ERIC
The ERISA Industry Committee
Driven By and For Large Employers
701 8th Street NW, Suite 610, Washington, DC 20001 • (202) 789-1400 • www.eric.org
Annette Guarisco Fildes, President & CEO

February 22, 2019

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Suite 400
Washington, DC 20210

Re: Request for Guidance to Address Missing and Unresponsive Participant Challenges

Dear Assistant Secretary Rutledge:

The ERISA Industry Committee ("ERIC") appreciates the opportunity to provide the United States Department of Labor (the "Department") suggestions for guidance on the important issue of missing retirement plan participants and participants who do not commence benefits at the required beginning date (the latter referred to in this letter as "unresponsive" participants). ERIC shares the Department's conviction that paying out retirement benefits is the singular purpose of retirement plans. Plan sponsors voluntarily spend time, money, and administrative resources to provide retirement plans in order to achieve the essential goal of paying retirement benefits to their former workers. Therefore, ERIC also shares the Department's concerns about barriers that may be preventing individuals from commencing their vested retirement benefits, and ERIC is committed to supporting solutions that remove such barriers.

There is a significant need for Departmental guidance on this issue, especially on the fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), that apply to defined benefit plans.[1] Even the most compliance-oriented plan administrators find it difficult to understand and comply with their fiduciary duties in this area due to the lack of applicable guidance from the Department. There is also the practical challenge that plan administrators cannot always do "whatever it takes" to find every last missing participant and nudge every unresponsive participant into payment due to the attendant costs and other challenges.[2] And even though there is no directly applicable guidance, the Department is aggressively pursuing a Terminated Vested Participant Project ("TVPP") enforcement initiative and subjecting plan fiduciaries to protracted investigations and, in some cases, findings of ERISA breach, in a manner that appears inconsistent with ERISA's fiduciary

[1] ERIC understands that the Department's guidance will focus on defined benefit plan issues, and so this letter assumes a focus on such plans. However, most of ERIC's recommendations also apply to defined contribution plans (should the Department's forthcoming guidance cover both).

[2] This challenge has been compounded by the termination of the Internal Revenue Service (the "IRS") and the Social Security Administration Letter Forwarding Program. This challenge is also expected to grow, given that today's workers tend to switch jobs more frequently and that large numbers of "Baby Boomers" are reaching retirement age every year.

standards. For all of these reasons, ERIC is extremely supportive of the Department's efforts to issue guidance in this area.

ERIC and its member companies are uniquely positioned to provide valuable insight that could strengthen this forthcoming guidance. ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC's members are leaders in every industry sector and provide comprehensive retirement benefits to tens of millions of active and retired workers and their families across the country. ERIC has a strong interest in policies that impact the ability of employers to provide cost-effective retirement programs and the ability of employees to receive such benefits. Although plans of all sizes deal with missing participant issues, ERIC's large employer members are especially likely to face these challenges because they tend to have larger defined benefit plans, which are inherently more complex and have more significant acquisition histories (including acquisitions where the plan inherited incomplete records).

ERIC's members care greatly about the participants and beneficiaries of their employer-sponsored plans. These member employers devote tremendous resources to their retirement plans, and they want each participant to benefit fully from them. This forthcoming guidance is greatly needed—and would be greatly welcomed—to guide plan fiduciaries in ensuring that retirement plan participants receive their benefits.

Executive Summary of ERIC Recommendations and Requested Guidance

As discussed below in more detail, ERIC supports the Department's issuance of guidance that affirms ERISA's fiduciary standards, including affirming that such standards require plan administrators to take reasonable steps to locate missing participants and to encourage unresponsive participants to begin payment on time. In issuing such guidance, we request that the Department seek to assist plan fiduciaries by providing them with a compliance roadmap to satisfy those duties, not one-size-fits-all requirements. In particular, the Department should affirm the fact-specific and process-oriented nature of ERISA's fiduciary duties and outline a compliance framework that allows fiduciaries the discretion to select reasonable steps to satisfy those duties. For example, the Department could issue an Interpretive Bulletin ("IB") or Field Assistance Bulletin ("FAB") that identifies Department-endorsed examples of how plan fiduciaries can fulfill their duties but allows fiduciaries the discretion to select among those compliance steps (or determine other methods of reasonable compliance) based upon the particular plan or participant.

ERIC strongly discourages the Department from any approach, or legal standard, that requires the same fiduciary action in all circumstances, such as a minimum standard checklist. Also, as discussed below, the Department's forthcoming guidance should be consistent with—or at least not inconsistent with—the guidance of other federal agencies, and should distinguish between missing and unresponsive participants because these two populations present distinct challenges.

In considering this type of fact-specific framework, ERIC makes six specific recommendations to the Department.

- First, ERIC encourages the Department *to extend Field Assistance Bulletin 2014-01* to searches for missing participants in nonterminating plans and defined benefit plans, provided the

Department frames these steps as recommendations and allows fiduciaries the discretion to select from among them.

- Second, ERIC recommends that the Department *articulate additional examples of compliance steps* (in addition to extending FAB 2014-01) that fiduciaries can consider in fulfilling their duties with respect to missing participants.

- Third, ERIC recommends that the Department *provide examples of compliance steps* related to unresponsive participants.

- Fourth, ERIC recommends that the Department provide guidance that supports, and provides fiduciary protection for, *additional distribution options*, particularly in the defined contribution plan context.

- Fifth, ERIC recommends that the Department provide some fiduciary protection (and monitoring guidance) for plan administrators that rely upon *third parties* to conduct missing participant search activities.

- Sixth, ERIC encourages the Department to provide additional but separate guidance—i.e., separate from this missing and unresponsive participant guidance—on the related issue of *uncashed checks and returned electronic file transfer payments*.

