



Filed Electronically at Regulations.gov

April 17, 2017

Attn: Fiduciary Rule Examination (RIN 1210-AB79)
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Re: Investment Advice Regulation Examination

Dear Sir or Madam:

The SPARK Institute, Inc. appreciates the opportunity to provide comments on the substantive questions of policy raised by President Donald Trump's February 3, 2017 Fiduciary Duty Rule Memorandum ("the Presidential Memorandum") and the Department's recently finalized 60-day delay of the Investment Advice Regulation's applicability date.¹ As we have expressed in the past, SPARK supports the Investment Advice Regulation's goal of ensuring that fiduciaries in a position of trust and confidence are subject to a "best interest" standard when providing investment advice with respect to employee benefit plans ("plans") and individual retirement accounts ("IRAs"). However, we are also concerned with some of the ways in which the Regulation will adversely affect the ability of Americans to gain access to retirement information and financial advice. Unless further changes are made to the Investment Advice Regulation before it becomes applicable, we are concerned that the imposition of a fiduciary standard of care in inappropriate circumstances will have negative unintended consequences for retirement plan sponsors and retirement savers. Those unintended consequences will be particularly harmful to retirement plan sponsors and retirement savers if the Department also does not adopt a less onerous and more cost-effective prohibited transaction exemption.

The Department is correct in its understanding that the industry agrees a best interest standard of care should apply when providing investment advice for a fee to retirement savers. The industry clearly does not agree, however, as evidenced by the volume of letters and testimony the Department received regarding the core rule and exceptions, that the Department

¹ For purposes of this letter, the term "Investment Advice Regulation" or "Regulation" refers to 29 C.F.R. § 2510.3-21, as currently set to become applicable on June 9, 2017, and the new and amended class exemptions released by the Department on April 8, 2016, as corrected by 81 Fed. Reg. 44,773 (July 11, 2016) and further modified by the Department's 60-day delay regulation published in the Federal Register at 82 Fed. Reg. 16,902 (Apr. 7, 2017).

has appropriately defined what it means to provide investment advice for a fee. As discussed more fully in this letter, the Department's interpretation of what constitutes fiduciary investment advice is overly broad, vague, and burdensome in a manner that is harmful to retirement savers and that warrants the review requested by the President before its harmful effects are experienced.

The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third party administrators, trade clearing firms, and benefits consultants. Collectively, our members serve approximately 85 million employer-sponsored plan participants.

Our comments below are offered to inform the Department on the ways in which it has already become apparent that the Investment Advice Regulation, especially its definition of fiduciary investment advice, will negatively affect the retirement savings landscape, if it becomes applicable as currently drafted. For the Department's reference, we have briefly summarized the key points from our discussion below:

- I. First, the Department should further delay the applicability date for the Investment Advice Regulation's definition of fiduciary investment advice beyond June 9, 2017.
- II. Second, the Investment Advice Regulation's overly broad definition of fiduciary investment advice, restrictive carve-outs, and unnecessarily burdensome requirements for satisfying the Best Interest Contract Exemption ("BICE") will result in reduced access to retirement savings offerings, retirement product structures, retirement savings information, and financial advice. Those changes will require retirement savers to choose between paying more for currently available products and services, and making important financial decisions without receiving valuable information that is currently made available to them by retirement industry service providers.
- III. Third, the Investment Advice Regulation's overly broad definition of fiduciary investment advice, restrictive carve-outs, and unnecessarily burdensome requirements for satisfying the BICE have resulted in, and will continue to create, dislocations and disruptions within the retirement industry that will adversely affect investors and retirees. In particular, we are concerned about the way in which the Regulation will prevent smaller plans and individual investors from receiving beneficial products and services that are currently made available to them by retirement industry service providers.
- IV. Finally, the Investment Advice Regulation's overly broad definition of fiduciary investment advice, restrictive carve-outs, and unnecessarily burdensome requirements for satisfying the BICE will cause an increase in litigation, and an increase in the price that investors and retirees must pay to gain access to retirement services.

THE DEPARTMENT MUST FURTHER DELAY THE APPLICABILITY DATE FOR THE INVESTMENT ADVICE REGULATION'S DEFINITION OF FIDUCIARY INVESTMENT ADVICE

I. A failure to further delay the definition of fiduciary investment advice will result in adverse consequences for retirement plans and individual retirement savers.

Our concerns regarding the Department's Investment Advice Regulation have recently been amplified by the Department's announced intention to have the Regulation's revised definition of fiduciary investment advice become applicable on June 9, 2017, without further revision, despite the fact that the Department has not yet completed the examination directed by the Presidential Memorandum. Not only do we believe that this decision will create adverse consequences for retirement plan sponsors, retirement savers, and our members (as discussed in more detail below), we are also concerned that the Department has mistakenly reached this conclusion before it has had a chance to complete the examination ordered by the Presidential Memorandum. More time is necessary to complete the presidentially ordered review and further delay of the entire Investment Advice Regulation is warranted.

