ERIC
The ERISA Industry Committee
Driven By and For Large Employers
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The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Request for Guidance to Address Missing and Recalcitrant Participant Challenges

Dear Assistant Secretary Rutledge:

The ERISA Industry Committee ("ERIC") writes to encourage the United States Department of Labor (the "DOL") to work cooperatively with the Internal Revenue Service (the "IRS") and the Pension Benefit Guaranty Corporation ("PBGC") (together, the "Agencies") to issue guidance that addresses the significant challenge of missing and recalcitrant retirement plan participants, and until such guidance is provided, to stop issuing letters that allege a breach of fiduciary duty related to such missing and recalcitrant participants.

ERIC shares the DOL's concerns about barriers that may be preventing plan participants from finding, and commencing, their vested retirement benefits, and is committed to supporting solutions to remove such barriers. But ERIC is also concerned about the lack of legal guidance for plan administrators in this area, and about DOL fiduciary duty breach findings made despite the lack of such guidance.

For these reasons, ERIC would greatly welcome additional guidance regarding what plan administrators should do to locate missing participants, and to encourage terminated vested participants who can be located to commence benefits at retirement age (the latter referred to in this letter as "recalcitrant" participants). The issuance of such guidance would provide much needed assistance to plan fiduciaries who are trying to address the challenges of missing and recalcitrant participants, and in particular, trying to help participants receive all of the retirement benefits they have earned.

ERIC's members are eager to help the Agencies in formulating such guidance and could provide valuable insight based on their daily interactions with participants, and the numerous and innovative measures they take to find participants. Based on that insight, one particular ERIC recommendation is that future guidance follow the roadmap provided by the recently re-introduced bipartisan Retirement Savings Lost and Found Act of 2018. Please see below for specific recommendations.

ERIC's Interest in Guidance Related to Missing and Recalcitrant Participants

The challenge of missing and recalcitrant participants is an important priority for ERIC and its members. ERIC's members care greatly about the participants and beneficiaries of their employer sponsored plans. These member employers put tremendous resources and funds into these retirement plans and want each participant to benefit fully from these plans. In this regard, ERIC's members agree completely with the DOL: they want these missing participants to be found and all participants to receive their hard-earned retirement benefits.

ERIC's interest in this issue is consistent with its overall mission. 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 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.

Like the DOL, ERIC is concerned about the significant number of missing retirement plan participants and recalcitrant participants who remain out of contact or stubbornly refuse to commence their benefits (or to cash checks once received).[1] This challenge has been compounded by the termination of the IRS and Social Security Letter Forwarding Program. This challenge is also expected to grow, given that today's workers tend to switch jobs more frequently.[2] Although plans of all sizes deal with missing-participant issues, ERIC's large employer members are especially likely to face these challenges because their plans tend to be larger and more complex, with more significant acquisition histories (including acquisitions where a plan has inherited incomplete records).

ERIC's members are, therefore, extremely supportive of solutions that address this challenge and the DOL's interest in pursuing such solutions. But ERIC believes strongly that the DOL's current efforts should be focused on addressing the current lack of guidance on this issue. There is very little Agency guidance,[3] case law or other authority defining the obligations of plan administrators to search for missing participants or to encourage recalcitrant participants to commence payment. There is a

[1] In recent years, there has been a growing awareness that there are significant numbers of such individuals. For example, as the Agencies are certainly well aware, in January 2018, the United States Government Accountability Office issued a "Report to the Ranking Member, Committee on Finance and United States Senate, on Workplace Retirement Accounts (Better Guidance and Information Could Help Plan Participants at Home and abroad Manage their Retirement Savings)" (the "GAO Report") that (among other things) addresses the challenges of missing retirement plan participants. The GAO Report followed a 2013 report by the ERISA Advisory Council on "Employee Welfare and Pension Benefit Plans" (the "Advisory Council Report") that also raised concerns about missing plan participants. Recently, the Advisory Committee on Tax Exempt and Government Entities (ACT) also addressed the issue in its 2018 Report of Recommendations (the "2018 ACT Report"), available at https://www.irs.gov/pub/irs-pdf/p4344.pdf.

[2] Also, defined contribution participation has increased and for such plans, auto-enrollment usage has increased due to the 2006 Pension Protection Act.