ERIC is confident that these recommendations—which draw on the deep experience of its members in sponsoring and administering large retirement plans—will help the Department to address the significant challenges of missing and unresponsive participants, and will remove the current confusion that plan fiduciaries face in fulfilling their fiduciary duties in this area.

ERIC Recommends That the Department Provide a Compliance Roadmap That Is Consistent with ERISA's Fact-Specific and Process-Focused Fiduciary Standards

As noted above, in drafting guidance on these missing and unresponsive participant challenges, ERIC expects that the Department will affirm that ERISA's fiduciary standards require plan administrators to take reasonable steps to locate missing participants and to encourage unresponsive participants to begin payment on time. ERIC agrees with these goals. ERISA's fiduciary standards require plan administrators to act solely in the interests of the plan, for the exclusive purpose of providing plan benefits and defraying reasonable plan expenses, and with the care, skill, prudence, and diligence of a prudent person. When applied to missing and unresponsive participant issues, these standards clearly require that fiduciaries act appropriately to preserve plan records, locate missing participants, and nudge unresponsive participants into payment.

The Department's forthcoming guidance should also assist plan fiduciaries in satisfying these duties by providing them with a compliance roadmap. In particular, ERIC asks the Department to consider issuing an IB or FAB that outlines some of the ways that plan fiduciaries can fulfill their duties to search for participants, preserve records and encourage commencements. However, it is critical that the Department avoid a compliance framework that requires the same steps in all circumstances, such as a minimum standard checklist. The challenges of missing and unresponsive participants are not solvable through a single checklist—and ERISA's legal standards do not require the same action in all contexts.

Instead, the solutions for locating and nudging participants—and the minimum standards required under ERISA's fiduciary duties—are necessarily fact-specific. They depend upon the particular plan, the individual participant and other variable factors. At a minimum, relevant factors include plan demographics (such as whether the population is older or younger, transient or stable, engaged or not engaged with the Internet etc.); participant account balances (for example, small balances may not warrant search and outreach efforts that exceed the cost of the benefit); and the history of the plan (for example, a plan sponsor with a lengthy acquisition history may have inherited bad records that cannot be fixed or a frozen plan may have already completed many comprehensive participant searches in the process of offering lump-sum payout windows). A single compliance checklist would be inconsistent with long settled principles (affirmed by the Department) that ERISA's fiduciary duties are fact-specific,[3] and permit consideration of reasonableness factors such as plan costs.[4] Moreover, ERISA's fiduciary duties should not go so far as to permit a fiduciary to disregard considerations related to a participant's privacy or the security of the participant's benefit, such as by requiring a plan administrator to send information about the participant and his or her benefit out to all similarly named individuals and unconfirmed family members. Such actions could cause identify theft and payment to the wrong individual. Any fiduciary duty to locate participants and nudge them into payment must be weighed against the fiduciary's responsibility to preserve participant privacy and the security of the benefit.

Accordingly, the Department's guidance should not only acknowledge the fiduciary duties related to missing and unresponsive participants, but also affirm that these duties are fact- specific. And the Department should provide a framework that helps fiduciaries achieve compliance—and helps them successfully locate and nudge more participants into payment—but allows for fiduciary discretion to select steps that suit the particular plan or participant.

For example, the Department's forthcoming guidance could identify Department-endorsed examples of how plan fiduciaries can fulfill their duties to search for participants, preserve records and encourage commencements, while affirming that plan administrators have the discretion to select among these examples (or determine other methods of reasonable compliance). The failure to implement any particular Department-endorsed step, or a particular number of such steps, would not in and of itself be probative of a lack of sufficient fiduciary process, particularly if the fiduciary engaged in a deliberate analysis of plan and participant-specific facts (such as demographics, account balances, costs, administrative burdens, and privacy and benefit security challenges). This type of flexible framework would allow fiduciaries the discretion to implement a compliance program that reflects the particular plan and the individual participant. It avoids a singular compliance checklist that would be contrary to ERISA's fact-specific fiduciary duties and less likely to solve the fact-specific challenges of missing and unresponsive participants.

---

[3]*E.g.*, 29 C.F.R. § 2550.404a-1 (recognizing, and quoting the statutory language that makes ERISA's fiduciary standards dependent upon, "the circumstances then prevailing"). *See also Donovan v. Walton*, 609 F. Supp. 1221, 1240 (S.D. Fla. 1985) (prudence "is given meaning by the facts and circumstances of each case"), *aff'd sub nom. Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986).

[4] *E.g.*, Field Assistance Bulletin No. 2006-01 (recognizing in the context of settlement distributions that plan fiduciaries may engage in a cost-benefit analysis and elect to not distribute *de minimis* amounts or to use omnibus distributions); Field Assistance Bulletin No. 2003-03 (permitting plan costs to be distributed per capita in the appropriate circumstances). If a plan administrator did not consider factors such as plan costs and administrative burdens in order to "do whatever it takes" to find missing participants and to nudge unresponsive ones into payment, this could violate other ERISA requirements such as the duty of loyalty and the requirement that plan expenditures be reasonable.

ERIC also endorses this type of flexible framework because it is process-oriented. In general, ERIC strongly encourages the Department to emphasize in its guidance that fiduciary compliance is measured on the basis of processes rather than outcomes. As the Department has long recognized, ERISA's fiduciary standards center on process over outcomes judged in hindsight.[5] Under these process-based standards, a fiduciary breach should not be determined by the mere existence of missing and unresponsive participants, or some arbitrary number or percentage of such participants; instead, the measure should primarily be whether the plan has a robust process to locate participants and to communicate with them. Yet, this has been a problem in the Department's ongoing TVPP investigations. In some of these investigations, ERIC members report that they have been told that a fiduciary breach will be ongoing until all missing participants are located, that the failure of a terminated vested participant to commence benefits at normal retirement age is a fiduciary breach, and that the existence of errors or gaps in plan records is probative of a fiduciary breach. These statements contradict long-settled ERISA authority that emphasizes process over outcomes.

