June 17, 2024

Delivered via email

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

Re: Retirement Savings Lost and Found Information Collection Request

Dear Mr. Butikofer:

On behalf of the SPARK Institute, Inc., we appreciate the opportunity to comment on the Department of Labor's ("Department's") proposed information collection request ("ICR") regarding the Retirement Savings Lost & Found Registry ("Registry") envisioned by Section 303 of the SECURE 2.0 Act of 2022 ("SECURE 2.0").

The SPARK Institute represents retirement plan recordkeepers, mutual fund companies, brokerage firms, insurance companies, banks, consultants, trade clearing firms, and investment managers. Collectively, our member firms administer the retirement plans for over 110 million American workers.

Although plan sponsors are ultimately responsible for directing how plan data is used and shared, retirement plan recordkeepers maintain and process much of the data that will be needed to populate the Registry. Accordingly, the SPARK Institute and our members want to be partners with the Department in helping to build the Registry and we want to see this program implemented as efficiently and successfully as possible.

The SPARK Institute supported the creation of the Registry as part of SECURE 2.0 because we want to see more missing participants reunited with the benefits that are owed to them. In this regard, the SPARK Institute and our members share Congress's and the Department's goal of reducing the number of missing participants and we understand the important role that recordkeepers currently play, and will continue to play, in pursuing this goal.

However, despite these shared interests and goals, the SPARK Institute has a number of concerns with the proposed ICR. This includes, as discussed below, concerns about the scope of the information being requested, concerns about the potential for "false positives," and concerns with the timeline that the Department has set for the first reporting of information. Accordingly,

based on these concerns, the SPARK Institute is urging the Department not to rush this project and to take the time that is needed to thoroughly consider alternatives, including alternatives that would more seamlessly permit, but not require, data to be voluntarily reported directly from the recordkeepers and service providers who hold this data on behalf of their plan sponsor clients.

I. KEY TAKEAWAYS

As explained in more detail below, we have concerns with the regime described in the ICR.

- In Section II, we explain our concerns with the overly broad information requested.
- In Section III, we explain our concerns with "false positives."
- In Section IV, we explain our concerns with the Department's rush to begin reporting.

We appreciate that the Department may feel compelled to move forward with *something* because of the statutory deadline. If the Department moves forward with the ICR as proposed, we would urge you to consider a "two-step" process; that is, after putting something in place by the statutory deadline, the Department should take the time to build a permanent system that works. In Section V, we provide suggestions for alternatives that the Department should consider. Among the suggestions we make is that the SPARK Institute strongly encourages the Department to explore incentives that would make it more likely for plans to participate.

II. CONCERNS WITH OVERLY BROAD SCOPE OF INFORMATION REQUESTS

In order to populate the Registry, Section 523(e) of the Employee Retirement Income Security Act of 1974 ("ERISA") authorizes the Department to collect specific pieces of plan and participant information with respect to plan years beginning after December 31, 2023. The common thread running through each of these data elements is their necessity for identifying missing participants, their necessity for enabling missing participants to identify the location and contact information needed to access their benefits, and their necessity for updating changes in plan and participant information that has previously been reported to the Department.

While we appreciate the Department's authority to collect the information that it is expressly authorized to collect through Section 523 of ERISA we are concerned about the scope of the elements that were requested in the proposed ICR. Specifically, in many cases, the proposed information requests, by the Department's own admission, go beyond what the Department is expressly authorized to collect under Section 523 of ERISA. Furthermore, in certain cases, the SPARK Institute believes that the requested information goes beyond what is reasonably necessary to ensure the proper administration and maintenance of the Registry, as envisioned by Congress.

Section 303 of SECURE 2.0 envisions a program that enables missing participants to identify the location and contact information that is needed to access their benefits. While a perfect missing participant solution might also provide additional functionality, Congress's solution, as expressed in Section 303 of SECURE 2.0, was just that simple. Before moving on to additional services and functionality that would necessitate broader information requests, we urge the Department to limit its information requests to only those data elements that are needed for

participants to locate and receive contact information that is needed to access benefits owed to them. Each additional element adds cost, complexity, and potential liability to the system.