[3] As used here, "guidance" means either formal rulemaking that is the product of notice-and-comment or otherwise entitled to deference, or an agency "advisory" interpretation stated in another format such as a regulatory preamble, opinion letter, advisory opinion, bulletin or memorandum. (Although, consistent with recent pronouncements by the Attorney General, ERIC agrees that such other "advisory" guidance should be oriented to education and nonbinding advice. *See* Office of the Attorney General, United States Department of Justice, Memorandum on the Prohibited on Improper Guidance Documents, Nov. 16, 2017.) For purposes of this request, ERIC is not considering "guidance" to include (and is not requesting) informal or off-the-record representations, such as a statement or finding made by a DOL investigator.

particular lack of guidance around the fiduciary duties under Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") as they relate to such issues. The DOL has not issued guidance on such fiduciary duties with the exception of a single Field Assistance Bulletin (FAB 2014-01[4]) that on its face applies only to defined contribution plan participants following a plan termination. FAB 2014-01 does not address —and there is no other DOL guidance that does address—the fiduciary duties that apply in the context of ongoing plan administration, defined benefit plans, or recalcitrant participants.[5] This has created significant uncertainty for plan administrators. For that reason, there is increasingly widespread agreement, even by the Agencies themselves, that additional guidance is needed.[6]

Compounding this uncertainty, and in spite of this lack of guidance, the DOL has recently undertaken numerous investigations on missing and recalcitrant participants as part of its Terminated Vested Participant Project ("TVPP"). This initiative has been ongoing since around 2015 and appears to be a priority for most (if not all) DOL regional offices. Numerous ERIC members have reported being subject to lengthy, taxing and expensive investigations under this initiative. The DOL characterizes this initiative as an enforcement priority and has claimed significant monetary recoveries. For example, the DOL recently described these investigations as a highlight of its enforcement activities in 2017, noting that "[o]f the $682.3 million recovered [during Fiscal Year 2017] investigations, EBSA helped terminated vested participants in defined benefit plans collect benefits of $326.7 million due and owing to them."[7] ERIC has received reports that in many of these investigations, the DOL has issued letters asserting violations of ERISA and threatening litigation if certain conditions are not satisfied, such as the plan locating **all** missing participants and **all** post-retirement age deferred vested participants commencing their benefits.

While ERIC supports the efforts of the DOL to conduct enforcement investigations, it is extremely troubled by the agency's issuance of these letters asserting breaches of fiduciary duty when there is no applicable legal guidance for plan administers to consider or follow. Prior to these investigations, even the most compliance-oriented administrators would have had no notice of the DOL's view regarding the appropriate handling of missing or recalcitrant participants during ongoing plan administration. While ERIC acknowledges that there are long standing general fiduciary standards that inform appropriate plan administration, there is nothing in those general standards particular to this issue, and nothing that sets

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

[5] ERIC recognizes that the DOL and IRS require certain disclosures regarding vested retirement benefits. Also, the DOL has issued regulations regarding mandatory "cash-out" distributions for small balance accounts (29 C.F.R. § 2550.404a-2) and a safe harbor for distributions from terminated individual account plans (29 C.F.R. § 2550.404a-3). However, both pieces of guidance have limited application for most participants in ongoing plans.

[6] The lack of guidance, including the lack of DOL guidance on ERISA's fiduciary duties, was noted in the GAO Report. The GAO specifically recommended the drafting of such guidance by the DOL and the IRS, including that the "Secretary of Labor should issue guidance on the obligations under ERISA of sponsors of ongoing plans to prevent, search for, and pay costs associated with locating missing participants." The DOL reportedly agreed "that additional guidance may be helpful to aid plan sponsors and plan fiduciaries of ongoing plans in meeting their existing fiduciary obligations to search for missing participants and to pay benefits." The IRS also reportedly agreed that guidance in certain areas would be helpful.

The 2013 Advisory Council Report also noted the lack of DOL guidance in this area and also encouraged the DOL to issue such guidance.