Apart from being legally misguided, these types of outcomes-based conclusions improperly assume that a robust process will provide resolution for all missing and unresponsive participants. This is not true. There can be individuals who are truly impossible to locate, even after numerous search attempts. For example, one ERIC member plan reported having a participant who was not locatable because (the plan later learned) the individual was in the Federal Witness Protection Program. Others have encountered issues with participants who are incarcerated, have left the country, or have gone "off the grid."

Similarly, ERIC's members have repeatedly found that there are participants who are not commencing, or even responding to plan mailings, by choice. These individuals prefer to put off starting benefits despite repeated reminders, including in some cases after being repeatedly told about the tax consequences of failing to start payment by their required beginning date. This reluctance to start benefits can occur for any number of reasons, such as a desire to defer payment while still working for another employer, concerns about managing assets, a desire to keep money from third parties such as creditors or ex-spouses, and uncertainty about whether they will remain eligible for other benefits, including government assistance.

For these reasons, the Department's forthcoming guidance should not measure compliance on the basis of outcomes like the existence of missing or unresponsive participants or the number or percentage of participants in these categories. Instead, the Department should adopt a process-based measure for

[5] *E.g.*, Field Assistance Bulletin No. 2015-02 ("the prudence of a fiduciary decision is evaluated with respect to the information available at the time the decision was made and not based on facts that come to light only with the benefit of hindsight"). *See also Bunch v. W.R. Grace & Co*., 555 F.3d 1, 10 (1st Cir. 2009) (confirming that hindsight "is not the lens by which we view a fiduciary's actions under ERISA," but rather that the fiduciary's actions are to be evaluated based on the "situation which faced it, based on the facts *then known*"); *DiFelice v. U.S. Airways Inc.*, 497 F.3d 410, 424 (4th Cir. 2007) ("First and foremost, whether a fiduciary's actions are prudent cannot be measured in hindsight, whether this hindsight would accrue to the fiduciary's detriment or benefit."); *Metzler v. Graham*, 112 F.3d 207, 209 (5th Cir. 1997) ("Prudence is evaluated at the time of the investment without the benefit of hindsight."); *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984), *cert. denied*, 469 U.S. 1092 (1984) (fiduciary conduct must be viewed "from the perspective of the time of the [challenged decision] rather than from the vantage point of hindsight"); *Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983) (the test of prudence is "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods"); *Marshall v. Glass/Metal Assocs. & Glaziers & Glassworkers Pension Plan*, 507 F. Supp. 378, 384 (D. Haw. 1980) ("The application of ERISA's prudence standard does not depend upon the ultimate outcome of an investment, but upon the prudence of the fiduciaries under the circumstances prevailing when they make their decision and in light of the alternatives available to them.").

compliance, like the flexible framework suggested by ERIC. Also, in the case of employers that have agreed to take certain actions for a limited period in connection with resolving a TVPP investigation, there should be no inference that these actions are required on an ongoing basis to demonstrate compliance with ERISA. (Indeed, ERIC's members suspect that with guidance and time, prudent practices will emerge that are more effective than the steps required by the Department to close these TVPP investigations.)

ERIC also recommends that the Department ensure that its forthcoming guidance is consistent with—or at least not inconsistent with—guidance of other federal agencies. Most especially, the Department's guidance should honor long-standing interpretations of Internal Revenue Code provisions by the IRS that permit plans to wait for benefit applications and to forfeit immediately payable benefits after a reasonable search effort.[6] ERIC's members have reported Department investigators in TVPP investigations making statements that contradict these IRS interpretations. This is highly detrimental to effective plan administration, as many ERISA plans have long relied on these IRS interpretations to structure benefit programs. When issuing future guidance, the Department should work with other federal agencies (especially the IRS) to avoid positions that contradict other regulators. As discussed below, this would not preclude the Department from providing helpful clarification on the required search and communication steps before a benefit can be forfeited (which ERIC acknowledges is within the Department's interpretive jurisdiction). Relatedly, ERIC encourages the Department to include in its forthcoming guidance fiduciary protections to support plan administrators that desire to use the newly expanded Pension Benefit Guaranty Corporation (the "PBGC") missing participant program.[7]

Finally, ERIC recommends that the Department's guidance distinguish between missing and unresponsive participants. These two populations present distinct challenges. For this purpose, a participant would only be a missing participant if the plan fiduciary has reason to believe that the participant's contact information, as reflected in the records of the plan, is no longer valid (primarily because a plan mailing to the participant has been returned as undeliverable), whereas an unresponsive participant appears to be receiving plan communications, but is not commencing benefits or otherwise responding to those communications. The types of searches that may be appropriate for missing participants will be a misuse of valuable plan resources for unresponsive participants. Instead, as