The Investment Advice Regulation's definition of fiduciary investment advice, as currently drafted, dramatically redefines which activities and communications will be considered fiduciary investment advice. The Regulation converts communications that are reasonably understood to be sales conversations into investment advice. The Regulation also prevents advice providers and advice recipients from agreeing on the scope of their advice relationship without exception. Because parties cannot agree to the terms of the advice relationship, the Regulation also makes it very difficult to know when communications will be considered a fiduciary recommendation or not. Accordingly, many service providers intend to refrain from making certain types of product and service available to their customers altogether. These flaws, among others, must be reconsidered as part of the examination ordered by the Presidential Memorandum before any part of the Regulation can become applicable.

Although we support a "best interest" standard for investment advice providers, we are concerned that the Department's Regulation has set too low a bar for communications that are considered investment advice, while also failing to permit advice providers and advice recipients to agree on the terms of their relationship when appropriate. Moreover, for entities that purposely decide to assume fiduciary status, the Regulation's new and amended prohibited transaction exemptions require advice providers to satisfy a series of burdensome and costly conditions that are expected to reduce access to advice services and other valuable information. Effectively, these new burdens and costs will force advice recipients to choose between paying more for currently available services, and making important financial decisions without access to valuable information that is currently made available to them by retirement industry service providers.

Our members take serious issue with the Department's position concluding that the revised definition of fiduciary investment advice is among the least controversial aspects of the rulemaking project. In fact, the comments of the SPARK Institute, and our testimony at the August 2015 hearings, focused primarily on the revised definition of fiduciary investment

advice, because of our concerns that changes were needed to allow SPARK members to continue providing their invaluable education, guidance, and services to retirement plan sponsors and participants.² Unless the definition of investment advice is further delayed or revised, retirement plans and individual retirement savers will begin to feel the negative effects we describe below beginning on June 9, 2017, regardless of the fact that the Department has delayed the applicability date for some of the BICE conditions until January 1, 2018. For investors affected by the revised definition of fiduciary investment advice, any future decision by the Department to revise or rescind the Regulation could simply be “too little too late.” Accordingly, we urge the Department to further delay the Regulation’s applicability date until after it has had a chance to complete the examination ordered by the Presidential Memorandum.

CONCERNS RAISED BY THE PRESIDENTIAL MEMORANDUM

II. The Department’s Investment Advice Regulation will reduce access to retirement savings offerings, retirement product structures, retirement savings information, and financial advice.

If the Investment Advice Regulation becomes applicable as currently drafted, it will dramatically expand upon the types of communications that are considered fiduciary investment advice for purposes of ERISA and the Internal Revenue Code (the “Code”). The fiduciary duty is the highest duty known to law and carries significant liabilities and obligations for any person deemed to be a fiduciary as a result of the provision of investment advice. Not only does fiduciary status subject investment advice providers to liability through a private right of action under ERISA for breach of fiduciary duty, the prohibited transaction rules found in ERISA and the Code also prohibit fiduciaries from receiving many forms of compensation in connection with fiduciary activity, unless an exemption applies. As a result of the Investment Advice Regulation’s facts and circumstances test for fiduciary investment advice and the situational ambiguities inherent in the Regulation’s revised standard, service providers can inadvertently and unwillingly trigger fiduciary status under circumstances for which reasonable minds could differ. This new reality creates a significant level of risk for many of our member companies. Further, that risk is only elevated by the fact that certain non-fiduciary conduct, when viewed independently, could trigger a fiduciary investment advice relationship when viewed in the aggregate.

² The position that the expanded definition of investment advice fiduciary is not “controversial” also completely misses the point of the Presidential Memorandum. The review ordered by the President is intended to prevent the Investment Advice Regulation from harming American investors and retirees by reducing access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice. By ordering the Department to prepare an updated economic and legal analysis considering the likely impact of the Investment Advice Regulation, the Presidential Memorandum has seriously called into question the Department’s previous study and analysis of the Regulation’s likely impact on retirement savers. Accordingly, the Department should not allow any part of the Investment Advice Regulation to become applicable until the Department has completed a full review of the Regulation and determined whether it will propose regulations revising or rescinding the Investment Advice Regulation.