[7] *See* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results-2017.pdf.

out the very specific requirements now being asserted by the DOL, such as the requirement to contact missing participants by certified mail or to run missing participant searches at all times. In this context, the DOL's insistence on issuing letters asserting breaches of fiduciary duty where there is no existing legal guidance is punitive and contrary to the rule of law.[8]

ERIC is particularly troubled because the consequences of these letters can be devastating for plan sponsors and individual fiduciaries. A DOL finding of fiduciary breach can result in mandatory and expensive statutory penalties under ERISA Section 502(l). Equally concerning, a finding of fiduciary breach can trigger serious reputational damage for any employer, and even more so for employers in industries where legal compliance is critically important (such as plan sponsors in highly regulated industries, or in fiduciary businesses, such as the financial services industry). The consequences can also be devastating for individual fiduciaries, such as committee members who work in human resources or financial services; these individuals also depend greatly on their reputations and their ability to continue serving in a fiduciary capacity. After the DOL issues a letter stating alleged breaches of ERISA, these companies and individuals acquire a permanent record of alleged legal non-compliance. Even if the DOL does not publicize its findings, these companies and individuals may need to disclose them in the future, such as a condition of a contract with a customer or under an employee agreement. And these consequences will continue: for example, the individual or entity may forever thereafter need to disclosure the DOL's allegations in RFPs and employment applications. DOL findings can also trigger other serious consequences such as mandatory disclosure to other regulators or professional licensing bodies. Of course, ERIC recognizes that these consequences should not limit the ability of the DOL to protect plan participants from clear legal violations, and ERIC supports the ability of the DOL to conduct investigations in general. But the issuance of these letters finding fiduciary breach, and the triggering of these significant consequences, is not appropriate or productive in this context where the DOL has not previously articulated the applicable legal standards.

Another reason why ERIC is troubled by the DOL's issuance of findings letters asserting breach of fiduciary duty is that these findings are frequently based on faulty factually assumptions, and worse, disregard for settled fiduciary standards. For example, ERIC's members report that DOL investigators have asserted the view that participants will only defer benefits after retirement age if they haven't received proper communication from the plan. In dealing with participants on a daily basis, ERIC members have found that participants may choose not to commence a benefit they are repeatedly told about for any number of reasons (such as a desire to defer while still working for another employer, concerns about managing the assets, concerns about creditors' claims, or uncertainty about whether they will remain eligible for other benefits, including government assistance). In some cases, these participants will claim, upon being contacted by the DOL, that they did not know about their benefit (a fact DOL investigators often raise), yet in those cases ERIC's members regularly find that they have sent numerous benefit communications to the participant's known address without any indication that

[8] This point is underscored by the recent release by the U.S. Department of Justice of a January 25, 2018 Memorandum on "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases," which states the opinion of the Associate Attorney General that enforcement litigation positions should only rely on agency interpretations that had been subject to notice-and-comment rulemaking. In the Associate Attorney General's view, not even "guidance documents" should be used to "coerce regulated parties into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or lawful regulation." Although issued by another agency, this memorandum underscores that enforcement activities (like the DOL's TVPP initiative) should require existing agency guidance (or statutory law) and should not proceed where, as here, there is no existing applicable law (regulatory or statutory).

the address is wrong (and, in some cases, even have service call records with the participant about the benefit).

Another erroneous factual assumption made by DOL investigators is that every missing participant can be found. In the experience of ERIC's members, there can be individuals who are truly impossible to locate; for example, when a plan inherits records from an acquired plan and those records have insurmountable gaps such as incorrect names or missing Social Security numbers. The DOL appears to believe that a simple Internet search using free search tools is likely to turn up most missing participants, but ERIC members have found that such tools have very limited efficacy, particularly for older employees without any significant Internet presence or those with relatively common names.

Another faulty assumption frequently made by DOL investigators is that if a missing or recalcitrant participant responds to a DOL mailing (and corrects a missing address or commences payment), then the plan's previous search and communication efforts must have been faulty. But ERIC's members have found that participants are far more likely to respond to a mailing from a federal agency than from a former employer, particularly from a company that may have acquired the former employee's company (or acquired a company that previously acquired the individual's former employee).