[6] *See* 26 C.F.R. § 1.401(a)-14(d) (Providing, that notwithstanding Section 401(a)(14) of the Internal Revenue Code of 1986, as amended (the "Code"), requiring benefits commencement not later than termination of employment or normal retirement date, if payment is "not possible" because "the plan administrator has been unable to locate the participant after making reasonable efforts to do so," payment can commence not later than 60 days after the participant is found.); 26 C.F.R. § 1.411(a)-11(c)(7) (Permitting a plan to treat the absence of a benefit application as an election to defer receipt of payments); and 26 C.F.R. § 1.411(a)-4(b)(6) (Permitting an exception to Code Section 411(a) for the forfeiture of an accrued benefit "on account of the inability to find the participant or beneficiary . . . provided that the plan provides for reinstatement of the benefit.").
These IRS interpretations are not only long settled (and thus long relied on by plan administrators), but are also binding on the Department as provisions for which regulatory interpretation has been reserved to the Secretary of the Treasury. *See* 29 U.S.C. § 1202(c); 29 C.F.R. § 2530.200a-2; and Reorganization Plan No. 4 of 1978, § 101, *reprinted in* 5 U.S.C. App. 1 (43 Fed. Reg. 47,713, Oct. 17, 1978) (reserving to the IRS interpretive authority over vesting and forfeiture and any other Parts 2 and 3 of Subtitle B of Title I of ERISA and Sections 404, 410, 411, 412, and 413 of the Internal Revenue Code, unless a provision has been specifically reserved to the Secretary of Labor; Code Sections 401(a)(14) and 411(a), and their corresponding provisions under ERISA, have not been reserved to the Secretary of Labor). *See also* ERISA Opinion Letter 77 – 08 (April 4, 1977) (noting that the Department is "not commenting on the issues of whether such recovery would constitute a forfeiture for purposes of section 203(a) of ERISA and section 411(a) of the Internal Revenue Code of 1954 . . .because these issues are within the primary jurisdiction of the Internal Revenue Service").
[7] Missing Participants, 82 Fed. Reg. 60,800 (Dec. 22, 2017); 29 C.F.R. § 4050.104 and 29 C.F.R. § 4050.404).

discussed below, the fiduciary duties around unresponsive participants should generally be limited to communication and outreach. The Department's forthcoming guidance should recognize this distinction and provide one set of guidelines for missing participants and another set for unresponsive participants focused on appropriate outreach.

ERIC's Specific Recommendations for a Department Roadmap

In formulating an appropriate fact-specific compliance framework (or other guidance), ERIC has six specific recommendations for the Department.

1. The Department Should Extend the Steps Under FAB 2014-01 as Suggested Steps for Defined Benefit Plan Missing Participant Searches

ERIC's first recommendation is that the Department extend Field Assistance Bulletin 2014-01[8] to searches for missing participants in nonterminating plans and defined benefit plans, provided the Department frames these steps as recommendations and allows fiduciaries the discretion to select among them after consideration of the plan's best interests.

As the Department is aware, those specific steps require plan administrators to (1) use certified mail; (2) check related plan or plan sponsor records; (3) contact the participant's beneficiary[9] on file; (4) use free electronic search tools; and (5) utilize a for-cost search tool or service (such as Internet search tools, commercial locator services, credit-reporting agencies, information brokers, and investigation databases).

ERIC believes that in many circumstances, these actions can be appropriate for a fiduciary fulfilling its duties related to missing participants. These steps have also been endorsed (to varying degrees) by the IRS and the PBGC as appropriate missing participant search steps.[10] Accordingly, ERIC encourages the Department to extend them to ongoing administration and defined benefit plans.

That said, in administering plans on a daily basis, ERIC's members have found that all of these steps are not necessary, or even well-suited, for all plans and all participants. ERIC would therefore strongly caution the Department against requiring all of these steps for ERISA compliance.

For example, in the experience of ERIC's members, certified mailings are not always the most productive means for reaching unresponsive participants. Some participants are more reluctant to open certified mailings because (for example) they fear that they are attempts to collect a debt or to serve legal process, or are part of a scam. Certified mailings are also not a foolproof way to

---

[8] Fiduciary Duties and Missing Participants in Terminated Defined Contribution Plans, Aug. 14, 2014.

[9] For purposes of this letter, and ERIC's recommendations to the Department, "beneficiaries" may include identified "alternate payees."

[10] Similar search steps have been adopted by the PBGC (identifying the search requirements before a plan can transfer a missing participant benefit to the PBGC; *see* Missing Participants, 82 Fed. Reg. 60,800 (Dec. 22, 2017); 29 C.F.R. § 4050.104 and 29 C.F.R. § 4050.404) and the IRS (setting out the minimum steps a plan can take to search for a missing participant to avoid a qualification failure under IRC 401(a)(9) for failure to make a required minimum distribution; see I.R.S. Memorandum for Employee Plans (EP) Examinations Employees, "Missing Participants and Beneficiaries and Required Minimum Distributions," Oct. 19, 2017).

validate an address. An individual who is not the participant can easily sign the certification. Certified mailings are also costly. If they are required for all plan outreach, this could deter a plan from sending more frequent outreach mailings. For these reasons, certified mailings should be an optional compliance step or mandatory only in limited circumstances.

Another example is the use of free electronic search tools. ERIC agrees that when addressing missing participants, in most cases it will be helpful to use free electronic search tools. But ERIC's members have also found that these sources can have significant limitations. Not every person can be found online. In fact, in most cases, free Internet search engines are overly inclusive and highly unreliable. A common name tends to generate an unwieldy number of results, the vast majority of which have no relevance. A plan administrator then has to expend significant time and resources vetting these results or sending an unending number of letters. The plan administrator also has to consider identity theft concerns (if, for example, the outreach is received by the wrong person). In light of these challenges, the use of free electronic search tools should be a possible compliance step, with plan fiduciaries having the discretion to determine whether and when to run such searches and how to use (or not use) the results.

There are similar challenges with for-cost search services and tools (a point even the Department acknowledges in FAB 2014-01, framing this step as optional). Again, ERIC's members agree that these types of resources may be helpful in some circumstances, but they have limitations and are not a panacea. A critical factor is cost (especially as weighed against effectiveness). These services can be expensive and therefore do not make sense for every missing participant. For example, it would not make sense to pay for searches that are (alone or cumulatively) more expensive than the participant's benefit. Similarly, it might not be in the plan's interest to keep paying for searches if a missing participant has already been searched for many times without success. As noted above, there are some individuals who are truly impossible to locate. A plan fiduciary could find that such repeated expenditures on for-cost searches are an inappropriate and wasteful use of plan resources.

