

June 17, 2024

*Filed Electronically*

James Butikofer  
Office of Research and Analysis  
Employee Benefits Security Administration  
Room N-5655  
US Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

Re: Proposed Information Collection Request; Retirement Savings Lost and Found

To Whom It May Concern:

The Investment Company Institute<sup>1</sup> appreciates the opportunity to submit comments on the proposed Information Collection Request (“Proposed ICR”)<sup>2</sup> issued by the Department of Labor (the “Department”), which proposes to collect information voluntarily in order to establish the Retirement Savings Lost and Found database, as directed by Section 303 of the SECURE 2.0 Act of 2022 (“SECURE 2.0 Act”).<sup>3</sup>

Section 303 of the SECURE 2.0 Act adds new Section 523 to ERISA and directs the Department, by December 29, 2024, to create a national online, searchable database to be managed by the Department, containing information on tax-qualified retirement plans to enable retirement savers to search for the contact information of their plan administrator and locate the benefits they have earned.

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<sup>1</sup> The [Investment Company Institute](http://www.ici.org) (ICI) is the leading association representing regulated investment funds. ICI’s mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI’s members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$35.1 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional \$9.1 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through [ICI Global](http://www.ici.org).

<sup>2</sup> The Proposed ICR was published at 89 Fed. Reg. 26932 (April 16, 2024).

<sup>3</sup> The SECURE 2.0 Act made several changes to ERISA and was enacted under the Consolidated Appropriations Act, 2023 (CAA).

ICI strongly supports efforts to help individuals save for and achieve a financially secure retirement. This includes not only accumulating assets, but also keeping track of those assets to ensure that individuals have access to use those benefits to fund their retirement. We continue to voice our strong support for initiatives designed to facilitate reuniting defined contribution plan participants with their unpaid retirement account balances.<sup>4</sup>

While we support the goal of Section 303, several aspects of the Proposed ICR raise concerns for our members.

### **I. Background on New ERISA Section 523—Retirement Savings Lost and Found.**

Congress was quite prescriptive in crafting ERISA Section 523, stating its exact intent and its expectations for the Lost and Found program. Section 523(a)(1) lists the following three functions that the program is to perform:

- (A) allow an individual to search for information that enables the individual to locate the administrator of any plan described in paragraph (2) with respect to which the individual is or was a participant or beneficiary, and provide contact information for the administrator of any such plan;
- (B) allow the Secretary to assist such an individual in locating any such plan of the individual; and
- (C) allow the Secretary to make any necessary changes to contact information on record for the administrator based on any changes to the plan due to merger or consolidation of the plan with any other plan, division of the plan into two or more plans, bankruptcy, termination, change in name of the plan, change in name or address of the administrator, or other causes.

To emphasize the limited intended use, Congress specifies that the Department may use the information it collects under Section 523 *only for the purpose described in item B above*.<sup>5</sup>

Section 523(b) describes the limitations of the information that should be available on the database:

The Retirement Savings Lost and Found [shall 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*

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<sup>4</sup> For example, we expressed strong support for the PBGC's expansion of its missing participant program to cover most terminated defined contribution plans. See letter from David M. Abbey, Senior Counsel, Retirement Policy to Regulatory Affairs Group, Office of the General Counsel, Pension Benefit Guaranty Corporation (November 21, 2016), available at <https://www.ici.org/doc-server/pdf/%3A30412a.pdf>. The PBGC's program also includes a search database; however, the PBGC's program is limited to participants of terminated plans.

<sup>5</sup> ERISA Section 523(f)(1).

*individual's plan* in order to make a claim for benefits owing to the individual under the plan. [emphasis added]

Section 523(e)(1) through (4) lists specific information that a plan administrator is to submit to the Department, beginning with plan years that begin after December 31, 2023.<sup>6</sup> The statute gives the Department the authority to determine the form and manner that this information should be submitted, but it does not, for example, include language granting the Department authority to collect *any* information it deems necessary to administer the program.