For some of our member companies, the new costs and expanded risks associated with fiduciary status, which cannot always be clearly ascertained because of the Regulation's facts and circumstances test, simply outweigh any benefits that could accrue by continuing to provide currently available products and services that could possibly be perceived as what is considered to be fiduciary investment advice under the Regulation. Accordingly, some of our member companies have already communicated their intent to eliminate some of the beneficial products and services that they currently make available to retirement savers. This reduction in valuable retirement savings products and services will have adverse consequences for retirement savers because many of the programs scheduled for elimination have proven to promote financial literacy, increase retirement savings, and improve the chances of our clients' achieving a financially secure retirement. Those negative consequences will occur if the Investment Advice Regulation's revised definition of investment advice becomes applicable on June 9, 2017, regardless of the fact that some BICE conditions will not become applicable until January 1, 2018.³

Again, while we support a "best interest" standard for advisers in a position of trust and confidence, we also urge the Department to reconsider the line it has drawn between fiduciary and non-fiduciary communications. That examination must be mindful of the ways in which changes to the definition of fiduciary investment advice can limit the kinds of products and services that have provided retirement savers with valuable benefits. Further, the Department's examination must avoid making the same procedural and substantive errors contributing to the Department's existing and flawed regulatory impact analysis for the Regulation. The Department must consider more efficient and less costly alternatives to the Regulation, as required by Executive Orders 12866 and 13563. For the Department's consideration, we have highlighted some of the most impactful ways that the Investment Advice Regulation will result in reduced access to products and services.

A. The Investment Advice Regulation will prevent service providers from having beneficial conversations with individual retirement savers about retirement account contributions and distributions.

If the Investment Advice Regulation goes into effect as currently drafted, a service provider, like a third party administrator, could trigger fiduciary status if it makes any suggestion with regard to a participant's decision to contribute amounts to, or distribute amounts from, a retirement plan or IRA. Not only are such conversations arguably not investment advice within the meaning of ERISA section 3(21), their blanket inclusion as investment advice under the Regulation will severely limit the beneficial conversations that service providers would otherwise be willing to have with individual retirement savers about contributions and

³ One SPARK member even relayed an anecdote about how she has already been informed that she will receive fewer advice services in connection with a personal IRA as a result of the Investment Advice Regulation. This member explained that she maintains an IRA account of less than \$100,000, which is invested in a couple of mutual fund positions. Her account has been serviced by a registered representative associated with a financial institution since she moved out of a bank money market fund. This member recently received a letter ending her relationship with the representative, and unilaterally replacing it with a self-directed brokerage account agreement, under which no interaction with any individual would be permitted when the Regulation becomes effective.

distributions. Under the current definition of fiduciary investment advice, our members have been able to provide immensely useful information to retirement savers encouraging them to save for retirement and discouraging them from taking early distributions without triggering fiduciary status. These conversations typically involve no discussions of investments, but rather focus on the need to save and to preserve those savings. Unfortunately, if the Investment Advice Regulation's definition of investment advice goes into effect on June 9, 2017 as currently drafted, we are concerned that many retirement savers will be deprived of that useful information and education. This is true regardless of the fact that the Department has delayed the applicability date for some of the BICE conditions. We anticipate that this change will result in more retirement savers making uninformed choices when faced with important decisions about retirement savings options beginning on June 9, simply because the education exception as presently drafted does not appear to permit providing standard guidance to specific individuals, because it would appear "personalized."

Under the Department's current five-part investment advice test, it is clearly not investment advice for a service provider to recommend that a participant contribute to a retirement plan or to recommend that a participant contribute at least as much money as is necessary to take full advantage of any employer matching contributions. Also, it is clearly not investment advice to recommend that a participant refrain from taking an early distribution in order to avoid potentially harmful tax penalties and other damaging economic consequences that result from taking early distributions. Conversely, under the Department's interpretation of its new Investment Advice Regulation, each of those recommendations could be considered fiduciary investment advice. ***In response to this change, many of our members are training their representatives to avoid making any statement that would encourage an individual to increase contributions to a retirement account and avoid making any statement that would discourage an individual from distributing amounts from their retirement account, even if the distribution would have damaging consequences for the retirement saver.*** This result hinders our members' attempts to educate retirement savers on the benefits of saving for retirement and the benefits of keeping retirement savings in a plan or IRA until such amounts can actually be used to provide income in retirement. Effectively, the Department's Investment Advice Regulation has made it more difficult for service providers to recommend that retirement savers take actions that avoid the harmful effects of inertia and leakage.

In the context of contributions and distributions, this reduced access to information and education has only been made worse by the FAQs released by the Department on January 13, 2017. Question 10 of those FAQs asks whether an employer can recommend that a plan participant increase plan contributions to a suggested percentage of compensation in order to maximize the employer match without being treated as providing fiduciary investment advice. Although the Department's answer to Question 10 says that it would not be fiduciary investment advice for an *employer* to make such a recommendation, the reason given for the Department's conclusion is that employers generally do not receive fees or other compensation in connection with or as a result of such recommendations. The implications of FAQ 10, along with related FAQ 9, suggest that it would be fiduciary investment advice for a service provider, retained by the same plan sponsor to do the same work, to make the same recommendation because the service provider was receiving compensation for its services. And this is a critical point. FAQ 10

implies that it is fiduciary investment advice for a 401(k) plan's service provider to simply recommend that an individual save for retirement.

