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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712
Suite 400
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Re: Additional Comments on the Definition of the Term "Fiduciary"; Conflict of Interest Rule – Retirement Investment Advice (RIN 1210-AB32) and Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25)

Dear Sir or Madam:

The SPARK Institute, Inc.[1] appreciates the opportunity to provide additional comments on the Department of Labor's ("Department") proposed rule concerning the definition of the term "fiduciary" (the "Proposal")[2] and the corresponding proposals for new and amended prohibited transaction exemptions.[3] We further appreciate the time and attention that numerous Department officials gave as they listened to and questioned the many witnesses who testified over the four days of public hearings the Department held on the Proposal.

Throughout the hearing, Department officials indicated some important clarifications that the Department may consider making in the final rule, and suggested certain other changes that may be made in response to comments received. With respect to these possible modifications to the Proposal, our members would find some of them to be very helpful. Other potential changes, however, would make the rule no more workable (or even less workable) for our members than its current form. In this regard, we submit these additional comments in order to follow up on some of the items that Department officials discussed for potential clarification or change. The other purpose we have for submitting additional comments is to expand upon some of our responses to the questions that the Department asked during the hearing.

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[1] 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 70 million employer-sponsored plan participants.

[2] 80 Fed. Reg. 21,928 (Apr. 20, 2015).

[3] *See, e.g.*, 80 Fed. Reg. 21,960 (Apr. 20, 2015); 80 Fed. Reg. 22,010 (Apr. 20, 2015).

As we have stated before, the SPARK Institute supports the Department's goal of ensuring that persons in a position of trust and confidence are subject to fiduciary standards when providing investment advice with respect to employee benefit plans ("plans") and individual retirement accounts ("IRAs"). Since the closing of the initial comment period, we have been cautiously encouraged by a few of the modifications that the Department appears willing to make to the Proposal; however, ***we remain concerned that absent substantial changes, the Proposal will inevitably produce the many unintended consequences that we and many others expressed concern about in previous comments***.

ADDITIONAL AND FOLLOW-UP COMMENTS

1. An expansion of the investment education carve-out to permit references to specific investments would be very helpful, but only if any accompanying conditions are workable.

First, we reiterate our concerns with the changes the Proposal would make to IB 96-1, given that the Department has presented no evidence that IB 96-1, in its current form, is not working or is being abused. We again ask the Department to reconsider the changes the Proposal would make to narrow what would currently be considered investment education under IB 96-1. We offer the following comments regarding items discussed at the hearing in the event the Department is compelled to move forward with the changes in their proposed (or a similar) form.

During the hearing, Department officials repeatedly suggested a willingness to allow references to specific plan investments under the investment education carve-out under two conditions. The first condition described was that all investment options available under the plan in a particular asset class be referenced. The second condition was that the provider of the investment education has no stake in the investments referenced.[4]

Allowing plan service providers to reference specific investments under the education carve-out would be useful in allowing service providers to continue providing helpful information to participants and beneficiaries without becoming fiduciaries. The SPARK Institute is very appreciative that the Department appears willing to reconsider its position on references to specific investments as provided in the current Proposal. In regard to the two conditions described by the Department, we have the following two requests:

- **Modify the second condition so that, instead of requiring that the provider not have a stake in the investments referenced, require that the plan**

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[4] *See, e.g.*, Transcript of Conflict of Interest Proposed Rule Public Hearing at 853, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript3.pdf: "MR. HAUSER: -- on the allocation issue a number of people have said at least -- you know, even supporters of the rule have said in that context maybe you should in the plan context where the investment lineup is overseen by a separate fiduciary you should go ahead and permit them to populate that asset allocation model as long as they populate it with all of the designated options under the plan and also maybe as long as they don't have a financial interest in this fund option versus that option when they do it."

administrator or independent fiduciary responsible for investment decisions select and/or approve of the specific investments (or approve the methodology of selecting the specific investments) being referenced. Under the second condition as described by the Department, a determination of who the education "provider" is may be unclear in some situations, and requiring that the education provider have no stake in the investments would prevent recordkeepers (who often deliver education on behalf of their clients) with proprietary funds on their platforms from delivering education, even where they had no part in selecting the investments to be referenced. Instead, providing for selection or approval[5] by an independent plan fiduciary who has no stake in which investments are referenced would protect retirement savers while ensuring that recordkeepers and other service providers can continue delivering their many forms of education that help participants understand how the funds in their plans may be used within a model allocation.