For all of these reasons, ERIC encourages the Department to extend the FAB 2014-01 steps to ongoing and defined benefit plan administration as examples of compliance options, subject to the discretion of the fiduciary to select and implement.

2. <u>The Department Should Provide Additional Optional Compliance Steps for Missing Participant Searches</u>

ERIC's second recommendation is that the Department articulate additional examples of compliance steps (in addition to extending FAB 2014-01) that fiduciaries can consider in fulfilling their duties with respect to missing participants.

ERIC's members have reported that the Department has presented a number of these suggestions in the course of TVPP investigations and ERIC agrees with the Department that certain of these steps are consistent with ERISA's fiduciary standards and could help reduce the number of missing and unresponsive participants. But like FAB 2014-01, these types of steps are not going to make sense for every plan and every circumstance, and ERISA's fiduciary standards should not per se require their application; instead the Department should frame these compliance steps as suggestions, and allow fiduciaries the discretion to select particular steps after consideration of the plan's best interests.

In particular, ERIC welcomes the following suggested compliance steps:

- Periodic missing participant searches. ERIC recognizes that ERISA's fiduciary standards may require fiduciaries to engage in periodic missing participant searches. However, ERISA should not be deemed to require a specific minimum number or frequency of searches. Instead, the required number and frequency is highly fact-specific based upon such considerations as cost,[11] plan structure,[12] depth of search, plan population, and average missing participant benefit or account balance, etc. For some plans, a regular search process, such as every few years, will best suit the plan's administrative programs (for example, in a plan that regularly conducts projects on a calendar basis or if the plan's recordkeeper has an ongoing search program built into its administrative services). But for other plans (such as a frozen plan that has more limited ongoing administration), it will be a better use of plan resources to focus on a single comprehensive search at certain points, such as when a participant reaches normal retirement age or minimum required distribution age. These factors can also vary from participant to participant. As noted above, there can be participants who truly cannot be located and participants with very small benefit amounts, and it would not be in the plan's interest to continually search for them.

  Accordingly, while ERIC agrees that ERISA's fiduciary standards may require some reasonable number of searches, the Department's guidance should recognize that those standards do not require a specific minimum number, or minimum frequency, of searches.

- Fiduciary discretion to validate an address. A frequent challenge for plans is determining whether a newly identified address is valid, such as an address found through free Internet searches or a for-cost search service. ERIC's view is that fiduciaries should have some discretion as to how to utilize such newly identified addresses, and what level of verification to require, based upon factors such as the quality of the search tool, cost and competing privacy considerations. Quite simply, ERIC would caution the Department against a "one size fits all" approach for address validation. For example, as noted above, certified mailings are not a foolproof way to validate an address and should not be mandatory.

  Instead, ERIC encourages the Department to endorse a standard for address validation that allows plan fiduciaries the discretion to reasonably determine if an address is valid. A certified mailing or a response to a follow-up confirmation letter could both be examples of reasonable grounds. Another reasonable basis could be if more than one for-

[11] Missing participant searches can be very expensive. For example, one ERIC member reported that for its large pension plan, a third party service provider estimated the cost of a search of all missing deferred vested participants to be approximately $200,000.
[12] For example, plans that forfeit benefits after normal retirement age or require retiring participants to commence benefits in order to receive retiree health benefits are not likely to have a large deferred vested population so that frequent searches may be less appropriate.

cost search service identifies the same address. But this should not be a conclusive list of reasonable grounds.

- Plan sponsor business-record searches. ERIC would not object to the Department suggesting that if the plan sponsor (or other participating employer) retains address records for business purposes, that the plan consider searching those related business records, provided this is framed as an optional compliance step. While this approach may be helpful for some plans, it should not be a mandatory requirement because of other legal requirements (including privacy laws). Also, many plan sponsors will not have such customer (or similar) address records.

- Fiduciary action before a benefit forfeiture. In addition to guidance regarding the ongoing searches a plan fiduciary should conduct for missing participants, a related concern for ERIC is the steps that the fiduciary must take before concluding that a participant cannot be located and the participant's benefit can be forfeited. ERIC's members report that Department investigators have expressed disagreement with the IRS rules that permit forfeiture. As explained above, these rules are within the jurisdiction of the IRS and binding on the Department. However, the Department could provide helpful clarification (and has interpretive jurisdiction) on the required search and communication steps before a benefit can be forfeited.

  ERIC would welcome guidance on such steps, provided they are sufficiently flexible to allow fiduciary discretion. For example, the Department could interpret ERISA as requiring an "exhaustive" search and outreach before forfeiture of a benefit of sufficient value (e.g., greater than $5,000) but provide fiduciary discretion to interpret the meaning of "exhaustive" for each particular plan and/or participant and endorse forfeiture upon a "limited" search for small account balances (e.g., less than $5,000). Appropriate examples of an "exhaustive" search could include completing all of the FAB 2014-01 steps, or completing multiple for-cost searches (using more than one database and/or service) and sending outreach letters to every current address identified in the multiple searches. But this should not be a conclusive list of "exhaustive searches." (ERIC also makes specific recommendations below with regards to death confirmations for a forfeiture at death.)

- Death searches. A frequent challenge for plans is confirming whether a missing participant has passed away, in order to determine if the participant's benefit has expired or is now payable to a beneficiary. ERIC agrees that ERISA's fiduciary duties may require some reasonable effort to search for deceased participants and confirm such deaths. For example, ERISA's fiduciary standards may indicate that plans check the Social Security Death Master Index (directly or through a search service).