The reduced access to education and information regarding contributions and distribution is, in part, due to the Investment Advice Regulation's overly restrictive carve-out for education. Specifically, the education carve-out is not available if a service provider makes any "reference to the appropriateness of any individual investment alternative or any benefit distribution option." The inability of service providers to reference the appropriateness of any benefit distribution option makes it particularly difficult for service providers to combat the problem of leakage. Early distributions, loans, and hardship withdrawals are all important plan features that make it easier to convince workers to start saving for retirement. However, they can also substantially hinder an individual's ability to put away enough money for retirement and should generally be avoided if a retirement saver has other means to satisfy current economic needs. If the Investment Advice Regulation goes into effect as drafted, some of our members will no longer be willing to have meaningful conversations with retirement savers about the negative consequences of early distributions.

Retirement savers should not be deprived of access to common sense recommendations regarding the benefits of making contributions to a retirement account and the potential harms associated with taking early distributions. Accordingly, we encourage the Department to make changes to the Investment Advice Regulation that would remove such conversations from the definition of fiduciary investment advice.

B. The Investment Advice Regulation will prevent service providers from promoting certain retirement savings offerings, retirement product structures, savings information, and financial advice.

Beyond the context of contributions and distributions, SPARK also believes that the Department's Investment Advice Regulation will limit retirement savers' access to currently available retirement savings offerings, retirement product structures, savings information, and even general financial advice. The following examples highlight five major areas of concern in this regard. Again, we must stress the fact that we expect the following reductions in products and services to occur when the Investment Advice Regulation's definition of fiduciary investment advice is set to become applicable on June 9, 2017, regardless of the fact that the Department has delayed some of the BICE conditions until January 1, 2018.

Rollover Information and Services. One of the most significant changes included in the Department's Investment Advice Regulation is the treatment of rollover recommendations as fiduciary investment advice, even when such recommendations make no reference to how amounts should be invested after they have been rolled over. This departure from the Department's long-standing position articulated in Advisory Opinion 2005-23A significantly alters the retirement savings industry advice landscape and will result in reduced access to beneficial rollover information, advice, and other services for plan participants and IRA owners.

If the Investment Advice Regulation becomes applicable as currently drafted, no service provider will be able to encourage an individual retirement saver to roll amounts over to their product unless the service provider can satisfy a prohibited transaction exemption, like the BICE. Many SPARK members do not believe that the initial and ongoing compliance costs associated with the BICE can justify its potential benefits in the context of rollover advice. Therefore, some SPARK members intend to substantially reduce the information and services they make available to support rollovers. This reduced access to information and services is likely to make the problem of missing participants and abandoned accounts worse because retirement savers will be less likely to roll over amounts into a plan when they switch jobs. Additionally, the lack of rollover services and information means that participants will be more likely to have multiple accounts with multiple service providers, making it more difficult for retirement savers to coordinate an appropriate savings strategy and asset allocation across accounts. Such a result would seemingly contradict Congress' previous efforts to facilitate rollovers and the aggregation of retirement assets, as evidenced by the Pension Protection Act of 2006 and the Economic Growth and Tax Relief Reconciliation Act of 2001.

Targeted Education. Under the Department's Investment Advice Regulation, a service provider will be considered a fiduciary if it directs a suggestion to a specific recipient or recipients with regard to how retirement assets should be invested. Our members are concerned that this new definition will limit the ability of retirement savers to receive information pursuant to targeted education campaigns, such as materials sent to groups of similarly situated plan participants identified under parameters set by the plan sponsors, because the Department's Regulation calls into question whether any information or education can be directed to a specific population without being considered a recommendation and triggering fiduciary status. For example, under the current rules, service providers can send a communication to all participants in a plan that are heavily invested in employer stock and advise those participants on the benefits of diversification. This kind of communication, which the service provider "directs" to specific recipients, can be particularly beneficial for participants because it allows useful education to be sent to those participants who could most benefit from such information. Under the Department's Investment Advice Regulation, many service providers will no longer be comfortable sending out such communications because of the risks associated with triggering fiduciary status. There are too many questions surrounding whether such communications will be considered recommendations to take action and whether the service provider would be directing the advice to specific recipients.

Third-party Advice Providers. Under the Investment Advice Regulation, it is fiduciary investment advice to recommend another person to provide investment advice services. In the context of participant-directed accounts, this expanded classification of investment advice will limit participants' ability to access important investment advice services and products that might otherwise be available to them, but for a lack of knowledge that such products and services exist and are available. For example, many recordkeepers partner with independent third-party investment advisers to provide managed account services to retirement plan participants and IRA owners. Because the Regulation makes it fiduciary investment advice to recommend a third person to provide investment advice, some of our members have expressed concerns that the Regulation will prevent them from discussing third-party advice services with participants on an

individual basis or with small plan sponsors. Such a result would be inconsistent with the spirit of the Regulation and we question the Department's apparent opposition to service providers recommending advice providers that must act in their customer's best interest. The costs to retirement savers created by the Department's restriction on recommending another advice provider far exceed the benefits that investors could receive from investment advice offered by a recommended financial professional or service.