Beyond the information that is reasonably necessary to ensure the proper administration and maintenance of the Registry, the proposed ICR asks plans to, for example, voluntarily report information regarding: (a) beneficiaries; (b) participant and beneficiary contact information (e.g., phone numbers, email addresses, physical address); (c) account balances; (d) "the identity of any separated vested participant of normal retirement age or older that is owed a vested benefit, and who has been unresponsive to plan communications about their benefits or whose contact information the plan has reason to believe is no longer accurate"; and (e) the account number or contract number of an automatic rollover IRA or distributed annuity. Perhaps most strikingly in this regard, rather than only requesting information with respect to plan years beginning after December 31, 2023, the proposed ICR requests plans to provide "specific information dating back to the date a covered plan became subject to ERISA."[1]

While this ancillary information might help the Department attempt to locate missing participants on its own, it is not needed to maintain the type of Registry envisioned by Section 303 of SECURE 2.0. For example, while the Department may want to know the account balances of missing participants, that information is not needed to enable participants to locate and receive contact information that is needed to access benefits owed to them. Data elements like this should be removed from the proposed ICR.

The SPARK Institute is concerned that this unnecessary collection of information is also likely to discourage plan sponsors from voluntarily reporting any information to the Department. One concern is that, if a plan sponsor reports information that the Department is expressly authorized to require, but does not report additional information, the Department could infer that the plan's records are somehow incomplete or deficient. For example, if a plan sponsor only provides data for plan years beginning after December 31, 2023, or cannot provide complete contact information, what inferences would the Department draw about data for prior plan years? It is difficult to imagine why a plan sponsor would unnecessarily expose itself to such scrutiny for voluntarily trying to help missing participants reunite with the benefits that are owed to them.

Aside from these risks, we are also concerned that information collected pursuant to these overly broad requests may not be as accurate, comprehensive, and up to date as other data sets for which there is a specific statutory or regulatory requirement to collect and report such information to the Department or another regulator. For example, if a plan sponsor has some of this information for plan years beginning before January 1, 2024, we have concerns about how accurate this data might be given that there was no previous legal requirement to report some of this information. As another example, we have concerns about the reliability of plan sponsors reporting participants as being "unresponsive." There is no definition for this concept and it is unlikely to produce uniform responses.

[1] 89 Fed. Reg. 26932, 26934 (April 16, 2024).

III. CONCERNS ABOUT FALSE POSITIVES

One of the biggest practical challenges in establishing and operating the Registry will be the need to avoid "false positives" – i.e., situations in which a participant or beneficiary queries the Registry and is identified as being entitled to a benefit, even though the benefit has already been paid to the participant or beneficiary. This could occur, for example, when an amount reported as distributed to an automatic rollover IRA is claimed by the former participant or automatically rolled over to a new employer's plan, but is not removed from the Registry. The SPARK Institute is concerned that, if the Department does not improve its proposed ICR, it will not collect all of the information that is needed to prevent false positives.

The Department must address these types of gaps before launching the Registry. Otherwise, participants and beneficiaries utilizing the Registry will be given the false impression that they are entitled to a benefit when they are not. Not only do we anticipate false positives creating an unnecessary hassle for plan administrators and recordkeepers, we are also very concerned that this problem will create confusion for participants and beneficiaries, and more generally erode the public's confidence in the Registry.

The following aspects of the proposed ICR are especially likely to contribute to false positives:

- ***No Reporting on Claimed IRAs and Distributed Annuities.*** While the proposed ICR seeks to collect information about participants who had their benefit paid to an automatic rollover IRA or as a distributed annuity, we are concerned that the proposed ICR would not collect information to identify cases in which a participant or beneficiary that is entitled to such an IRA or annuity claims their benefit or automatically has their benefit rolled over to a new employer's plan. As the Department considers this issue, it is important to recognize that, although plan sponsors may currently have information on automatic rollover IRAs and distributed annuities, this information is not shared with the plan's recordkeeper. Also, we understand that plan sponsors generally do not receive data on claimed IRAs and distributed annuities. Thus, there should be some way for IRA custodians and annuity issuers to voluntarily provide pertinent information to correct the database.

- ***Delays in Reporting.*** The framework envisioned by the proposed ICR would update missing participant data no more frequently than annually as part of the Form 5500. As a result, any queries of the Registry would rely on data that could be a year old, if not older. While we would expect participants to remember whether they had received a retirement benefit within the past year, if the Registry permits beneficiaries to make queries, they may not be aware of distributions received by a deceased participant during the prior year. As discussed below, to address this problem, we encourage the Department to explore solutions that would voluntarily permit plan sponsors to update Registry data more frequently to avoid these types of issues.