- **Allow references to specific investments under the education carve-out if *either* condition (not both) is met.** Thus, in combination with our suggestion in the previous bullet, an education provider would be permitted to reference specific investments if (1) all investment options available under the plan in a particular asset class are referenced *or* (2) the plan administrator or independent fiduciary responsible for investment decisions selects and/or approves of the specific investments referenced. We believe that either condition on its own would appropriately address the Department's concerns with respect to protecting retirement savers and therefore urge the Department to provide flexibility to choose the condition that best meets the needs of a particular situation. In many cases, a requirement to reference all of a plan's investments would not provide a model portfolio that represents a realistic example of how the model asset allocation might be implemented.

  The importance of this distinction can be illustrated with an example. Imagine a plan with a large number of investment options, including many in the same asset class. Showing a participant an asset allocation model that also references, for example, the 20 large cap equity fund investments available under the plan, could easily paralyze the participant from taking action. In such a situation, or even as a general principle, we see no reason that the *named fiduciary* (typically the plan sponsor) could not decide to limit which investments are referenced, for the sake of presenting a simplified model to participants – after all, the plan sponsor has no stake in one investment over another.[6]

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[5] The plan administrator (or other independent fiduciary responsible for investment decisions) could, for example, select the investments, approve a proposed selection by the service provider, or approve a *methodology* for selecting the investments that will be listed for a particular asset class. For example, if there were a large number of equity funds, the fiduciary could approve a methodology of listing only those funds with a certain Morningstar rating.

[6] Alternatively, if the Department decides that *both* conditions are required, we ask the Department to set a maximum number of investment options that must be listed for each asset class (such as eight) under the first

2. **Descriptions of an investment's or distribution option's characteristics, including the pros and cons of selecting that investment or distribution option, should be included within the investment education carve-out.**

During the hearing, Department officials stated that a provider may describe the characteristics of an investment under the investment education carve-out. We ask the Department to clarify that such characteristics include a description of the pros and cons of investment and distribution options, such as the pros and cons of an equity investment versus a fixed income investment. We further ask the Department to clarify that during such communications a provider may also mention specific investments.

Our members continue to be concerned that the line between education and advice under the Proposal is very unclear when compared to the bright line under which service providers currently operate. Making the clarification described above would offer some limited relief to our members as they face the need to train call center representatives and other employees on how to operate under the new regime.

3. **It is critical that the Department allow existing clients to be grandfathered under current rules, particularly if the Department does not provide for a transition period of at least thirty-six months.**

We understand from various comments made by Department officials that the Department may be willing to consider introducing further grandfathering provisions to the Proposal, beyond the very limited grandfather provision in the Best Interest Contract Exemption ("BICE"). We appreciate the Department's apparent understanding of the vast challenges that service providers would face in ensuring that their millions of existing clients and accounts meet the extensive requirements of the Proposal and/or BICE in the short time frame allowed before the rule's effective date. An option to grandfather existing clients under current rules will be critical, and we urge the Department to proceed with implementing such a provision, especially if the Department does not allow at least thirty-six months before the final rule is applicable.

4. **The "specifically directed to" language of the proposed definition of fiduciary is not necessary to address concerns expressed by the Department but would severely curtail helpful communications that service providers send to retirement savers.**

Many commenters, including the SPARK Institute, urged the Department to remove the reference to advice that is "specifically directed to" an individual from the proposed redefinition of fiduciary. Our comment letter of July 21, 2015, provides a series of examples of why this language is not necessary and captures clearly non-fiduciary communications. During the hearing, Department officials suggested that this phrase is necessary to prevent advisors from disclaiming fiduciary status by claiming that a specific recommendation was not individualized

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condition. Thus, the first condition would be that all investment options available under the plan, up to a maximum of eight in a particular asset class, be referenced.

because the advisor did not know any individual information about the participant or IRA owner.[7] Our members continue to be very concerned that a definition of fiduciary that includes recommendations that are "specifically directed to" an advice recipient could be interpreted too broadly and will result in the consequences we described in our previous comment letter, such as calling into question very standard forms of communications from service providers that are sent to subsets of participants.

We urge the Department to address its concern about advisors disclaiming fiduciary status in the manner described above by using an approach with fewer externalities for plan sponsors and retirement savers, such as by introducing a requirement that in order to be considered fiduciary investment advice, the advice must be provided under circumstances that a "reasonable person would understand to be individualized advice that may be relied upon in making investment or investment management decisions." This approach, in combination with clarification that a "call to action" is required (as discussed in the following point), would address the Department's concerns and eliminate the reason the Department has given for retaining the "specifically directed to" language.

5. **We remain concerned about the Department's adoption of FINRA's definition of "recommendation," especially if the Department incorporates the entire FINRA rule and accompanying guidance.**

The Department asserted multiple times during the hearing that it intended for the term "recommendation" to mean a "call to action" and that the Department had intended to incorporate FINRA's definition in this regard. The Department specifically questioned the SPARK Institute about its position that the Department should not adopt FINRA's standards with respect to the term "recommendation."