As we mentioned in our July 21, 2015 comments on the Department's proposed Investment Advice Regulation, we do not believe that a recommendation to hire another person or entity to provide fiduciary investment advice should trigger fiduciary status, unless the person making the recommendation is specifically engaged to make such recommendations for a fee. If a recordkeeper cannot avoid fiduciary status when explaining the only independent advice provider that is made available through its suite of services, the liabilities and risks associated with taking on fiduciary status will prevent some of our members from promoting such services and, therefore, reduce retirement savers' access to these forms of investment advice.

Platform Exception Not Available for IRAs. The Investment Advice Regulation makes clear that it is not fiduciary investment advice for a service provider to market or make available a platform of investments to the fiduciary of a *retirement plan* as long as certain conditions are satisfied. However, the Investment Advice Regulation intentionally does not contain a similar carve-out to exempt the provision of a platform of investments to an IRA owner. The absence of an express platform exception of any kind in the IRA context will severely limit IRA owners' ability to receive educational materials from service providers, which could otherwise include a sample menu of investments that are appropriate for a similar investor in a retirement plan. As we explained in our July 21, 2015 comments on the proposed Investment Advice Regulation, it is *not* investment advice to put together a platform that is not tailored to any particular investor simply because the platform includes some investments and excludes others. Against the backdrop of a specific exception for platforms marketed to retirement plans, some of our members have doubts as to whether they can continue to make limited sample menus of investments available to IRA owners without triggering fiduciary status. In the absence of a specific exception designed for IRAs, we are concerned that some of our members may not feel comfortable limiting the potential universe of investments available to their IRA customers and this limitless set of choices could overwhelm investors who have a limited understanding of what investments would be appropriate for a retirement account.

General Non-fiduciary Investment Information. As discussed above, the Department's new definition of fiduciary investment advice adopts a facts and circumstances test that makes it difficult to determine when certain conversations will be considered fiduciary investment advice. We expect that this problem of situational ambiguity will prevent retirement savers from receiving general non-fiduciary investment information because service providers will be apprehensive about having their call center staff engage in any conversations with retirement savers, other than those that are clearly not fiduciary investment advice. The risk of triggering fiduciary status is simply too great. For example, under the five-part test for fiduciary investment advice, it is clearly not investment advice for call center representatives to respond to a retirement plan participant's concerns about market volatility by explaining that the market

ebbs and flows, and that retirement investors should generally adopt a long-term vision for retirement savings. However, under the Department's revised definition of fiduciary investment advice, those kinds of conversations could be interpreted as fiduciary investment advice depending on the specific words used by the call center representative, the amount of time spent emphasizing certain principles of investing, and other dynamics of general human conversation. In the absence of a bright-line rule, service providers may be forced to significantly reduce the amount and breadth of information that is currently made available to retirement savers. Such a result would be very harmful to investors.

C. The Investment Advice Regulation will prevent service providers from making available certain retirement savings offerings, retirement product structures, savings information, and financial advice because the Best Interest Contract Exemption does not provide a workable exemption.

As discussed throughout this letter, the Department's Investment Advice Regulation is causing service providers to limit the products and services they make available to retirement savers in order to avoid fiduciary status. In a similar regard, even if some of these service providers could get comfortable with taking on fiduciary status, many of them do not believe that there is a cost-effective prohibited transaction exemption ("PTE") that would permit them to receive compensation in relation to any fiduciary investment advice provided. This is because, despite the Department's efforts to create a workable catch-all PTE, the BICE is simply too expensive for many firms to implement. Unless the Department creates a truly workable catch-all exemption, the Department's overly broad and fact-specific definition of fiduciary investment advice will deprive retirement savers of access to a number of beneficial retirement savings offerings, products structures, information, and advice.

The retirement industry's expected shift away from commission-based compensation arrangements is one striking example of how the BICE's unworkable conditions will result in reduced access to certain offerings. Because the BICE's requisite policies and procedures prohibit a Financial Institution from using "differential compensation or other actions or incentives that are intended or would reasonably be expected to cause Advisers to make recommendations that are not in the Best Interest of the Retirement Investor," many firms are eliminating commission-based products out of a concern that any differential compensation arrangement will fail to satisfy the conditions of the BICE. This can have negative consequences for investors that do not require ongoing services because those investors will only have access to fee-based advice services, which charge investors a percentage of assets on an ongoing basis. For some investors, a one-time commission on an investment product would be a much more advantageous arrangement, especially when dealing with products that require little ongoing monitoring or advice after the initial sale, like a target date fund or an immediate annuity.