IV. CONCERNS WITH PROPOSED TIMELINE FOR FIRST REPORTING

The SPARK Institute is concerned with the proposal's rushed request for reporting to occur as early as the 2023 Form 5500. The proposed ICR was only released in April and, until finalized, plan sponsors and service providers cannot know the information that the Department will eventually expect to receive. Additionally, even if the ICR is finalized and published in record time, it will take significant time and resources for recordkeepers to create the flags and systems that would be necessary to complete such reporting on behalf of their clients. In short, we do not anticipate that any recordkeepers will report this data on the 2023 Form 5500 – at least not on a system-wide or automated basis.

We appreciate the fast-approaching statutory deadline set by Congress, but urge the Department not to rush its first draft of the reporting framework that will be used to populate the Registry. With regard to this timeline, we are especially concerned that any plans or service providers who scramble to populate the first reporting of information will be unable to take the time that is needed to create accurate and complete reporting systems. In this regard, the Registry will not be able to achieve its goals if the Department is receiving inaccurate or incomplete data.

With a very short timeline, we are also concerned that the Department has not fully considered or addressed a number of important considerations that will be relevant to information reported to the Registry. For example, the proposed ICR does not clearly address concerns about data privacy, the Department's potential uses of information reported to the Registry, or key cybersecurity issues. In light of the Department's recent emphasis on fiduciary responsibilities relating to cybersecurity, there are a lot of unanswered questions about how data reported to the Registry will be protected. On this issue, the proposed ICR only provides a vague and generalized discussion of its cybersecurity procedures.[2]

Moreover, to the extent that any initial reporting system is a placeholder for a future system, the stakeholders who will be responsible for providing data for the Registry will be much more reluctant to participate. That is, if the first version only appears to be a temporary solution, recordkeepers and the plans that will ultimately bear the costs for populating the Registry will find it very difficult to justify the resources and costs that will be needed to build a reporting infrastructure twice (or more). At this point in time especially, the Registry is just one of many complex and expensive builds that recordkeepers are dealing with in the wake of SECURE 2.0 and significant regulatory changes recently finalized by the Department.

[2] 89 Fed. Reg. 26932, 26935 (April 16, 2024) ("Multiple security measures will be in place to protect plan participant and beneficiary data (i.e., Social Security numbers) in the Department's Lost and Found online searchable database. A public user will have no access to sensitive data. Government access to the data will also be strictly controlled, which will be encrypted both at rest and in transit. The database will implement extensive logging and monitoring mechanisms, and sensitive data masking techniques will be implemented to mask personally identifiable information.").

V. THE DEPARTMENT SHOULD TAKE TIME TO THOROUGHLY CONSIDER ALTERNATIVES

Given all of the concerns expressed in the preceding sections of this letter, the SPARK Institute is urging the Department not to rush this project and to take the time that is needed to thoroughly consider alternatives, including alternatives that would more seamlessly permit, but not require data to be voluntarily reported directly from recordkeepers and service providers at the direction of their plan sponsor clients. We recognize the December 29, 2024 deadline imposed by SECURE 2.0, but also believe that, in order to make the Registry successful, it needs to be developed and populated the right way from the start.

Direct Reporting by Recordkeepers. In recent discussions with the SPARK Institute, officials from the Department asked SPARK whether it would be possible and/or better for recordkeepers to, at the direction of their plan sponsor clients, directly report plan and participant information voluntarily to the Department in order to populate the Registry. On this potential alternative, we believe that this type of direct reporting by recordkeepers may be possible and such a system might work better than a system that reports plan and participant information on separate Form 5500s. Done correctly, this would streamline reporting and directly harvest the relevant data from the recordkeepers who maintain it on behalf of their plan sponsor clients, rather than getting the data from a spreadsheet that is attached to each Form 5500 independently.

We also believe, however, that if the Department pursues such an approach, direct reporting will not, by itself, address the concerns expressed in this letter. For example, direct reporting by recordkeepers would not address our concerns about the proposal's overly broad information requests and its unnecessary potential for false positives.