Even more concerning is that certain DOL investigators have taken legal positions that are contrary to long-settled fiduciary standards. Most notably, ERIC members report that they have been told by DOL investigators that ERISA's fiduciary duties require "whatever it takes" to put participants into pay status and to locate missing participants, 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 de facto a fiduciary breach, and that the existence of errors in plan records is probative of a fiduciary breach. These statements mischaracterize long settled fiduciary standards (recognized by the DOL) that measure compliance by process, rather than outcomes judged in hindsight.[9] If a plan fiduciary follows an appropriate process, that should satisfy ERISA; outcomes such as persistently missing individuals, stubbornly recalcitrant participants, and reasonable record errors should not alone equate to a fiduciary breach.

[9] *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.").

These DOL pronouncements are also contrary to the long-settled principle (consistently affirmed by the DOL) that ERISA's fiduciary duties are fact-specific[10] and permit appropriate consideration of "reasonableness" factors such as plan cost and participant privacy.[11] A "one-size-fits-all" litmus test, such as a "do whatever it takes" standard, is contrary to both principles. Instead, the prudence standard requires consideration of the facts at issue; for example, consideration that a particular plan (or participant) has small assets that may not warrant expenditures on robust search programs; or that a particular plan inherited grossly inadequate records in an acquisition many years prior; or that a particular plan has a higher population of participants that are difficult to locate, such as seasonal or transient workers. Under this framework, the prudence of a plan's missing participant search process or the plan's program for communicating with recalcitrant participants will necessarily depend upon these types of plan-specific facts. Fiduciaries should also be permitted to weigh such "reasonableness" factors as privacy and cost, a point recognized by even the DOL in its FAB 2014-01.[12] In fact, if a plan administrator did not consider factors such as cost and privacy (in order to "do whatever it takes" to find a missing or recalcitrant participant), this could violate other ERISA requirements such as the duty of loyalty and the requirement that plan expenditures be reasonable. For all these reasons, ERIC is concerned that DOL investigators are making improper factual assumptions and adopting legal positions that are contrary to settled ERISA fiduciary standards.

A further concern of ERIC is that the DOL is also not honoring the legal interpretations of the other Agencies, in particular, IRS interpretations that are binding on the DOL. For example, ERIC's members report instances of investigators asserting that it is a breach of ERISA's fiduciary duties to not put a missing or recalcitrant vested participant into pay status at normal retirement age and that ERISA does not permit the forfeiture of a missing participant's benefits. Yet both are permitted actions under IRS guidance. *See* 26 C.F.R. § 1.401(a)-14(d),[13] 26 C.F.R. § 1.411(a)-11(c)(7),[14] and 26 C.F.R. § 1.411(a)-4(b)(6).[15] These IRS interpretations are not only long settled (and thus long relied on by plan administrators), but are also binding on the DOL as provisions for which regulatory interpretation has

[10] *E.g.*, 29 C.F.R. § 2550.404a-1 (recognizing, and quoting the statutory language that makes ERISA's fiduciary standard 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. in Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986).

[11] *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).

[12] In stating that steps such as the use of for-cost commercial locator services are only "[p]ossible additional search steps" depending upon the facts and circumstances. This point was recently affirmed by the DOL, as reported in the preamble to the PBGC's Final Rule on Missing Participants, 82 Fed. Reg. 60,800, 60,806 (Dec. 22, 2017) ("EBSA has advised PBGC that use of a commercial locator service is not necessarily required for DC plans [under FAB 2014-01, and the specific additional steps that a plan fiduciary takes to locate a missing participant may vary depending on the facts and circumstances.").

[13] 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.

[14] Permitting a plan to treat the absence of a benefit application as an election to defer receipt of payments.

[15] 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 to who payment is due, provided that the plan provides for reinstatement of the benefit."

been reserved to the Secretary of the Treasury.[16] When DOL investigators state positions contrary to this binding IRS authority, it creates confusion and makes it more difficult for plan administrators to comply with the law. As the PBGC recently observed[17] (and the DOL reportedly agreed[18]), the challenge of missing and recalcitrant participants requires interagency cooperation and coordination. These DOL investigatory pronouncements against settled IRS authority undermine such interagency coordination.[19]