D. For SPARK Institute members that have decided to use the BICE to provide advice to participants in plans, or in connection with rollover discussions, the BICE's conditions will result in all the adverse effects the President identified.

Some SPARK Institute members have indicated that they would like to provide investment advice to participants, either on an ongoing basis or in connection with rollovers. Many of these members intend to provide such advice by relying on a PTE *other than* the BICE, like the statutory exemption (ERISA section 408(g)), the Level Fee exemption, or a product-specific exemption, like PTE 84-24 or 77-4. But for those SPARK Institute members who plan to comply with the BICE, the exemption in its current form will create the adverse effects that the President asked the Department to consider in accordance with his February 3, 2017 memorandum. For the Department's consideration, we have provided an overview of some of those adverse effects below.

Increased Compliance Costs. The BICE's conditions are unnecessarily complex and burdensome. The BICE's contract requirement, multi-tiered disclosure regime, written policies and procedures requirement, website, and overall monitoring obligations create significant compliance costs for firms seeking to rely on the BICE. Many of these new conditions have limited utility for individual retirement savers and overlap with existing requirements under ERISA, e.g., the BICE's disclosure requirements overlap but do not necessarily harmonize with ERISA's 408b-2 and 404a-5 disclosure regimes. This compliance infrastructure must be continuously monitored and updated as plans and investors seek to change investment options pursuant to a communication covered by a Best Interest Contract. As currently drafted, we anticipate that the BICE will significantly increase the cost of some products and services, which could make some of those products and services unaffordable for small retirement savers and plans. It is important to keep in mind that, in the context of a rollover, the service provider's first goal is to persuade a participant to keep retirement savings preserved for retirement, either by keeping the account in a plan or rolling it over into an IRA. In short, the expenses of BICE compliance for any service provider using the exemption will undercut our members' best efforts to prevent plan leakage.

Increased Litigation Costs. The BICE will dramatically increase litigation costs by requiring each Financial Institution to enter into a contract with each IRA owner receiving advice. The increased litigation costs will limit the kinds of communications that Financial Institutions will be willing to have with their customers. As discussed in more detail below, these anticipated litigation costs come at a time when many retirement plan sponsors and service providers are already coming under unrelenting and indiscriminate attack from the class action plaintiffs' bar. The BICE's extensive set of warranties and prohibition on class action waivers will establish new relationships that we have no doubt will make it even easier for class action firms to bring expensive and disruptive litigation. For IRAs, the BICE creates a new cause of action that does not exist under current law. Even in the plan market, where Congress has provided specific causes of action, we expect that the claims class action plaintiffs will bring under the BICE will carry a lower bar for getting past a motion to dismiss (the only real goal of these lawsuits) than is required of plaintiffs seeking to remedy fiduciary violations under ERISA section 502.

BICE Compliance Costs Borne By Small Savers. Under the Investment Advice Regulation, the SPARK Institute expects that larger retirement savers will continue to have access to fee-based advice, which does not require an adviser to comply with the full BICE. However, because small retirement investors often do not have enough assets to justify an adviser's services under a fee based-compensation model, the full BICE will most frequently be used by those advice providers that are willing to deal with retirement savers that have smaller account balances. Accordingly, much of the BICE's substantial compliance costs will be passed on to those retirement savers with smaller accounts, to the extent that advice is provided at all. In short, the Investment Advice Regulation's costs, which flow in large part from the BICE, will be borne by those investors who can least afford to pay for increased compliance costs.

Indeterminate Standards Create Uncertainty. The BICE's conditions include a number of vague standards. For example, in attempting to reshape the market for retirement products and services and the compensation models that have existed for many years, the BICE prohibits Financial Institutions from using "incentives that are intended or would reasonably be expected to cause the Adviser to make imprudent investment recommendations," and requires Advisers and Financial Institutions to act "*without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party.*" Those indeterminate and nebulous standards have caused significant uncertainty for SPARK Institute members seeking to rely on the BICE. This uncertainty is only aggravated by the fact that the BICE will expose many service providers to private breach of contract actions. In order to avoid unacceptable levels of risk created by some of the BICE's vague standards, some SPARK Institute members are simply eliminating access to investments and other offerings that result in any level of differential compensation. In the alternative, customers who wish to access such currently available product services may be required to pay more to receive the same services going forward. In any event, these new standards have resulted in fewer choices for retirement savers.

III. The Investment Advice Regulation has resulted in dislocations and disruptions within the retirement services industry that will adversely affect investors and retirees.

A. The Investment Advice Regulation will prevent service providers from offering important products and service to small plan sponsors.