One helpful enhancement to avoid these issues would be an option for recordkeepers to, at the direction of their plan sponsor clients, voluntarily report and update information at more frequent intervals. Also, to help avoid false positives, another enhancement would involve direct reporting on a voluntary basis by providers of automatic rollover IRAs and issuers of distributed annuities, in addition to retirement plan recordkeepers. As discussed earlier in this letter, retirement plan recordkeepers do not have data on when individuals claim automatic rollover IRAs and distributed annuities.

To be clear, we greatly appreciate the Department's current consideration of alternatives, such as the direct reporting of plan and participant information by recordkeepers, and we greatly appreciate the Department soliciting input from our members on these alternatives. However, this solution by itself would not resolve our concerns with the proposed ICR.

Other Alternatives Should be Explored. Given SPARK's concerns with the proposed ICR and the direct reporting alternative being considered by the Department, the SPARK Institute strongly urges the Department to take the time that is needed to further explore alternatives, especially alternatives that would utilize the existing recordkeeping infrastructure maintained by our members. For example, the Department should further explore options that would: (a) permit, but not require, recordkeepers and other service providers to directly report data to the Department at the direction of their plan sponsor clients; (b) allow recordkeepers and other service providers to voluntarily update the data more frequently than annually (ideally in real

time) at the direction of their plan sponsor clients; (c) rely more heavily on automated technologies; and (d) harness the power of private sector recordkeeping systems. To be clear, we do not believe the Department should, or is authorized to, mandate direct transfers of data from recordkeeping systems.[3] Additionally, these potential alternatives are only general principles for the Department to consider. Before moving forward on any alternatives, we strongly encourage the Department to consult with a wide range of industry stakeholders and provide recordkeepers an opportunity to share their views on specific design ideas.

The SPARK Institute also strongly encourages the Department to explore incentives that would make it more likely for plans to voluntarily participate. For example, the Department should consider creating a fiduciary safe harbor for plan sponsors that report information to the Registry. While reporting alone may not satisfy such a safe harbor, relief could be conditioned on a plan fiduciary taking a series of reasonable and cost-effective steps to locate missing participants and reporting the missing participant to the Registry. At the very least, the Department should indicate that a plan fiduciary will not violate any of its fiduciary duties, such as its obligation to "ensure proper mitigation of cybersecurity risks" by voluntarily reporting information to the Registry.

One possible approach that the Department should consider is a request for proposal ("RFP") on a private sector vendor (or vendors) to operate the Registry. While Section 303 of SECURE 2.0 does not expressly consider a government contract for the Registry, we are not aware of any prohibition on this, and we know that there are firms in the private sector, including some of our members, who have significant experience handling the types of file exchanges and information technology infrastructure that will be needed to establish and maintain the Registry. SPARK members include a variety of entities working on innovative solutions, and while we express no preference for one member over another, we think the Department might benefit from working with an industry vendor (or vendors).

Fraud Prevention. As the Department considers potential alternatives, we also urge the Department to consider additional steps that it can take to help mitigate the ways in which the Registry itself will contribute to the risk of fraud. For example, one concern that our members have flagged is a concern about the extent to which the Registry will make it easier for fraudsters to collect information about potential targets and the location of retirement benefits that are owed to them. To address these concerns, we urge the Department to put in place reasonable procedures to ensure that only those persons who are entitled to a benefit identified through the Registry are able to receive information about the location of such benefits. Reasonable procedures could include, for example, requiring Registry users to create an account, requiring users to verify their identity, and tapping into third-party authentication services and records to ensure that users are who they say they are. Additionally, a number of our members have noted that the Registry's website should utilize technologies to prevent "screen scraping."

Registry Promotion. As the Department further explores this issue, we also urge the Department to not place the burden for promoting the Registry on plan sponsors and recordkeepers. For

[3] It is also important to recognize that not all plan service providers have all of the data that would be needed to populate the Registry.

example, we would be concerned if the Department sought to mandate that plans provide notices to participants about the Registry or incorporate that information into existing notices.

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The SPARK Institute appreciates the opportunity to provide these comments to the Department. If you have any questions or would like more information regarding this letter, please contact the SPARK Institute's outside counsel, Michael Hadley (mlhadley@davis-harman.com) or Adam McMahon (armcmahon@davis-harman.com), Davis & Harman LLP.

Sincerely,

Tim Rouse
Executive Director