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August 7, 2017

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

Re: Request for Information on the Investment Advice Regulation

Dear Sir or Madam:

The SPARK Institute, Inc. is pleased to submit comments on the Department of Labor's ("the Department's") recent request for information ("RFI") on the Investment Advice Regulation.¹ The comments offered below supplement our July 21, 2017 letter supporting a delay of the upcoming January 1, 2018 applicability date, and our April 17, 2017 letter responding to the substantive questions of policy raised by President Donald Trump's February 3, 2017 Fiduciary Duty Rule Memorandum ("the Presidential Memorandum").² In addition, below, we provide our thoughts on the FAQs the Department released on August 3, 2017 relating to contribution recommendations. We very much appreciate the Department addressing this issue in response to our prior letters and offer additional insights.

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.

I. INDUSTRY DEVELOPMENTS SINCE JUNE 9, 2017

The Department's RFI asks for comments on developments that have occurred since the Regulation's definition of fiduciary investment advice became applicable on June 9, 2017.

¹ For purposes of this letter, the term "Investment Advice Regulation" or "Regulation" refers to 29 C.F.R. § 2510.3-21, as currently applicable, 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).

² During the Investment Advice Regulation's rulemaking, the SPARK Institute also provided comments on the Department's proposal by letters dated July 21, 2015 and September 24, 2015.

Unfortunately, as we have previously cautioned, many plan sponsors, participants, and IRA owners have been cut off from beneficial products and services that were previously made available to them. The following list of examples, many of which were previously discussed in our April 17, 2017 letter to the Department, highlight some of the most important ways in which retirement investors have been cut off from beneficial products and services since June 9, 2017.

- Some financial services firms have instructed their representatives to avoid making any statements that would encourage an individual to increase contributions to a retirement account or any statements that would discourage an individual from distributing amounts from their retirement account, even if those statements clearly improve the individual's chance of being adequately prepared for retirement. (In response to the Department's August 3, 2017 Investment Advice Regulation FAQs, many of our members are currently reconsidering their positions with respect to contribution recommendations.)
- Small plan sponsors have been cut off from valuable products and services, like customized reports that help plan sponsors compare the performance and fees of investment alternatives already selected by the plan sponsor. This reduction in products and services is a response to the litigation risk accompanying communications that even approach the definition of investment advice under the Department's Regulation. In fact, some firms have instructed their advisers and sales force not to interact in *any* way with any party that is not a financial institution or a fiduciary responsible for managing at least \$50 million in assets.
- Many retirement investors have automatically been transferred from an account with an adviser to a self-directed account. One large mutual fund provider reported that the number of orphaned accounts on its books (i.e., accounts no longer serviced by an adviser) *tripled* in the first quarter of 2017 due to the Investment Advice Regulation. These small accounts averaged \$21,000. This shift is emblematic of the industry-wide effects experienced after the June 9, 2017 applicability date.
- Many retirement investors no longer have access to services that are designed to assist them in consolidating retirement accounts when switching employers. This change is a reversal of positive steps that have been taken in the area of retirement savings portability.

The overall reduced access to important products and services is a direct result of the steps our members have been forced to take in order to comply with the Department's overly broad and poorly tailored definition of fiduciary investment advice. Unless changes are made to the Regulation's definition of investment advice and the accompanying prohibited transaction exemptions, we are concerned that this reduced access to information, products, and services could become permanent.

II. CHANGES TO THE DEFINITION OF FIDUCIARY INVESTMENT ADVICE

As we have explained throughout the Department's rulemaking process and most recently, in response to the Department's request for comments on the concerns raised in the Presidential Memorandum, the Regulation sets the bar for fiduciary investment advice too low. The Department's facts and circumstances test creates situational ambiguities in many interactions our members have with retirement investors and makes it difficult for our members to train staff and design compliance systems in accordance with the Regulation. It also converts communications that are reasonably understood to be sales conversations into advice and prevents advice providers and recipients from agreeing on the scope of their advice relationship without exception.

