



October 15, 2024

Submitted via regulations.gov

**RE: Retirement Savings Lost and Found Information Collection Request
(ICR Reference No: 202403-1210-001)**

Dear Sir/Madam:

The American Benefits Council (“the Council”) appreciates the opportunity to comment on the Department of Labor’s (department) revised information collection request (“Revised ICR”)¹ with respect to establishing the Retirement Savings Lost and Found online searchable database (“Lost and Found”). The Council supported the enactment of the SECURE 2.0 Act of 2022 (“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.² 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.

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.

¹ 89 Fed. Reg. 74,291 (Sept. 12, 2024).

² The Lost and Found was created by section 303 of SECURE 2.0 and is described in section 523 of the Employee Retirement Income Security Act of 1974 (“ERISA”).

On April 16, 2024, the department published an initial proposed ICR in connection with its efforts to establish the Lost and Found (“Initial ICR”).³ The Council submitted comments on the Initial ICR on June 17, 2024.⁴ Although we appreciate that the Revised ICR reflects several changes that the department made in response to concerns raised by the Council and other stakeholders regarding the Initial ICR, we reiterate in this letter the continuing and more fundamental need for the department to issue workable guidance for plan sponsors regarding missing and unresponsive participants of ongoing plans. We also reiterate our concerns with the challenges that we believe will inevitably result from the voluntary approach the department is taking in establishing and populating the Lost and Found. Finally, we offer our specific comments and questions with respect to technical matters concerning the Revised ICR.

THE NEED FOR WORKABLE GUIDANCE ON ADDRESSING MISSING AND UNRESPONSIVE PARTICIPANTS

Before addressing the substance of the Revised ICR, we would like 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 more 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 acknowledged in the Initial ICR that missing participants can occur for “many reasons,” the department was primarily critical of 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.”⁵

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

³ 89 Fed. Reg. 26,932 (Apr. 16, 2024).

⁴ <https://www.americanbenefitscouncil.org/pub/?id=2773C76E-02F8-105E-0A56-4405075FD9B1>

⁵ 89 Fed. Reg. 26,933.

investigations that indicate a problem with missing or unresponsive participants.⁶ But this “best practices” guidance does not help plan sponsors with respect to the need for a safe harbor 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 significant uncertainty in facing long and costly audits.

The Council has previously commented on the fact that the Pension Benefit Guaranty Corporation (PBGC) has 80,000 missing participants, and yet its general approach has been to wait for the 80,000 missing participants to contact the agency. To our knowledge, the department has exercised no oversight of the PBGC regarding this situation, generally leaving those 80,000 missing participants on their own.⁷ 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 continuous 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.

As we have expressed before, 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.

PROCEDURAL CONCERNS WITH THE REVISED ICR

As noted above, the Council 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 was very intentional in establishing the 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.⁸ In doing so, Congress carefully balanced the need for any new information collection requirements

⁶ Available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance/best-practices-for-pension-plans>.

⁷ The only step forward in this area was facilitated not by the department’s national office, but rather by the PBGC Participant and Plan Sponsor 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.

⁸ ERISA § 523(a)(1)(A).

imposed on plan administrators with other important goals, such as safeguarding and protecting the privacy of participant data. With both the statutory language and congressional intent in mind, the Council continues to have procedural concerns with the department's decision to establish and initially populate the Lost and Found in the manner proposed.

1. The Voluntary Nature of the Revised 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).⁹ In issuing both the Initial and Revised ICRs, not only has the department not followed the statute's directive to promulgate regulations setting forth plan administrators' data submission requirements, but the department seeks to collect information from administrators on a *voluntary* basis in order to populate the Lost and Found.

The voluntary nature of both the Initial and Revised ICRs 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*. The disclosure of such information on a voluntary basis raises serious liability issues in the case of a data breach at the department.¹⁰ 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 data 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 Revised ICR does not address that, which is another reason why plans are unlikely to provide the data. The Revised ICR also fails to address the statutory requirement and safeguard that the department allow any individual to contact the department to opt out of

⁹ ERISA § 523(e).

¹⁰ 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.").

inclusion in the Lost and Found,¹¹ providing yet one more reason why plans are unlikely to share the requested information.

- **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.¹²
- **Voluntary submission of employee data could possibly be used in the department’s missing participant audits against the employer.** SECURE 2.0 prohibits 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 voluntary submissions. Neither the Initial ICR nor the Revised ICR addresses this concern.

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

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

The department stated in the Initial ICR that it is seeking voluntary participation from plan administrators “[a]s an initial matter.”¹³ We read this 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, and the Revised ICR does not suggest or clarify otherwise. 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.¹⁴

¹¹ ERISA § 523(c)(2).

¹² <https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/tips-for-hiring-a-service-provider-with-strong-security-practices.pdf>.

¹³ 89 Fed. Reg. 26,933.

¹⁴ ERISA § 523(e).

STREAMLINED DATA REQUEST IN THE REVISED ICR

In our comment letter on the Initial ICR, we expressed significant concern that the scope of the data the department was proposing to request from plan administrators for purposes of populating the Lost and Found far exceeded the scope of the data collection described in the statute. We appreciate that the department responded to commenters' concerns regarding scope by streamlining the Revised ICR so that it is consistent with the statute.

TECHNICAL QUESTIONS REGARDING THE PROPOSED METHOD OF DATA COLLECTION

Most Council members with whom we have spoken about the Revised ICR are still considering whether the data sharing and contractual concerns described above are surmountable in a voluntary regime. Because of this, we are aware of few members who have given careful consideration to the technical submission process the department has outlined in materials accompanying the Revised ICR, and whether that process raises any technical questions or concerns regarding implementation. Questions and/or requests for clarification that we have heard, however, include the following:

- What is the process for a plan administrator to update the information it previously provided to the Lost and Found? For example, if a plan administrator previously uploaded the information for a participant, and that participant has since withdrawn her benefit from the plan, how would the administrator make that update to the Lost and Found?
- The filing instructions that describe how to use the Lost and Found template provide that Column R (Separated Vested Participant Social Security Number) should include, among others, "separated vested participants aged 65 or older who are in pay status." It is not clear what precisely the department means by that language, particularly with respect to such participants being "in pay status" in this context. Additional clarification would be helpful.
- Although non-ERISA plans are not subject to the information collection requirements of section 523 of ERISA, we understand that there could be some non-electing church plans that might be interested in participating in the Lost and Found on a voluntary basis (recognizing that participation is voluntary for all ERISA plans at this time). Please address whether non-electing church plans may voluntarily participate by submitting data to the Lost and Found and, if so, whether any special procedures should be followed. If allowed to participate, we assume that a non-electing church plan's voluntary participation in the Lost and Found would have no effect on that plan's status as a church plan, although

confirmation of this point by the department would be helpful as non-electing church plans determine whether they would like to participate.

* * * *

Thank you for considering the Council's comments on the department's Revised ICR regarding the establishment of the 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 DHowland@abcstaff.org.

Sincerely,

A handwritten signature in black ink, appearing to read "DHowland". The signature is written in a cursive, flowing style with a large initial "D" and a long, sweeping underline.

Diann Howland
Vice President, Legislative Affairs