  However, as with missing participant searches generally, the necessary level and frequency of such death searches will be fact-specific to the particular plan and participant. Accordingly, ERIC again cautions the Department against a "one size fits all" set of requirements for the scope or frequency of such searches. Again, ERIC believes that a roadmap of compliance steps will best match ERISA's fiduciary standards. For example, the Department could provide a list of examples of "reasonable death searches." Such examples could include a check of the Social Security Death Master Index, the use of a for-cost search service or a check of online obituaries, provided, however, that this is not a conclusive list of the "reasonable" means to search for a death.

- Death validation. A related concern for ERIC is what steps are required for a plan administrator to validate that a participant has died (such as after the above death search generates a result indicating a death). While obtaining a death certificate is an ideal way to verify death, in the experience of ERIC's members, it can be very challenging and costly.[13] And frequently, the plan does not have the ability to locate a family member to provide such a death certificate (or to even verbally confirm the death) if the participant has been long deceased and/or missing before death and there is no beneficiary on file.

  For these reasons, ERIC encourages the Department to endorse a standard that allows plan fiduciaries to treat a participant as deceased, even in the absence of a death certificate, if the fiduciary has a reasonable basis for the conclusion.[14] One example of a reasonable basis should be if the participant is found on the Social Security Death Master Index (directly or through a search service). However, this should not be the only example. Other appropriate bases could include an obituary that identifies the participant by first and middle name, or lists some other material identifying information such as a correct birthdate or reference to employment with the plan sponsor. Another reasonable basis could be that a commercial locator service that searches Social Security numbers identifies the participant as deceased.

- Beneficiary searches. ERIC recognizes that for plans that pay a benefit to a beneficiary upon a participant's death, ERISA's fiduciary standards may require some searches for a deceased participant's beneficiaries (in order to confirm whether there is a beneficiary to collect a survivor benefit). At minimum, this likely requires outreach to any beneficiary listed in the participant's file (which, as noted above, is a step under FAB 2014-01).

  An unanswered question is whether ERISA requires affirmative efforts to identify and locate beneficiaries (i.e., "beneficiary searches"). ERIC objects to a standard that would require beneficiary searches before a benefit is payable because this would be extremely difficult and costly to administer. In ERIC's experience, the vast majority of plans are administered to only require identification of the beneficiary when a benefit becomes due. Otherwise, the plan has to constantly request beneficiary designations, regularly monitor those designations for changes (e.g. divorce, death or for non-spousal beneficiaries, a participant's own desires) and constantly request updates. This creates an unmanageable amount of additional plan administration.

  For that reason, ERIC's position is that such beneficiary searches should only be required when a benefit becomes payable (under the terms of the plan) to a beneficiary, and there is a named beneficiary on file with the plan, and that beneficiary is determined to be

[13] For example, many states that issue death certificates only do so to family members and/or for an expensive fee.
[14] In recommending this approach, ERIC reminds the Department that in accordance with 26 C.F.R. § 1.411(a)-4(b)(6), a plan must provide for reinstatement of the benefit should the participant, or a beneficiary entitled to a benefit, contact the plan. Accordingly, a forfeiture upon death—and the related validation of death—is always reversible.

missing (primarily on the basis of returned mail). In that situation, ERIC believes the Department's guidance should treat the beneficiary like any other missing participant.

ERIC does not believe that the Department should require beneficiary searches when the plan's records do not name a beneficiary unless, and until, the plan receives contact from a confirmed family member of the participant. In the experience of ERIC's members, if there is no response to mail at the participant's last known address, and no other affirmative contact by a family member after death, finding a deceased person's potential beneficiary is like searching for the proverbial needle in a haystack. While there are search tools that suggest an individual's potential family members, these tools are overly responsive and unreliable. They tend to generate an unwieldy number of possible hits (e.g., dozens of names with many possible addresses) based on unreliable factors (like associated addresses of residence). Moreover, Plan administrators are often hesitant to reach out to these numerous potential hits because of the tremendous resource burdens and also because of identity theft and privacy concerns. For all of these reasons, ERIC strongly objects to a standard that would require beneficiary searches before the plan has a named beneficiary or receives contact from a confirmed family member.

Also, in circumstances where the plan has a beneficiary on file and that beneficiary is not missing but is electing to not commence (or otherwise not responding to plan communications), that beneficiary should be treated like any other unresponsive participant.

- Periodic data cleanups. A significant challenge for many plans is that there are often circumstances where the plan has inaccurate or incomplete participant records. These record gaps can result in incomplete participant information (such as incomplete Social Security numbers) and can make locating a lost participant nearly impossible, such as if the gap is a missing or incorrect Social Security number. In most cases, these records were lost or recorded incorrectly a long time ago and through no fault of the current plan administrator. This is especially true in the context of pension plans, as these plans tend to be older and more complex, with more significant acquisition histories.

  On the one hand, ERIC understands that it is the Department's position that ERISA's fiduciary standards likely require plan fiduciaries to make some reasonable efforts to cure such record gaps when they are discovered. But again, this is an area where there is no conclusive list of "reasonable efforts." ERIC would welcome suggestions from the Department, so long as they are not framed as required or definitive. For example, one way plans can address participant record gaps is to periodically engage in a data cleanup project. ERIC understands that the Department is supportive of this approach. Again, however, this will not be the case for every plan; for example, a plan with few record gaps or a limited missing participant population, or a plan that has previously undertaken exhaustive participant searches (such as a frozen plan that conducted a comprehensive search project when it was frozen) should not be required to expend valuable resources to conduct such cleanup projects on an ongoing or periodic basis. For similar reasons data cleanup is also not something that should be required on regular timetables, such as every year or two.

The Department's guidance could also offer suggestions to avoid such errors in the future (such as guidance regarding the appropriate steps to be taken during a plan sponsor transition such as a corporate sale or merger).