The inability of service providers and recipients – particularly plan fiduciaries – to *mutually* agree on the scope of their relationship is among the Regulation's most harmful flaws. The Regulation's distinction between small and large plans means that small plan sponsors are forced into a fiduciary relationship with service providers, while larger plan clients can generally avoid a fiduciary relationship altogether. Because the costs and risks associated with taking on fiduciary status under the Department's Investment Advice Regulation are so severe, the inability of small plans and individual retirement investors to mutually agree on the scope of the advice relationship means that many retirement investors have already been, or will be, cut off from beneficial retirement products and services. In order to reverse this harmful result, we encourage the Department to revisit when it may be appropriate for parties (particularly plan fiduciaries) to mutually agree on the scope of their advice relationship and to develop rules that would allow parties to mutually agree that certain casual conversations will not be considered fiduciary investment advice. As further explained below in this letter, we believe that such agreements are particularly appropriate in the context of communications between retirement industry service providers and small plan sponsors who, in accordance with the Regulation's currently overbroad restraints, are essentially deemed incapable of distinguishing between sales and advice.

Our previous comments to the Department have explained a number of ways that the Department can revise its definition of fiduciary investment advice to prevent the Regulation from creating harmful unintended consequences. In this letter, however, we will highlight the following areas of concern that are responsive to specific questions presented in the Department's RFI.

A. Recommendations To Make Or Increase Contributions To A Plan Or IRA Must Clearly And Expressly Be Excluded From The Definition Of Investment Advice

The Department's RFI asks whether recommendations to make or increase contributions to a plan or IRA should be expressly excluded from the definition of investment advice. Our answer to this question is undoubtedly, yes. Accordingly, the Department should amend the Regulation to make it clear that recommendations to make or increase contributions to a plan or IRA are expressly excluded from the Regulation's definition of fiduciary investment advice.

Because such an amendment would simply clarify the current terms of the Regulation, we believe that the Department could expedite this process through an interim final rule.

No portion of the Regulation's current definition of investment advice, or the text of ERISA itself, references a recommendation to make or increase contributions to a plan or IRA when there is no reference as to the advisability of a particular investment within the plan or IRA. As best we can tell, the idea that the Regulation could cover *contribution* recommendations was not raised in any of the Department's preamble or explanatory materials. If the Department intended the Regulation to cover a recommendation to contribute to a plan or IRA, it should have included a reference to those recommendations in its proposed rulemaking and in the text of the final Regulation itself.

We very much appreciate the Department's recent August 3, 2017 FAQs addressing the treatment of contribution recommendations. Our members are currently analyzing those FAQs and considering how they will proceed with respect to contribution recommendations going forward. According to those FAQs, the Department will not consider communications that encourage plan participants or IRA owners to make or increase contributions to a plan or IRA as investment advice, provided that there is no recommendation with respect to specific investment products, or with respect to investment management of a particular security or other investment property. The FAQs go on to say that the Department will also not consider recommendations to a plan administrator relating to methods to increase employees' participation in, or level of contributions to, an ERISA plan to be fiduciary investment advice.

Despite this positive development in the Department's position on contribution recommendations, we still believe that the Department must take further action to make it clear that contribution recommendations are excluded from the definition of investment advice. The positions expressed by the Department in its most recent FAQs are still only sub-regulatory guidance positioned among previous Department FAQs that were less than clear on this critical issue. Accordingly, we encourage the Department to amend the Regulation to make it clear that recommendations to make or increase contributions to a plan or IRA are expressly excluded from the Regulation's definition of fiduciary investment advice.

Employer plan sponsors typically hire and evaluate their service providers on how effective they are at getting more employees enrolled in the plan and increasing contributions into the plan. Non-fiduciary service providers, however, are making every effort to stay away from any situation that could be construed or misconstrued as a fiduciary action. Service providers are besieged by class action lawsuits that routinely claim that non-fiduciary service providers acted as a fiduciary, even when there is no basis for that classification. In the absence of an amendment to expressly exclude contribution recommendations from the definition of investment advice, the persistent threat of litigation facing our industry may make non-fiduciary service providers loathe to engage or communicate with plan participants in a number of ways that would otherwise help those participants contribute enough to have a secure retirement.

