or mandatory, will increase the administrative and cost burdens on any administrators who may attempt to comply with the initial voluntary request for data, we again encourage the department not to implement its proposed voluntary reporting scheme but to instead proceed directly to the rulemaking process as required by the statute.<sup>12</sup>

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<sup>10</sup> We ask the Department to postpone its voluntary ICR in this manner in the event that the Department does not withdraw the proposed ICR and engage instead in the regulatory process as required by section 523(e) of ERISA, as requested above.

<sup>11</sup> 89 Fed. Reg. 26,933.

<sup>12</sup> ERISA § 523(e).

Thank you for considering the Council's comments on the department's proposed ICR regarding the establishment of the Retirement Savings Lost and Found under section 523 of ERISA. If you have any questions or if we can be of further assistance, please contact me at 202-289-6700 or [ldudley@abcstaff.org](mailto:ldudley@abcstaff.org).

Sincerely,

A handwritten signature in cursive script that reads "Lynn Dudley".

Lynn Dudley  
Senior Vice President, Global Retirement & Compensation Policy