ERIC, like the DOL, appreciates that the issue of missing and recalcitrant participants is concerning and should be addressed. But the DOL should not tackle this challenge by issuing letters asserting breach of fiduciary duty (thereby triggering the serious financial and reputational consequences, described above). Instead, the DOL should focus its efforts on issuing much needed guidance in concert with the other Agencies. Such guidance will provide plan administrators with a roadmap that they are certain to follow going forward. It will also provide DOL investigators with appropriate guidelines on the applicable legal standards and factual assumptions. A regulatory process will also permit the Agencies to consider the valuable insights of ERIC's members, and other plan administrators, who deal with plan participants on a daily basis.[20]

For similar reasons, ERIC asks that the DOL refrain from treating the existing TVPP investigations as requiring the imposition of penalties under Section 502(l) of ERISA. In this context where existing legal authority is lacking, it is overly punitive for the DOL to take the position that these investigations involve a "breach of fiduciary responsibility" that triggers these statutory penalties. Instead, in this context of limited legal authority, the DOL should treat these investigations as better suited for voluntary compliance. Such voluntary compliance would permit plan fiduciaries to make appropriate improvements and to resolve these matters without a formal finding of fiduciary breach and the associated 502(l) penalties.

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[16] *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 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).

[17] For example, in the PBGC's December 22, 2017 Final Rule on its missing participants program, the PBGC noted that it received comments that it should harmonize the program with DOL guidance. The PBGC agreed, stating that "[h]armonization is the hallmark" of the program; the PBGC followed the counsel of the ERISA Advisory Council Report, which "urged cooperation among federal agencies to develop and implement the missing participant program," and consulted with both the IRS and the DOL on the Final Rule. Missing Participants, 82 Fed. Reg. 60,800, 60,806 (Dec. 22, 2017).

[18] The DOL reportedly agreed with the PBGC and stated an intent to coordinate future guidance with the PBGC's Missing Participant rule. 82 Fed. Reg. at 60,801.

[19] In its 2013 report, the ERISA Advisory Council also strongly urged the DOL to "[w]ork with other federal agencies with respect to programs aimed at Lost Participants." The Advisory Committee on Tax Exempt and Government Entities (ACT) 2018 ACT Report also urged the DOL to issue guidance in this area and to coordinate with other of the Agencies on such guidance; for example, the report noted that "plan sponsors need consistent inter-agency guidance on the use of the forfeiture and reinstatement provision; it is unworkable for plan sponsors if the IRS authorizes a method and the DOL treats such method as a prohibited transaction."

[20] Notably, neither the GAO Report nor the Advisory Council Report recommended that the Agencies address the challenges of missing and recalcitrant participants by engaging in enforcement actions.

For all of these reasons, ERIC would greatly welcome additional guidance in this area, instead of the current DOL emphasis on investigations, including (as discussed below) guidance that follows the framework laid out in the recently introduced Retirement Savings Lost and Found Act of 2018. All of the Agencies have recently stated an intent to issue such guidance, and ERIC strongly encourages them to do so.[21] Until such guidance is issued, the DOL should refrain from making any further findings of ERISA breach in this area or issuing of Section 502(l) penalties.[22]

ERIC's Recommendations on Guidance Related to Missing and Recalcitrant Participants

ERIC's members are eager to help the Agencies in formulating such guidance, and its members could provide valuable insight based on their daily interactions with participants.

Based on that insight, ERIC would encourage the DOL and the other Agencies to consider at least the following recommendations in formulating its guidance:

- **The Agencies Should Provide a Roadmap for Plan Administrators on the Appropriate Actions and Considerations for Missing and Recalcitrant Participants and Should Consider the Retirement Savings Lost and Found Act as a Guide.** Of greatest priority, ERIC's members would welcome a roadmap for plan administrators on the appropriate actions and considerations related to searches for missing participants and communications with recalcitrant participants. Such guidance exists in limited contexts, such as the DOL FAB 2014-01 for defined contribution plan terminations; the PBGC's newly finalized Missing Participant Final Rule, identifying the search requirements before a plan can transfer a missing participant benefit to the PBGC;[23] and the IRS's October 19, 2017 Memorandum for Employee Plans (EP) Examinations Employees, which sets 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.[24] But there is no equivalent guidance for other contexts, including most notably, on ERISA's fiduciary duties during ongoing plan administration, for defined benefit plan administration, and with respect to recalcitrant participants. There is also no guidance on the required search and communication steps before a benefit can be forfeited (as permitted under current IRS rules). ERIC's members would welcome a compliance roadmap in at least those contexts (or even a generally applicable standard for plan administrators in all contexts).