We must also emphasize that the issue of contribution recommendations *should not be resolved through the promulgation of a new prohibited transaction exemption*. Under the

current terms of the Regulation, recommendations to contribute to a plan or IRA should not be considered fiduciary investment advice when there is no reference as to the advisability of any particular investment within the plan or IRA. Any prohibited transaction exemption promulgated to address communications that are not considered fiduciary investment advice under the Department's recent interpretive guidance would simply be misguided.

B. Expand The Exception For Communications With Independent Fiduciaries With Financial Expertise

The Department's RFI solicits comments on the possible ways in which the Regulation's exception for communications with independent fiduciaries with financial expertise ("the Sophisticated Fiduciary Exception") could be expanded. In response to this request, we encourage the Department to take two important actions: (1) the Department should expand the Sophisticated Fiduciary Exception to cover advice to plan sponsors that have agreed that the advice provider will not be a fiduciary; and (2) the Department should address two additional concerns we have with the existing Sophisticated Fiduciary Exception, as discussed below.

Small Plan Sponsors. As we have explained throughout the Department's rulemaking process, 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, the 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. We believe that such relief could fit appropriately within the Regulation's existing framework for communications with independent fiduciaries with financial expertise. If the Department does not adopt this reasonable position, it should at least consider lowering the \$50 million threshold to no more than \$10 million, or permit plan sponsors to qualify for the exception if their plan has more than 100 participants.

Additional Concerns with the Existing Regulation. We have also identified two specific concerns with the Regulation's current Sophisticated Fiduciary Exception. Those concerns are further explained for the Department's consideration below:

- **Burdensome Representations:** First, we urge the Department to reconsider the Sophisticated Fiduciary Exception's existing conditions requiring any advice provider, effectively, to obtain written representations from the advice recipient that: (i) the advice recipient is a fiduciary with respect to the transaction; (ii) the advice recipient is capable of evaluating investment risks independently, and (iii) the advice recipient holds, or has under management or control, total assets of at least \$50 million. Although we appreciate the Department's FAQ responses permitting an advice provider to obtain these representations through negative consent, that guidance does not go far enough to eliminate the unnecessary burdens imposed by these written representations. The Sophisticated Fiduciary Exception's representations are cumbersome when executing a number of transactions with our

members' clients, especially when multiple parties are involved, like plan sponsors, consultants, investment providers, and recordkeepers. They are also arguably unnecessary when the transaction itself assumes that at least some of the conditions are met – e.g., when the transaction at issue deals with assets that are far in excess of \$50 million. The representations also unnecessarily involve costly legal review for every transaction, they must be considered within the context of pre-existing contractual relationships, and they increase litigation risk from plaintiffs' attorneys. Accordingly, we encourage the Department to remove the written representation requirements altogether.

- Clarification Requested: Second, we urge the Department to provide clarification on, or an amendment to, the Regulation with respect to the following scenario. If an advice provider communicates with an advice recipient who is not actually a fiduciary with respect to a plan, despite any representation given by the purported independent fiduciary, is the Sophisticated Fiduciary Exception still available to relieve the advice provider from any fiduciary status? We do not believe that the advice provider would be a fiduciary investment adviser in this situation because the advice provider would not have any link to a plan or IRA owner that otherwise might be expected to consider the advice being given. The advice provider would simply be engaging in discussions with a third-party that does not result in the provision of investment advice, directly or indirectly, to a recipient retirement investor or plan. If the Department's Sophisticated Investor Exception remains substantially intact, we urge the Department to provide clarification on this issue.

C. The Department Should Reconsider Its Position On Certain Forms Of Distribution Advice

To date, the Department has not reversed the prior Administration's position on distribution advice because the Department remains concerned about harmful distribution and/or rollover recommendations. But we encourage the Department to consider a more nuanced position on distribution advice, especially in the context of *plan-to-plan transfers* during a participant's working years. Such a change would help reduce the problems associated with abandoned accounts and other issues that result when participants have accounts scattered among various employer-based plans and service providers. To resolve these issues, we encourage the Department to exclude recommendations regarding plan-to-plan transfers during an employee's working years from the definition of investment advice. In those situations, fiduciary protections are already in place on both ends of the transfer because the fiduciary for the plan receiving any rollovers, typically the plan sponsor, would have already selected the investment menu that would be available to employees who are eligible to enroll in the plan.³

As we previously explained, and comments from SPARK Institute members have confirmed, we have always been concerned that the Department's Investment Advice Regulation

³ Our members that service 403(b) plans noted that a similar rule should apply to contract exchanges among 403(b) annuities or custodial accounts.

will prevent our members from providing beneficial information to keep participants in the retirement system, particularly in the context of in-service withdrawals. 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.