To reiterate, our concerns with adopting FINRA's standards in this regard are that (1) FINRA's rules deliberately set a low bar for what constitutes a recommendation, which would result in a wide variety of persons not selling securities (e.g., recordkeepers and third-party administrators) becoming subject to standards that were not developed with them in mind, and (2) we are concerned that whenever FINRA makes future changes to its guidance regarding what constitutes a "recommendation," it will do so only with broker/dealers in mind (as would be expected), and that FINRA would not consider the impact of any changes on service providers

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[7] *See, e.g.*, Transcript of Conflict of Interest Proposed Rule Public Hearing at 1034, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript3.pdf: "MR. CAMPAGNA: … If you're in a roomful of people and you're saying -- you're pointing out specific people and without considering their individualized circumstances, you're saying that you should invest in a particular product. That is specifically directed and it seems to be along the lines of a recommendation without being individualized." This describes a recommendation, to be sure, but it demonstrates an important principle: there are circumstances where a course of action might be viewed as being suggested, but no reasonable person would think that a *fiduciary* relationship – the highest duty known to the law – has been entered into. We do not necessarily agree that a reasonable person would think that someone giving a speech in a room full of people would think the speaker has taken on a fiduciary obligation or undertaking to provide advice in the individual's sole interest.

and other entities that are subject to its guidance only by way of the Department's regulatory regime.

As stated in our letter, our position is that the proper test is whether there has been "advocacy" for a course of action. A clarification that a recommendation must entail a "call to action" rather than a mere "suggestion," however, would be an improvement.

It was unclear from the Proposal whether the Department intended to incorporate FINRA's rules with respect to the term recommendation into the Department's rule, or if the Department would simply use some of the same words and principles from the current FINRA rules. After all, FINRA Policy Statement 01–23, which Department officials repeatedly raised, is not a formal legal test but rather a detailed document providing guidance on when the "suitability" standard is triggered. It was designed for broker-dealer communications and contains a number of examples not suited to the retirement plan participant experience. Policy Statement 01-23 uses the word "fiduciary" *not even once*.

If the Department chooses to utilize FINRA's rules and guidance, we ask that the Department address our members' concerns by (1) not incorporating the FINRA materials by reference, and (2) carefully considering where modifications to FINRA's language are warranted in order to avoid pulling persons into fiduciary status where it would not be appropriate. This second point is especially critical given the much harsher penalties that would result under the Department's regime.

6. **If the Department chooses not to expand the scope of the seller's carve-out to small businesses and individuals, as many commenters have requested, it is even more imperative that certain other changes and clarifications be made to the Proposal.**

Despite numerous commenters' requests (including those made in our comment letter of July 21, 2015), and those made by commenters testifying as advocates for small plan employers, that the Department – at a minimum – expand the seller's carve-out to small plans, we have not seen any interest from Department officials in making this requested expansion. Although we continue to strongly believe that an expansion of the seller's carve-out to small businesses is an appropriate and necessary outcome, we would like to emphasize a number of points in our previous comment letter that become even more imperative if the Department chooses not to expand the seller's carve-out.

First, our requests for clarification on the role and scope of what it means to be a fiduciary under the Proposal, which are described in Section II.H. of our previous comment letter, become even more critical if the seller's carve-out is unavailable to plan service providers dealing with small plans and individuals. We made several requests in Section II.H. for the Department to clarify certain long-standing interpretations regarding the scope of fiduciary duties and fiduciaries' abilities to allocate those duties.

Second, we assume that if the Department does not expand the seller's carve-out to small plans, it *must*, at a minimum, make the BICE available. If it does, then three requirements of the BICE

would cause particular concern for our members absent the requested expansion of the seller's carve-out. One of these requirements is that any advice be provided "without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party" – a standard that raises additional concerns because it will often be very difficult and costly for a business entity to prove that it has acted without any regard to its interests when defending itself against litigation. The second requirement causing concern in the absence of an expanded seller's carve-out is the requirement that a financial institution warrant that there will be no compensation that would "tend to encourage" recommendations that are not in the best interest of the client, a standard that will also be nearly impossible for a business entity to prove that it has met. Third, the BICE places a significant burden on the sale of one's own products because any advice that does not cover a full range of investment classes is heavily disfavored. An investment provider that simply wants to sell equity funds to plan fiduciaries must face additional – and unnecessary – burdens under Section IV of the BICE.

(We want to be very clear these are not the only concerns our member have with the BICE. Please refer to section IV of our July 21, 2015, comment letter for a comprehensive list.)