Sophisticated Investor Exception Excludes Small Plan Sponsors. The Department's Regulation creates a significant carve-out from the definition of fiduciary investment advice for conversations between service providers and buyers deemed to have a certain level of financial expertise, i.e., banks, insurance companies, registered investment advisers, registered broker-dealers, and large plan fiduciaries with control over assets equal to or exceeding \$50 million ("the Sophisticated Investor Exception"). Because the Department limited the Sophisticated Investor Exception to plan sponsors controlling assets equal to or exceeding \$50 million, some SPARK members intend to discontinue offering some of their commonly available products and services to plans that are not eligible for the Sophisticated Fiduciary Exception. We expect this discontinuation of services to occur when the Investment Advice Regulation's definition of

investment advice is set to become applicable on June 9, 2017, regardless of the fact that some BICE conditions are now set to become applicable on January 1, 2018.

In the absence of concrete guidance on what communications constitute fiduciary investment advice, this bifurcation of services is an appealing and straightforward compliance approach for some of our members. Some of our members intend to adopt this approach for all of their offerings, while others intend to implement this approach on a product-by-product basis. One of our members has informed us that they have instructed their advisers and sales force to *not* interact in any way with any party that does not meet the Sophisticated Investor Exception. That member expects this change to be particularly harmful for smaller plans because they will either encounter reduced access to services or increased costs by hiring an eligible independent adviser. The decision to adopt such a strategy reflects the calculation by some of our members that the benefits of providing certain products and services to the small plan and individual markets do not justify the risk of being considered a fiduciary subject to potential lawsuits and the prohibited transaction rules. This result means that small plan sponsors are expected to lose access to at least some of the beneficial products and services that would otherwise be available to them if they were large enough.⁴

Given these anticipated changes, we urge the Department to allow for additional flexibility in the availability of the Sophisticated Investor Exception and to consider how the Regulation can be changed to prevent small plan sponsors from losing access to beneficial products and services. As we mentioned in our July 21, 2015 comments on the Department's proposed Investment Advice Regulation, we believe that plan sponsors of all sizes should be permitted to agree upon and define, in writing, the service provider's role, whether a fiduciary relationship is intended or expected, and if it is, the scope of that fiduciary relationship. Accordingly, any potential revisions to the Department's Investment Advice Regulation should permit such agreements to limit the scope of a service provider's fiduciary status as well as enable plan sponsors below the \$50 million level to enter into an arms-length transaction for which no fiduciary role is intended or expected.

Narrow Selection and Monitoring Carve-out. The Investment Advice Regulation will also limit the ability of small plan sponsors to access useful products and services because the Regulation's carve-out for selection and monitoring assistance does not cover many beneficial services that are commonly available to small plan sponsors under current law. The Investment Advice Regulation's "selection and monitoring" carve-out is only available if selection and monitoring assistance is provided in connection with a service provider's platform offering and when such assistance is based on certain criteria permitted by the regulation, e.g., criteria identified by an independent plan fiduciary, plan size, or the plan's current investment alternatives. This narrow exclusion for selection and monitoring assistance fails to capture many beneficial forms of selection and monitoring assistance currently available in the small plan sponsor market. Many service providers currently provide selection and monitoring assistance to

⁴ This reduced access to products and services for small plan sponsors is only aggravated by the Department's unwillingness to expand plan design options for small plan sponsors by removing its strict regulatory barriers to the creation of open multiple employer plans.

small plan sponsors even when such assistance is not offered in connection with an initial platform offering or sample menu of investments. Also, many service providers currently provide selection and monitoring assistance to plans based on objective criteria that are identified by a service provider (other than plan size and current investments) and disclosed to the recipient plan sponsor. Because these services do not fall squarely within the Investment Advice Regulation's carve-out for selection and monitoring assistance, some SPARK members intend to stop making certain selection and monitoring products and services available to the small plan market. For these firms, it is not feasible to continue offering those products and services in the small plan market because of the significant liabilities and obligations accompanying fiduciary status and the accompanying prohibited transaction rules.

For example, some of our members currently provide small plan sponsors with customized reports on the performance of designated investment alternatives selected by the plan sponsor. These reports review the designated investment alternatives based on objective criteria that are identified by our service provider members. This type of report is particularly helpful for plan sponsors in helping them identify poorly performing investments. In light of the Department's Investment Advice Regulation, some of our members intend to only make these services available to larger plans that qualify for the Sophisticated Fiduciary Exception. While small plans would benefit from these types of products and services, many service providers cannot get comfortable providing them to small plan sponsors, unless the plan is acting through a person or entity that can otherwise satisfy the Sophisticated Investor Exception, e.g. an independent registered investment adviser. This means that some small plans will be forced to make important decisions without valuable, and currently available, forms of selection and monitoring assistance.

B. The Investment Advice Regulation has limited the ability of service providers to develop new and innovative products and services.