[21] In addition to the DOL and PBGC statements (noted elsewhere in this letter) indicating guidance in this area is forthcoming, the IRS recently announced that it too would issue guidance on the subject of missing participants. ERIC also understands that DOL representative very recently made additional informal statements indicting that the DOL is committed to issuing new guidance in this area. These DOL statements are greatly welcomed.

[22] In stating its concerns in this letter, ERIC agrees with similar statements made in the letter by the American Benefits Council, dated October 2, 2017 and addressed to Deputy Assistant Secretary Timothy D. Hauser.

[23] Missing Participants, 82 Fed. Reg. 60,800 (Dec. 22, 2017); 29 C.F.R. § 4050.104 and 29 C.F.R. § 4050.404.

[24] I.R.S. Memorandum for Employee Plans (EP) Examinations Employees, "Missing Participants and Beneficiaries and Required Minimum Distributions," Oct. 19, 2017.

In considering such a roadmap, ERIC endorses the compliance steps proposed in the recently re-introduced Retirement Savings Lost and Found Act of 2018 (the "Act") and encourages the DOL and the other the Agencies to consider the Act as a compliance model.

As a general matter, ERIC strongly supports the passage of the Act as a valuable tool in addressing the challenges of missing and recalcitrant participants. The legislation was the product of bipartisan negotiation and has bipartisan sponsorship (as well as the support of the AARP). The Act would bring significant resources to help plans locate missing participants. Among other things, it creates the Office of Retirement Savings Lost and Found, which will have the power to collect and centralize information (including information from the Commissioner of Social Security) to connect plans and participants. The Act would also create an online search tool, regularly updated based on information from the IRS, that would enable retirement participants to search for their benefits. Since the IRS and Social Security Administration Letter Forwarding Programs were terminated, plans have lacked a government resource to help them locate missing participants. This search tool, together with the Office of Retirement Savings Lost and Found, will provide such much-needed resources.

Until the Act is adopted by Congress, ERIC also encourages the DOL and the other Agencies to consider the Act as providing a roadmap for appropriate guidance regarding ERISA's fiduciary duties applicable in this area. The Act amends Section 404(a) of ERISA and provides that a plan administrator "shall not be treated as failing to satisfy any requirement to search for or attempt to locate, or to provide any document or information to" a "lost or missing participant" if the plan administrator has made an attempt to contact that person via certified mail or similar mail source (or electronic, if only an electronic address is on file), and attempted one of the following (or two of the following, if the plan only has electronic records): (1) checked related plan or plan sponsor records; (2) contacted the participant's beneficiary; (3) used free electronic search tools; or (4) utilized a commercial locator service; and provided the plan has complied with its obligation to file an annual Form 8955-SSA.[25]

ERIC believes this approach strikes the right balance and should be adopted by the Agencies in other contexts. Unlike the "do whatever it takes" standard suggested by recent DOL investigations, this standard allows plan administrators to pick the one or two actions most appropriate for the plan and requires only a one-time search (plus a search before required minimum distribution age). This measured approach is process driven, allows for consideration of the particular facts and circumstances, permits weighing of "reasonableness" factors such as cost and privacy, and does not penalize fiduciaries for their predecessor's incurable errors. It is, therefore, consistent with long settled fiduciary principles.

The roadmap is also consistent with the approach taken by all three of the IRS, the DOL and the PBGC in their existing guidance on missing participant issues. That guidance is the aforementioned DOL FAB 2014-01, the PBGC Missing Participant Final Rule, and the IRS October 19, 2017 Memorandum. The roadmap in the Act utilizes the optional steps that are already in each of these three pieces of guidance, those steps being: a certified mailing to the participant (required by the DOL and IRS guidance, and the PBGC guidance for certain plans and benefits); a search of related plan and employer records (required by the DOL and IRS

[25] This is the annual registration statement for separated deferred vested participants, required under Code § 6057(a).

guidance, and the PBGC guidance for certain plans and benefits); use of publicly available and free records (required by the DOL and IRS guidance, and the PBGC guidance for certain plans and benefits); a check with designated plan beneficiary (required by the DOL guidance, and the PBGC guidance for certain plans and benefits); and the use of for-cost search tools such as a commercial locator service (required by the IRS and the PBGC guidance for certain plans and benefits, and permitted as an optional step by the DOL guidance).[26] The roadmap in the Act therefor draws from, and harmonizes, these three pieces of Agency guidance. As discussed below, ERIC is also recommending that forthcoming guidance be consistent (or at least not inconsistent) between the Agencies. The roadmap in the Act permits such consistency because it harmonizes the existing guidance of all three Agencies.