Finally, future Department guidance must avoid penalizing plan fiduciaries for inherited record errors (including errors such as missing Social Security numbers that are preventing the plan from locating a participant). So long as a fiduciary makes a reasonable attempt to resolve inherited record errors, the fiduciary should not be held responsible for incurable errors that arose before the fiduciary's tenure (which is consistent with long-standing ERISA legal authority).[15]

3. <u>The Department Should Articulate Optional Compliance Steps for Unresponsive Participants</u>

ERIC's third recommendation is that the Department provide examples of compliance steps related to unresponsive participants. As noted above, unresponsive participants present different challenges—and require different solutions—than missing participants. Chief among the differences is that repeated searches are not appropriate for unresponsive participants. Also, there should be some recognition in the Department's guidance that certain unresponsive participants do not commence benefits, or even respond to plan outreach, by choice. The guidance should acknowledge that if a plan administrator takes sufficient outreach steps then the administrator should not be penalized if the participant chooses to disregard that outreach and remain out of payment by choice.[16]

More generally, the Department should frame compliance steps with respect to unresponsive participants as suggestions, and allow fiduciaries the discretion to select particular steps after a consideration of the plan's and its participants' best interests.

ERIC's members have reported that the Department has presented a number of these suggestions in the course of the TVPP investigations, and ERIC agrees with the Department that certain of these steps are consistent with ERISA's fiduciary standards and could help reduce the number of unresponsive participants. But like the missing participant steps addressed above, these steps are not going to make sense for every plan and every circumstance, and ERISA's fiduciary standards should not per se require their application; instead, the Department should frame these compliance steps as suggestions, and allow fiduciaries the discretion to select particular steps after consideration of the plan's and its participants' best interests.

---

[15] *See, e.g.*, *Davidson v. Cook*, 567 F. Supp. 225, 237-38 (E.D. Va. 1983), *aff'd*, 734 F.2d 10 (4th Cir. 1984), *cert. denied*, 469 U.S. 899 (1984) (no liability of current fiduciaries for prior fiduciaries' breaches merely because of "speculative" claims that the successors could have done more to remedy the prior breach); *Fernandez v. K-M Indus. Holding Co.*, 585 F. Supp. 2d 1177, 1184 (N.D. Cal. 2008) (successor fiduciary can only be liable if the breach of fiduciary duty continues); *Conner v. Mid S. Ins. Agency*, 943 F. Supp. 647, 661 (W.D. La. 1995) (successor fiduciary "may not be held liable with respect to a breach of duty which occurred before he became a fiduciary"; duty is only "to make reasonable efforts to remedy those breaches of which he had actual knowledge" (citations omitted)).

[16] Also, under most plans, a participant's choice to not commence at normal retirement age will not reduce his or her benefit because the plan will pay an actuarial adjustment and/or interest payment (although ERIC recognizes that there may be other consequences, namely the excise tax after required beginning date and the risk of the loss of a contingent benefit that is only available when a participant commences benefits before death).

In particular, ERIC welcomes the following suggested compliance steps:

- Referencing predecessor employers in communications to deferred vested participants. ERIC understands that in TVPP investigations, the Department has recommended that some plans include language in plan communications directed to missing and unresponsive participants that refers to predecessor employers under which benefits accrued (and not just the current plan sponsor). This approach may be helpful for plans that have predecessor employers that are unrelated to the plan sponsor. It should not, however, be a mandatory requirement, as there are many plans that do not have unrelated predecessor employers or may not be able to identify the applicable predecessor employer from their currently available records.

- Communications to deferred vested participants providing instruction on staying in touch with the plan and commencing benefits on time. ERIC acknowledges that ERISA may require that fiduciaries alert participants to their benefit rights and their obligation to commence at the required beginning date. For example, it may be consistent with ERISA's duties to ensure that certain plan documents (such as the plan's summary plan description and any plan communications for terminated participants) remind those participants to keep in touch with the plan, to report address changes, and to start benefits by the required beginning date.

  However, ERIC would object to any language requirement that is too specific or too burdensome and does not allow for adjustment for the particular plan and/or particular document. As a practical matter, plan administrators need flexibility to draft and send such items in the manner they see fit. And as a legal matter, ERISA does not require plan fiduciaries to communicate such concepts in a specific fashion.

- Periodic mailings to deferred vested participants past normal retirement age and required beginning date. ERIC recognizes that ERISA's fiduciary standards may require plan administrators to engage in outreach to participants after they pass normal retirement age and especially after they pass their required beginning date. Of course, this population already receives certain disclosures sent to all plan participants, such as (for defined contribution plans) summary annual reports and (for pension plans) the annual funding notice. There are also communications targeted to terminated participants, namely the vested benefit statement required at legal separation. Even so, ERIC would not disagree with a Department interpretation that ERISA requires additional communications, such as targeted mailings at the significant points of normal retirement age and required beginning date.

  But ERIC would caution the Department on a standard that mandates more frequent communications, such as vested benefit reminders every year after normal retirement age and/or required beginning date. While there may be some plans for whom frequent mailings are productive (for example, because the population tends to respond well to mailings), there may be other populations that are unresponsive to annual mailings. Another factor is that plan mailings are expensive and administratively burdensome; apart from the cost for the mailings themselves, there are also costs and resource burdens on the preparation and follow-up for such mailings. For example, one ERIC member reported that for its large pension plan, a mass mailing to deferred vested participants can require four to six months of work. A plan administrator may reasonably elect to focus plan resources on a very aggressive outreach at normal retirement age and/or required beginning date, rather than sending ongoing mailings. For these reasons, even if the Department interprets ERISA as requiring additional communications as participants pass normal retirement age and required minimum distribution date, it should avoid a highly structured communication schedule and instead permit fiduciary discretion to design a plan- and/or participant-specific outreach program.