Prior to the Investment Advice Regulation, call centers operated by SPARK Institute members did not routinely tell participants what they should do. But they did try to highlight the negative consequences of loans and in-service distributions. Since the Regulation went into effect, service providers have changed their scripts to stay as far away from "advice" as possible. The negative effects of increased leakage attributable to those changes will not be fully felt immediately, but over time, these changes will substantially decrease retirement preparedness, especially among the most vulnerable Americans. In order to prevent the problems associated with abandoned accounts and leakage, the Department should reconsider its position on discussions involving in-service withdrawals during a plan participant's working years.

D. Establish A More Appropriate And Well-Tailored Definition Of Investment Advice

Based on the RFI's request for specific issues that could be addressed through changes to the Regulation, we encourage the Department to provide clarification on the following two issues:

Clarification on the Regulation's Application for CIT Advisers. Many of the SPARK Institute's members offer retirement investments, including mutual funds, insurance products, separate accounts, and collective investment trusts. As the industry has processed the Regulation and put in place compliance mechanisms, an issue has been discovered that is particularly acute for collective investment trusts ("CITs"). Imagine the following situations:

1. An investment manager meets with a plan of less than \$50 million to discuss managing certain plan assets in a separate account. The investment manager intends to simply rely on the "hire me" exception from the Regulation in these discussions. When the investment manager learns the size of the investment the plan wishes to make, the investment manager states that the investment is too small to be cost effective as a separate account but explains that the investment manager's affiliated trust company sponsors a CIT with the same investment strategy managed by the investment manager. The investment manager touts the quality of its management of the strategy.
2. An investment adviser is hired to provide investment advice and management to a large plan. The investment adviser recommends that the plan invest in a CIT for which the investment adviser is the primary manager (or sub-manager). The investment adviser does not charge a management fee at the plan level for any assets held in the CIT.
3. The facts are the same as #2, but in this case the investment adviser is a sub-adviser of a CIT. The investment adviser will not waive its investment advice fee at the plan level, but recommends that the plan invest in a share class of the CIT which does not have a fund level investment management fee.

None of these situations would fall under the “Sophisticated Fiduciary Exception” because the plan is too small or the investment adviser has agreed to act as a fiduciary. But all of these scenarios are very similar to the discussions an investment adviser can have under the “hire me” exception if assets are managed directly in a single account.

In response to public comments received on the Department’s April 2015 proposed Investment Advice Regulation, the Department revised the final Regulation to clarify that it would not be fiduciary investment advice for a “person or firm to tout the quality of his, her, or its own advisory or investment management services or those of any other person known by the investor to be, or fairly identified by the adviser as, an affiliate.” As part of the Department’s examination of the Regulation, we urge the Department to confirm that this “hire me” exception extends to an investment adviser that recommends an advice recipient to purchase shares of a collective trust managed by the same adviser. The real issue is that the scope of the “hire me” exception is not clear. We believe it should be available for an investment manager to tout the quality of its advisory or investment management services, even if those services will be delivered through investing in a CIT or similar entity. Recommending the quality of the investment manager’s own services with respect to its management of a pool of assets under the collective trust is functionally equivalent to touting the quality of the manager’s services in an account set up just for that plan.

Recommendations of Third-Party Fiduciaries and Non-Fiduciary Services. Many recordkeepers facilitate relationships between retirement investors and investment advisers (e.g., though the promotion of managed account services or the introduction of retirement investors to specific advisers). Because the Regulation makes it fiduciary investment advice to recommend a third person to provide investment advice, we are very concerned that the Regulation will prevent recordkeepers 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 customers’ 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.