In addition, we call the Department's attention to the request described in footnote 25 of our previous comment letter. There, we asked the Department, if it retains the 100 participant threshold for use of the seller's carve-out, to confirm that the participant count used to determine whether the 100-participant threshold has been met is determined via the aggregation of all plans sponsored by the employer and its affiliates. An employer with three plans of 90 participants each is functionally similar to an employer with one plan containing 270 participants. Similarly, if an employer has at least one plan with 100 or more participants but the employer (or an affiliate required to be treated in the same controlled group) has another plan with under 100 participants, those plans should be treated the same (i.e., the seller's carve-out should be available to all plans of an employer as long as at least one plan in the controlled group meets the 100-participant count threshold). Any other outcome would require that two plans of the same sponsoring employer be treated entirely differently, which would confuse and frustrate the many plan sponsors with this type of plan structure.

Ultimately, the core of our members' concern with respect to the limited scope of the seller's carve-out is that service providers and other businesses that interact with plans and retirement savers need the Department to provide a clear explanation and avenue by which they can act both as a fiduciary *and* sell their products and services. In this regard, the Department will need to provide guidance outside of this Proposal on the fundamental inconsistency between selling a product or service and acting solely in the interest of the buyer, as ERISA requires.

7. **Making the adjustments to the platform and selection and monitoring carve-outs that we recommended, while helpful, would not address all of our concerns with respect to small businesses.**

During the hearing, the Department asked whether, if the Department made the adjustments to the platform and selection and monitoring carve-outs that the SPARK Institute recommended in its comment letter of July 21, such adjustments would address all the concerns we expressed

about the Proposal's effect on small businesses. We responded that making those adjustments would be a big step forward – a point that we reiterate today – but such adjustments would not address all of our concerns.

We continue to believe that there must be *some* ability for service provides and other businesses to sell products and services to plans and retirement savers without triggering fiduciary status, and we believe that even small plan fiduciaries are able to determine whether they are being sold a product or service as opposed to receiving impartial investment advice, especially when provided with a specific written disclosure. As we previously stated, ERISA itself makes no distinction between the duties and requirements of small and large plan fiduciaries. The inability of service providers to sell to small plans will decrease access to products and plans and decrease the likelihood that small employers will start or maintain plans, further contributing to Americans' retirement savings coverage gap.

In addition, even if the Department makes our suggested changes to the platform and selection and monitoring carve-outs, we would remain concerned about the need for the Department to adequately address the "hire me" issue, particularly as it relates to a service provider's ability to respond to a plan's request for proposal ("RFP"). A person should not be considered a fiduciary solely because that person recommended itself or an affiliate to provide the services described in section 3(21) of ERISA. We appreciate that the Department appeared open to addressing the concerns that we and others raised with respect to "hire me" conversations. In addition to clarifying that "hire me" conversations do not result in fiduciary status, we ask that the Department extend that same result to conversations in which a service provider makes a suggestion to "hire my affiliate." For example, if a provider responds to an RFP, but happens to deliver some of its services through an affiliate, fiduciary status should not be triggered.

8. It is appropriate to expand the platform provider carve-out to IRAs because the carve-out only provides relief for marketing a platform of investments.

During the hearing panel on which the SPARK Institute participated, a Department official asked for more information on how the panelists envisioned expanding the platform provider carve-out to IRAs. To follow up on this question, we reiterate the points made in our July 21 comment letter that it should not be considered investment advice to put together a platform that is not tailored to any particular investor simply because that platform includes some investments and excludes others.

In fact, we agree with statements made by Department officials that some of the "carve-outs" are not really "carve-outs" but rather clarifications that certain activities can be undertaken without triggering fiduciary status.[8] An IRA platform "carve-out" would simply make clear that it is not

[8] *See, e.g.*, Transcript of Conflict of Interest Proposed Rule Public Hearing at 724, *available at* http://www.dol.gov/ebsa/pdf/1210-AB32-2-HearingTranscript3.pdf: "MR. HAUSER: … I mean, first off the carve-out may have been an unfortunate bit of nomenclature. You aren't a fiduciary unless you meet the definition of what counts as fiduciary activity, so you've got to have a recommendation to have made an investment, you know, those things at the front of the regulation, a recommendation to make an investment, a recommendation with respect to a distribution."

"advice" to put together a platform of IRA investments and market them publicly, because doing so would not reasonably be viewed as a recommendation regarding the investments in the platform.

Without this expansion, the implication is that even "marketing" that a provider offers IRA custodial services or IRA annuities is advice, requiring compliance with the BICE to simply be an IRA provider at all. Expanding the Proposal's carve-out to IRAs would be an important change to allow platform providers to continue to communicate the availability of an IRA platform to individuals who currently have or express an interest in having an IRA.

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The SPARK Institute appreciates the opportunity to provide these additional 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