## II. Proposed Information Collection Request.

In the Proposed ICR, the Department proposes to request that plan administrators (or their authorized representative, such as a recordkeeper) voluntarily furnish specified information to establish the database. The Department requests, to the extent possible, the information listed in Section 523(e), as well as several additional data elements,<sup>7</sup> all dating back to the date a plan

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<sup>6</sup> Section 523(e)(1) through (4) lists the following information to be provided, with respect to plan years beginning after the second December 31 occurring after the date of the enactment:

- (1) The information described in paragraphs (1) through (4) of section 6057(b) of the Internal Revenue Code (the “Code”), which includes:
  - (A) any change in the name of the plan,
  - (B) any change in the name or address of the plan administrator,
  - (C) the termination of the plan, and
  - (D) the merger or consolidation of the plan with any other plan or its division into two or more plans.
- (2) The information described in subparagraphs (A) and (B) of section 6057(a)(2) of the Code, which includes:
  - (A) the name of the plan, and
  - (B) the name and address of the plan administrator.
- (3) The name and taxpayer identifying number of each participant or former participant in the plan—
  - (A) who, during the current plan year or any previous plan year, was reported under section 6057(a)(2)(C) of the Code, and with respect to whom the benefits described in clause (ii) thereof were fully paid during the plan year;
  - (B) with respect to whom any amount was distributed under section 401(a)(31)(B) of the Code during the plan year; or
  - (C) with respect to whom a deferred annuity contract was distributed during the plan year; and
- (4) In the case of a participant or former participant to whom paragraph (3) applies—
  - (A) in the case of a participant described in subparagraph (B) thereof, the name and address of the designated trustee or issuer described in section 401(a)(31)(B)(i) of the Code and the account number of the individual retirement plan to which the amount was distributed; and
  - (B) in the case of a participant described in subparagraph (C) thereof, the name and address of the issuer of such annuity contract and the contract or certificate number.

<sup>7</sup> The Department explains that it is requesting the additional information because it believes it “may increase the efficiency and effectiveness of locating missing participants.” 89 Fed. Reg. at 26934. Further, the Department seems to suggest that it has authority to verify participants’ and beneficiaries’ identities under the Lost and Found database and therefore has authority to request additional information for this purpose. *Id.*

became subject to ERISA. The Department notes that it is considering various methods of collecting the data, going forward, to minimize the burden on plans.<sup>8</sup>

Before stating our concerns, we first acknowledge that the request for data is, at this point, voluntary and that the request (as well as the information collection under Section 523(e), beginning with respect to plan years beginning in 2024) is directed at plan administrators. Despite the fact that the onus to provide the information is on the plan administrator, some of our members may be asked to provide assistance with this task.

Our primary concern relates to the breadth of data requested. The Proposed ICR requests significantly more information about participants and their beneficiaries beyond the data elements listed in the statute.<sup>9</sup> Further, the Proposed ICR requests data dating back to the date a

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<sup>8</sup> For example, the Department explains that the information can be electronically submitted as an attachment to the EFAST2 filing and that it is considering establishing a portal for submitting the information directly into the database. 89 Fed. Reg. at 26935.

<sup>9</sup> Information requested by the Proposed ICR beyond that required by the statute (listed in footnote 6 above) includes:

For Plans with Separated Vested Participants:

- 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, provide the names and EINs of the prior plan sponsors and include the date of change.
- 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.
- Name, date of birth, mailing address, email address, telephone number, and SSN 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 as set forth in paragraph 4 above, 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, provide the name and plan number of the transferor plan. Include the date of transfer to the plan.

For Plans That Distributed Benefits Under Code Section 401(a)(31)(B):

- 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, provide the names and EINs of the prior plan sponsors and include the date of change.
- The date of birth, mailing address, email address, and telephone number of each participant or former participant with respect to whom any amount of the vested benefit was distributed under section 401(a)(31)(B) of the Code.
- With respect to such participant or former participant, the amount of the distribution.
- With respect to such participant or former participant, the name, date of birth, mailing address, email address, telephone number, and SSN of any designated beneficiary.

plan became covered by ERISA, while the statute specifically authorizes collection of information with respect to plan years beginning in 2024. This drastically expanded scope of information—both the data elements themselves and the time period the request covers—far exceeds the reporting contemplated by the statute and therefore does not seem to comport with Congressional intent.

Collecting and providing this expansive amount of data would be prohibitively expensive, placing an enormous cost and burden on plans and their recordkeepers—cost that may ultimately be passed on to plan participants.

Further, the prospect of sharing participants' confidential and personal information raises significant data security concerns. Cybersecurity is an extremely high priority for our members and for us. Our members know too well that it is an unfortunate reality that every transmission of personally identifiable information (PII) and other plan-specific information and every additional holder of such information creates new risks, including cybersecurity risks, inadvertent disclosures and unauthorized leaking.<sup>10</sup> The data security risk of providing the additional information described in the Proposed ICR creates liability exposure for recordkeepers, particularly if they weigh the benefits of providing information on a voluntary basis.