We also urge the Department to make it clear that it is not fiduciary investment advice for a service provider to recommend a third-party to provide *non-fiduciary services*, even when the service provider making the recommendation will receive compensation in connection with its recommendation. We are particularly concerned about this issue in the context of non-fiduciary service providers who recommend third-party service providers to facilitate rollovers. Even when the recommended third-party would not be providing any recommendation or information dealing with specific investments, the Regulation’s broad definition of investment advice, which includes communications dealing with rollovers and transfers, raises concerns for some of our members. This stifles innovation, especially in the area of portability, and prohibits plan participants from receiving valuable retirement planning tools and education. Accordingly, we urge the Department to expressly make clear that a service provider’s recommendation of a third-

party to provide non-fiduciary services, especially in the context of rollovers, is not fiduciary investment advice.

III. CHANGES TO THE REGULATION'S PROHIBITED TRANSACTION EXEMPTIONS

As discussed above, the overly broad definition of investment advice contained in the Department's Regulation sets the bar too low. Since those provisions became applicable on June 9, 2017, countless interactions that would have previously not been considered investment advice under the Department's five-part test will now be considered fiduciary investment advice subject to the prohibited transaction rules under ERISA and the Internal Revenue Code. As a default, those rules prohibit any fiduciary from making a recommendation that could affect its compensation, unless an exemption applies. In the absence of a workable and cost-conscious prohibited transaction exemption, the expanded definition of fiduciary investment advice has resulted, and will continue to result in a reduction in beneficial products and services being made available to retirement plan sponsors, participants, and IRA owners. As the Department reconsiders the Regulation, especially the Best Interest Contract Exemption ("BICE"), we offer the following comments in response to the questions raised in the Department's recent RFI.

A. The BICE Implementation Costs Do Not Justify Its Purported Benefits

The Department's RFI asks for comments on the extent to which the incremental costs associated with the BICE exceed its associated benefits. As we explained in our July 21, 2017 letter urging the Department to delay the upcoming January 1, 2018 applicability date, the BICE conditions set to go into effect in less than five months create immense compliance costs for our members who have chosen to implement the BICE. These costs are attributable to the litigation risks flowing from the new contract requirement, the conditions that prevent an adviser from disclaiming any liability, and the BICE's policies and procedures that effectively eliminate the ability to earn differential compensation. Simply put, the costs associated with the BICE, as currently drafted, do not justify its purported benefits

From a quantitative perspective, one SPARK member told us that *it expects to spend \$35-40 million for the remaining effort to build for the January 1, 2018 requirements*. Another well-known retirement plan provider told us to date, it has spent approximately \$20 million to prepare for the Investment Advice Regulation, including compliance, training, and information technology, and, *unless the Department announces a delay, it will be forced to spend another \$8.5 million dollars*. Simply to do the programming to integrate the BICE requirements into its broker-dealer platform is expected to cost the second provider \$1 million between now and January 1, 2018.

From a qualitative perspective, in order to illustrate the administrative burdens and costs created by the BICE, one member shared the following steps that its firm must undertake to achieve full compliance between now and January to comply with the BICE.

- Draft all required disclosures and contracts (including contracts, point of sale, public web site, on demand, and proprietary investments).

- Develop and roll out internal BICE compliance policies, procedures, and oversight processes. This includes addressing *all* potentially conflicted compensation (including internal and external compensation practices).
- Plan, design, and build systems for generating, distributing, executing (for IRA contracts), collecting, storing, posting, reproducing and updating BICE disclosures, contracts, and related documentation.
- Develop and distribute client communications and amend contracts as necessary.
- Develop and send communications with third-party distribution partners and amend contractual relationships if necessary.
- Build systems to facilitate oversight of internal advice engagements.
- Build systems to allow for client reporting on internal advice engagements.
- Build systems to allow for financial institution reporting on advice engagements within the distribution network.
- Conduct internal training.