The Department's Investment Advice Regulation has also created dislocations and disruptions in the retirement industry by forcing affected companies to halt their efforts to provide retirement plans and individual investors with new and innovative products. First, the Investment Advice Regulation's broad definition of fiduciary investment advice requires service providers to use significant discretion in determining whether a given communication will be deemed fiduciary investment advice. The Investment Advice Regulation's examples of communications that do not constitute fiduciary investment advice only cover a limited range of communications and still leave open many unanswered questions as to whether certain communications would be considered fiduciary investment advice. Any new product or service contemplating a communication that does not fall squarely within one of those examples faces a potentially unacceptable level of uncertainty and risk going forward. Accordingly, many firms have halted their efforts to create new and innovative products and services that are designed to increase retirement savings and promote financial literacy among retirement savers. Second, the Department's Investment Advice Regulation has also stifled innovation because firms affected by the Regulation have had to devote significant resources in order to comply with the new rule in time for the original April 10, 2017 applicability date.

IV. The Investment Advice Regulation is likely to cause an increase in litigation, and an increase in the price that investors and retirees must pay to gain access to retirement services.

A. The Investment Advice Regulation is likely to cause an increase in litigation.

For roughly the past decade, retirement plans and their service providers have increasingly become the targets of class action lawsuits. These claims, which are rarely dismissed in the early stages of litigation, have created significant costs for SPARK members. Ultimately, those costs, which are significant even if limited to discovery and settlement, are passed on to the plans and participants our members serve. Although our members, and the plan sponsors they serve, have been named in hundreds of these lawsuits, few of these cases have resulted in judgements against our members. The Investment Advice Regulation will only serve as a catalyst for plaintiffs' law firms seeking to engage in more costly litigation against retirement plan sponsors and their service providers.

The Investment Advice Regulation will cause an increase in litigation against our members for two primary reasons. First, the Investment Advice Regulation will increase the number of persons who are considered a fiduciary. Accordingly, there will be more litigation targets for breach of fiduciary duty lawsuits. Because the Investment Advice Regulation adopts a facts and circumstances test for fiduciary status, which cannot be limited by agreement or disclaimer, companies targeted by unwarranted litigation will have trouble dismissing such claims at the early stages of litigation through a motion to dismiss. Second, the BICE conditions relief upon advice providers entering into a contract with IRA owners and making a series of warranties to IRA owners. These new contract requirements are expected to significantly increase the risk of litigation for any service provider that enters into a Best Interest Contract because it is much easier to prove a breach of contract than it is to prove a breach of fiduciary duty. The litigation risks associated with the BICE are only aggravated by the fact that advice providers are not permitted to include any exculpatory language or class action waivers in a Best Interest Contract.

As a general matter, our members are not concerned about the costs of *losing* one of these lawsuits. Instead, they are concerned that the Investment Advice Regulation, by its nature, allows a plaintiff to allege enough in a complaint that even frivolous lawsuits cost millions of dollars to defend. The amicus program of the Department's Office of the Solicitor has added to this problem because the Department routinely intervenes on the side of the plaintiff, even when the Department acknowledges in its briefs that it has no knowledge a breach has actually occurred.

The anticipated spike in litigation, along with the many costly conditions necessary to satisfy the BICE, make the BICE an unworkable PTE for some of our members. For those firms, the costs and risks associated with the BICE outweigh any potential business opportunities that could be pursued by assuming fiduciary status. Some of our members have designed compliance systems to support the BICE and intend to rely on the exemption if the Investment Advice Regulation becomes applicable as drafted. However, the costs associated with supporting the

BICE will result in increased prices for retirement savers, even when there are no changes in the investment products held. Other members simply cannot sustain the costs and risks associated with the BICE and will be forced to cut back on important products and services that are currently made available to their customers. Customers affected by this reduced access to products and services could be left without valuable assistance when approaching important decisions affecting their own chances for a financially secure retirement or the retirement security of their employees.

B. The Investment Advice Regulation has already increased compliance costs for recordkeepers and other service providers.

The Investment Advice Regulation has forced the retirement industry to completely reorganize itself in just a matter of months. Our members have had to devote teams of employees and external consultants to analyze the Investment Advice Regulation, develop a suitable compliance strategy, and begin implementing that strategy on a highly expedited basis that will need to be further transitioned over time to a more robust automated and cost-effective program. These activities have required the full attention of all departments within our member companies, including legal, compliance, operations, information technology, sales, and executive leadership. Compliance with the Regulation as currently drafted will require continued compliance efforts from all of those resources. All of this activity is costly and ultimately increases costs for our clients.

The Department must carefully examine the Investment Advice Regulation to examine the ways in which the Investment Advice Regulation can be changed to reduce unnecessary compliance costs, especially when such compliance efforts would not provide retirement savers with any appreciable benefits, or even worse, take some beneficial products and services away from them.

* * * * *

The SPARK Institute appreciates the opportunity to provide these comments to the Department. If the Department has any questions or would like more information regarding this letter, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com or 202-347-2210).

Sincerely,



Tim Rouse
Executive Director