In addition to the overly broad scope of information requested, the voluntary nature of the Proposed ICR itself raises concerns for service providers—even those who may support the establishment of the Lost and Found database. Service providers generally do not disclose employees' PII except as required by law. Service providers' agreements with plans generally include restrictions on sharing plan and participant information to third parties. Further, we have heard concerns that disclosing such information without the employees' consent may implicate state privacy laws. Therefore, it would be difficult for a service provider to justify voluntarily providing the information requested, even to a federal agency.

Based on the above concerns, we make the following suggestions.

- We urge the Department to require no more than the information specified by Section 523(e). We believe that Congress carefully considered the information the Department would need to carry out the mandate of establishing and maintaining the database.

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For Plans That Distributed Annuities under 2510.3–3(d)(2)(ii):

- Name, EIN, mailing address, and telephone number of 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, provide the names and EINs of the prior plan sponsors and include the date of change.
- The date of birth, SSN, mailing address, email address, and telephone number of each participant or former participant with respect to whom an annuity contract was distributed.
- With respect to such participant or former participant, the name, date of birth, mailing, address, email address, telephone number, and SSN of any designated beneficiary.

<sup>10</sup> As we have previously highlighted, the regular occurrence of high-profile data breaches highlights the vital importance of safeguarding the full array of such information. Plans and their service providers accordingly dedicate substantial resources to maintain effective information security programs.

- We suggest including a carve-out for information on cashouts in connection with an automatic portability transaction.<sup>11</sup> 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. The auto-portability system is, at its core, designed to reunite participants with their accounts (or prevent participants from losing track of them). Because the auto-portability system includes ongoing searches of its database, including those accounts in the Department’s Lost and Found database would be largely duplicative. It would be very helpful to carve these out.
- To encourage plans to voluntarily provide the data, the Department should consider providing an incentive. For example, the Department could provide a fiduciary safe harbor on steps fiduciaries of defined contribution plans can take to fulfill their obligations under ERISA to locate missing participants. Providing the information voluntarily could be part of satisfying such safe harbor. The Department at the very least should indicate that a plan fiduciary will not violate any of its fiduciary duties, such as its obligation to “ensure proper mitigation of cybersecurity risks” by voluntarily reporting information to the Lost and Found database.
- Finally, if the Department eventually determines to use a mandatory scheme, any mandatory reporting should not apply earlier than the 2025 filing year (or later depending on when requirements are finalized). Building a reporting system to enable this information to be provided will require a significant effort. The Department should keep in mind that the industry needs time to build out processes to properly support any such reporting.

We share the Department’s goal of making sure that workers and their beneficiaries receive the retirement benefits they earned, and the Lost and Found database could be a useful tool towards achieving this goal. Given the problems presented by a voluntary reporting approach and, on the other hand, the significant mandatory reporting obligations already faced by plans,<sup>12</sup> the Department should take more time to consider and evaluate other approaches to populating the database. We recognize that the Department is under a statutory deadline for creating the Lost and Found database, but believe it is imperative not to implement a solution before all options are thoroughly vetted. We would be happy to work with the Department on ways to maximize

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<sup>11</sup> Section 120 of the SECURE 2.0 Act created a statutory prohibited transaction exemption under the Code for service providers offering "auto-portability" services (i.e., transfer of a participant's automatic rollover IRA attributable to participation in a previous employer's plan to a new employer’s plan). The Department issued a proposed regulation to implement this statutory provision. 89 Fed. Reg. 5624 (January 29, 2024).

<sup>12</sup> Section 319 of the SECURE 2.0 Act directed the Department, along with Treasury and the PBGC, to examine the reporting and disclosure requirements in ERISA and the Code applicable to pension and retirement plans and provide a joint report to Congress with recommendations to “consolidate, simplify, standardize, and improve” the requirements. The Department should ensure that the reporting to implement the Lost and Found database does not go against this goal, increasing reporting burdens. See the request for information issued jointly by the agencies to develop a public record for purposes of the directive in section 319 of the SECURE 2.0 Act. 89 Fed. Reg. 4215 (January 23, 2024).

the functionality of the database while minimizing the cost and burden on plans in supplying the necessary data.

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ICI looks forward to continuing to work with the Department to implement the Retirement Savings Lost and Found database, as well as the numerous other changes included in the SECURE 2.0 Act. If we can provide you with any additional information regarding these issues, please do not hesitate to contact Elena Chism at 202/326-5821 ([elena.chism@ici.org](mailto:elena.chism@ici.org)) or Shannon Salinas at 202/326-5809 ([shannon.salinas@ici.org](mailto:shannon.salinas@ici.org)).

Sincerely,

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