From the beginning, SPARK has supported a “best interest standard” for fiduciaries that provide investment advice to retirement investors. However, when full compliance with the BICE is required, in order for our members to get paid, the purported benefits associated with the BICE do not justify its costs. For service providers that wish to avoid BICE implementation costs and risks altogether, they will no longer provide certain services and products to small plans and individual investors for whom the regulation is intended to serve. For service providers that have chosen to implement the BICE, the cost associated with current implementation and the forthcoming litigation risks will ultimately be passed on to the retirement investors for whom the Regulation was intended to protect. Accordingly, the Department must reconsider its revised definition of Fiduciary Investment Advice and work to develop a more cost-conscious and workable prohibited transaction exemption with the goal of achieving a more appropriate balance between compliance costs and investor benefits.

B. Streamline And Eliminate Unnecessary BICE Disclosure Conditions

The Department’s RFI solicits comments on the ways in which the Department could streamline the BICE in order to make it a more workable exemption. If the Department intends to retain the current BICE framework, we strongly support measures to streamline the BICE disclosure requirements. As currently constructed, the BICE disclosure requirements are cumbersome, costly to produce, duplicative of similar disclosures already required under ERISA (e.g., 408b-2 and 404a-5), and marginally beneficial to the typical retirement investor who is already inundated with a number of other disclosures under existing statutory and regulatory mandates. As the Department reconsiders ways to streamline the disclosures required under the BICE, we make the following suggestions:

- Eliminate the public web site: The current BICE requires Financial Institutions to maintain a web site, freely accessible to the public and updated no less the quarterly, which contains a wide-range of disclosures. The BICE web site disclosures are the most problematic disclosure requirement for our members and should be eliminated. It is especially problematic for our members because it provides individual investors with

little information that is not already made available to them, while only serving as a bullseye for plaintiffs' attorneys scouring for potential claims.

In some ways, the public web site may also only serve to confuse investors. For example, the web site disclosures require any Financial Institution to post "a schedule of *typical* account or contract fees and service charges." For actual investors who obtain products and services from a Financial Institution with a BICE web site, this information is irrelevant and confusing because it does not reflect the actual amount they are paying.

- Adopt a single set of simple, clear, and focused disclosures: The current BICE requires Financial Institutions and Advisers to make a series of detailed disclosures at multiple points throughout the adviser-client relationship and across different mediums (e.g., in the contract, at the point of sale, and through a public web site). The Department should revise these disclosure requirements by adopting a single set of simple, clear, and focused up-front disclosures for investors. Those disclosures should only communicate the information necessary for the investor to appreciate the adviser's potential conflicts of interest in simple terms. This recommended approach would be consistent with the findings of the November 2013 ERISA Advisory Council Report noting the fact that "individuals are overwhelmed by too much information and would benefit from streamlined communication."

The disclosures described in ERISA section 408(g)(6) reflect the disclosures that Congress believes are necessary to accomplish those goals in a particular context and should be considered as the maximum possible extent of disclosures in order to satisfy the BICE.⁴ We encourage the Department to convene a group of interested parties to create a streamlined disclosure, and we would be pleased to participate.

⁴ The disclosure requirements of ERISA section 408(g)(6) are met if —

(A) the fiduciary adviser provides to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication)— (i) of the role of any party that has a material affiliation or contractual relationship with the fiduciary adviser in the development of the investment advice program and in the selection of investment options available under the plan, (ii) of the past performance and historical rates of return of the investment options available under the plan, (iii) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property, (iv) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property, (v) the manner, and under what circumstances, any participant or beneficiary information provided under the arrangement will be used or disclosed, (vi) of the types of services provided by the fiduciary adviser in connection with the provision of investment advice by the fiduciary adviser, (vii) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice, and (viii) that a recipient of the advice may separately arrange for the provision of advice by another adviser, that could have no material affiliation with and receive no fees or other compensation in connection with the security or other property, and

(B) at all times during the provision of advisory services to the participant or beneficiary, the fiduciary adviser— (i) maintains the information described in subparagraph (A) in accurate form and in the manner described in paragraph (8), (ii) provides, without charge, accurate information to the recipient of the advice no less frequently than annually, (iii) provides, without charge, accurate information to the recipient of the advice upon request of the

- Eliminate overlapping disclosure regimes: At least when dealing with ERISA plans and participants, fiduciaries relying on the BICE should not be required to make disclosures that overlap with existing disclosure obligations under ERISA, like the 408b-2 or 404a-5 disclosures.