- **Agency Guidance Should be Consistent (or at Least Not Inconsistent).** Future guidance from the DOL (and other Agencies) should be consistent with—or at least not inconsistent with—guidance of other Agencies, including that the DOL should honor existing IRS interpretations. As explained above, DOL investigators have reportedly made statements contradicting long standing IRS authority. These inconsistent statements are causing confusion and uncertainty for plan administrators.

  ERIC encourages the DOL to work in a coordinated fashion with the other Agencies to avoid such confusion in the future. As noted above, we understand that the PBGC and the DOL have already stated an intent to coordinate of future guidance.[27] ERIC strongly encourages the DOL to do so.

- **DOL Guidance Should be Consistent with Long Settled Fiduciary Principles.** In issuing any such guidance, ERIC encourages all of the Agencies to follow long settled fiduciary principles emphasizing process (rather than outcomes), allowing for consideration of particular facts and circumstances, permitting "reasonableness" considerations, and not penalizing fiduciaries for predecessor errors that they cannot cure. For example, future guidance should recognize that if a fiduciary follows an appropriate process, that should be enough; an outcome such as persistently missing or recalcitrant individuals or reasonable record errors should not equate to a fiduciary breach. Similarly, the Agencies should avoid a "one size fits all" litmus test that may not fit all plans or all participant populations, and instead should adopt compliance standards (like the one in the Act) that permit a plan administrator to consider the particular facts of that plan, and "reasonableness" factors such as cost and participant privacy. The Agencies should also avoid a standard that penalizes fiduciaries for predecessor record errors that are incurable and instead should offer guidance to avoid such errors in the future (such as guidance regarding the appropriate steps to be taken during a plan sponsor transition like a corporate sale or merger).

In addition to the above specific recommendations, ERIC would also welcome guidance on any of the following:

[26] Critically, all three require only limited search steps. This underscores that the DOL "do whatever it takes" investigatory position is truly an outlier and contrary to even its own guidance applicable in a different context.

[27] Missing Participants, 82 Fed. Reg. 60,800, 60,801, 60,806 (Dec. 22, 2017).

- further expanding the options for permissible rollovers of missing and/or recalcitrant participant funds to IRA rollover accounts, federally insured bank accounts, state unclaimed property funds, and the like;

- coordination by the Agencies to support plan administrators that desire to use the newly expanded PBGC missing participant program;

- addressing the appropriate monitoring of any service provider engaged to locate and/or communicate with missing or recalcitrant participants;

- addressing additional communication notices, such as vested benefit reminders for additional years;

- suggesting optional language for plan mailings to missing or recalcitrant participants;

- providing guidance on related issues such as the ability of plans to send money to state unclaimed property;

- providing guidance on how plans should handle uncashed benefit checks, including (particularly the IRS) on the taxation issues relating to distributions involving incorrect participant address and uncashed benefit checks (as recommended by the GAO Report);

- providing guidance on missing participant search standards in other contexts such as with respect to excess amounts owed to participants following a VCP;

- providing guidance on the appropriate treatment of interest payments on reinstated accounts, and other delayed payments; and

- until the Act is passed, considering a program, like creation of the Office of Retirement Savings Lost and Found and an online search tool as described in the Act, to replace the terminated IRS and Social Security Administration Letter Forwarding Programs.

* * *

ERIC is ready to work with DOL and the other Agencies as they develop guidance that addresses the challenges of missing and recalcitrant retirement participants, and fully offers its services and knowledge to the Agencies.

If you have any questions concerning our comments, or if ERIC can be of further assistance, please do not hesitate to contact Will Hansen at whansen@eric.org or (202) 627-1930.

Sincerely,

Will Hansen

Will Hansen
Senior Vice President, Retirement Policy