Relatedly, ERIC believes that any mandatory outreach to unresponsive participants should be limited to letters from the plan. Some ERIC member plans utilize limited telephone outreach and even occasional e-mail outreach, and have found some success with these methods. However, these methods have significant limitations and will not make sense for all participants or plans. For example, plan-wide phone outreach can be very time-consuming, labor intensive and expensive. Unlike letters that can be bulk generated, phone calls to large numbers of participants can take a significant amount of time (and cost, if handled by a third-party administrator). Another challenge is that if the information is not in the participant's file, it can be very difficult to locate an accurate phone number and/or e-mail address. While this contact information can be searched for (both online and through for-cost services), these resources tend to generate an unwieldy number of results, the vast majority of which are not accurate. A plan administrator then has to expend significant time and resources sending letters to numerous potential hits; there are also extremely significant risks of exposing the participant's benefits to identity theft. Participants also tend to be wary of responding to a "cold" phone call or e-mail (including due to scam/phishing fears). For that reason, phone and e-mail outreach should not be a requirement under ERISA.

ERIC would also caution the Department against requiring plans to get affirmative election deferrals from participants that are past normal retirement age. ERIC has heard of the Department recommending this in TVPP investigations. In the experience of ERIC's members, these types of plan mailings have a very low return rate while imposing significant costs and burdens.

4. Providing Support, and Fiduciary Protection, for Additional Distribution Options

ERIC's fourth recommendation is that (particularly in the defined contribution plan context) the Department provide guidance that supports, and provides fiduciary protection for, additional distribution options for missing and unresponsive participant funds, provided such payments are entirely optional in the sole discretion of the plan administrator. Such options could include distributions to IRA rollover accounts, federally insured bank accounts and the like. These types of additional disbursement options would be particularly helpful with respect to participants with small benefit balances. The challenge of small balances[17] has been a particular concern for ERIC's members; plan administrators are frequently hesitant to expend the plan's valuable financial and administrative resources on costly participant searches and outreach efforts for small benefit amounts. Accordingly, ERIC would welcome the

[17] Specifically, small benefit balances that do not qualify for lump sum or small cashout distribution options.

Department's support, including fiduciary protection, for such additional (optional) distribution programs, especially for small benefit amounts.

5. Monitoring of Missing Participant Service Providers

ERIC's fifth recommendation is that the Department provide some fiduciary protection for plan administrators that rely upon third parties to conduct missing participant search activities. In the experience of ERIC, plans often use such third parties for these functions, either directly or through the plan's recordkeeper, in part because these search activities can require unique skills and information access. In issuing guidance, it would be helpful if the Department recognized that plan fiduciaries can use such third parties for these services, and that if they do, their fiduciary duties will be limited to effective monitoring (such that so long as the plan fiduciary engages in sufficient monitoring, the fiduciary will not be liable for any ERISA breaches on the basis of those searches being inadequate or incomplete).

ERIC also welcomes guidance on the required scope of selecting such third-party providers and monitoring them. This is another area that lacks guidance and could benefit from instruction by the Department. For example, the Department could identify the types of questions that would be appropriate during the selection of such third-party providers (and make those questions available on an ongoing basis on the Department's website). Of course, as ERIC acknowledges, there are general fiduciary standards that apply to a fiduciary's monitoring of any service provider. Appropriate monitoring could include a plan fiduciary understanding how often its provider runs searches, the scope of the search, and the follow-up thereafter. However, the Department should also recognize that there are unique challenges that limit the ability of plan fiduciaries to monitor search services. Most significantly, these providers often restrict the information they make available to third parties, largely because their search methods are proprietary. Because of this, ERIC would caution the Department against articulating a monitoring standard that would require plan fiduciaries to access information that the search providers treat as proprietary or otherwise confidential.

6. Uncashed Check Guidance

ERIC's sixth recommendation is for the Department to provide additional but separate guidance—i.e., separate from this missing and unresponsive participant guidance—on the related issue of uncashed checks and returned electronic file transfer ("EFT") payments. This topic presents enormous challenges for plan administrators, in part because there is essentially no existing fiduciary guidance. This area also presents practical difficulties because plan administrators have little control over the check and EFT payment process, and have limited ability after a payment is issued to force the participant to cash the check or update his or her bank account information. There is also applicable law (including under the Uniform Commercial Code) that makes it difficult for plans to frequently cancel uncashed checks. These challenges are compounded for small benefit payments (such as small annuity amounts). ERIC's members have reported ongoing problems with participants regularly failing to cash very small annuity payment checks (such as for several dollars); at the same time, it is very difficult for a plan administrator to repeatedly monitor, cancel, and reissue these small payments. These are just a few of the complicating challenges related to uncashed checks.

For all these reasons, ERIC welcomes Departmental guidance in this area. But in requesting this guidance, ERIC makes two related requests. The first is that the Department recognize that this topic is sufficiently complicated in its own right that it should receive its own deliberative attention and consideration. While ERIC is formulating a number of recommendations for the Department in this area, ERIC would like the opportunity to separately address this topic before the Department issues guidance on it. Second, ERIC has received reports that the Department is examining uncashed check issues in at least a few of its TVPP investigations. ERIC is very concerned about this because of the lack of existing fiduciary guidance. For that reason, ERIC asks the Department to refrain from asserting any findings of fiduciary breach related to such uncashed check issues until the Department provides clarifying guidance on the topic.

* * *

ERIC is ready to work with the Department as it develops guidance that addresses the challenges of missing and unresponsive retirement participants, and fully offers its services and knowledge to the Department. We appreciate your consideration of these comments and welcome the opportunity to meet with you to discuss them. If you have any questions or need additional information, please do not hesitate to contact Aliya Robinson, Senior Vice President, Retirement and Compensation Policy, at 202-627-1930 or arobinson@eric.org, or me at 202-627-1910 or aguariscofildes@eric.org.

Sincerely,

Annette Guarisco Fildes
President & CEO