C. The Department Must Avoid Additional Exemptions That Will Stifle Innovation

The Department's RFI asks whether additional and more streamlined approaches would better address marketplace product innovations. SPARK is concerned by the Department's logic propelling its consideration of additional product-specific exemptions because we believe that product-specific exemptions, in the context of emerging product designs, will freeze or stifle innovation. For example, some of our members are interested in pursuing fee-based annuities and clean mutual fund shares, but those efforts are still in their infancy. The feasibility and demand for such products is untested and the market's appetite for a particular product or design feature is the best driver of innovation. We are concerned that, if the Department proposes or creates product-specific exemptions for fee-based annuities, clean mutual fund shares, or any other product, the financial services industry will only develop those products in a manner closely adhering to the proposed exemption. This would effectively stifle or freeze innovation among products that the Department's RFI implicitly recognizes as potentially promising retirement industry products.

Based on these concerns, we urge the Department to reconsider its approach to a broad principles-based exemption by developing a more workable prohibited transaction that is cost conscious and widely available. The Department should proceed with the utmost caution if it intends to develop rules and exemptions that inherently favor certain developing products over other market products that have proven to be successful for many years.

IV. MISCELLANEOUS ISSUES

A. The Department Should Coordinate With The SEC To Establish A Uniform Standard Of Conduct

The Department's RFI solicits comments on the ways in which the Department can work to harmonize its efforts with the Securities and Exchange Commission ("SEC") and other financial regulators. As we explained in our July 21, 2017 letter urging the Department to delay the Regulation's January 1, 2018 applicability date, we strongly believe that the Department and other financial regulators, like the SEC, must work together to develop unified standards for advisers and brokers who interact with retirement and non-retirement investors.

recipient, and (iv) provides, without charge, accurate information to the recipient of the advice concerning any material change to the information required to be provided to the recipient of the advice at a time reasonably contemporaneous to the change in information.

We believe that there is ample opportunity for collaboration on these issues. For example, when drawing the line between advice recipients who have financial expertise and those who do not, the Department could borrow concepts from FINRA's current guidance distinguishing between communications sent to retail and institutional investors. Inter-agency coordination like this would help reduce administrative and compliance burdens for our members and generally reduce confusion for investors who maintain retirement and non-retirement investment accounts.

We also believe that the Department should, as much as possible, allow compliance with SEC rules to satisfy prohibited transaction exemptions. This is nothing new – the law is brimming with examples where compliance with securities law satisfy ERISA's requirements, such as the special plan asset rule for registered mutual funds or the safe harbor in Section 28(e) of the Securities Exchange Act of 1934 for soft dollar compensation. Especially in the context of individual investors, the SEC's wealth of expertise in regulating investment advice and financial markets makes it the primary and appropriate regulator on the critical issues contemplated in the Department's current Investment Advice Regulation.

B. The Department Should Develop An Industry Response Program

If the Department retains the Investment Advice Regulation's basic framework, we urge the Department to establish some type of Industry Response Program to resolve widespread and recurring uncertainty regarding some of the Investment Advice Regulation's ambiguities and "blind spots." SPARK has recently had a positive experience working to resolve uncertainty with the Internal Revenue Service through its Issue Industry Resolution Program. We believe that the industry's relationship with the Department would be greatly enhanced if the Department were to adopt a similar program. Many of the Department's Investment Advice Regulation FAQs have been helpful in clarifying the intent of the new Regulation. But they appear to have been developed on an "ad hoc" basis with input from only part of the industry – often individual law firms with particular client concerns. These same FAQs often create new questions among SPARK's members, and because that guidance does not go through the normal notice and comment process, a program should be implemented to ensure there is an interactive process between the Department and industry as the Department works to develop guidance that affects our members and the clients they serve. A regular and systematic process would be appropriate, especially during the early implementation stages of the Department's transformative Regulation. This process would also help reestablish strong and collaborative working relationships between industry groups and Department staff.

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Investment Advice Regulation RFI

Page 14 of 14

August 7, 2017

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,

A handwritten signature in black ink, appearing to read "Tim Rouse", with a stylized flourish at the end.

Tim Rouse
Executive Director