October 2, 2020

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN 1210-AB91, Proxy Voting and Shareholder Rights NPRM

Dear Sir or Madam:

On behalf of the SPARK Institute, Inc., we are writing to provide comments on the amendments proposed by the Department of Labor (the "Department") to the "Investment Duties" regulation under the Employee Retirement Income Security Act of 1974 ("ERISA") with respect to proxy voting and the exercise of other shareholder rights (the "Proxy Voting Proposal" or "Proposal").[1]

The SPARK Institute appreciates the Department's efforts to clarify in regulations that ERISA's fiduciary duties of prudence and exclusive purpose extend to the management of shareholder rights, including proxy voting, in connection with plan assets that consist of shares of stock. As discussed below, however, we are concerned that the Proxy Voting Proposal will add significant cost and untenable requirements to a fiduciary's management of plan assets with little accompanying benefit to participants, and may even produce results that are contrary to the Department's goals.

Our concerns with the Proxy Voting Proposal are even more acute when considered in conjunction with the Department's outstanding proposal to amend the Investment Duties regulation with respect to the selection of investments, including environmental, social, and corporate governance ("ESG") considerations (the "ESG Proposal").[2] Thus, in addition to asking the Department to address the questions and concerns we raise below that are specific to the Proxy Voting Proposal, we urge the Department to carefully consider the combined impact of the ESG and Proxy Voting Proposals on plan fiduciaries and whether the additional costs and

[1] 85 Fed. Reg. 55,219 (September 4, 2020).

[2] 85 Fed. Reg. 39,113 (June 30, 2020).

burdens that would be imposed under the two sets of amendments are more likely to harm, rather than enhance, participants' retirement security.

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 95 million employer-sponsored plan participants.

I. Comments on the Department's General Approach to the Proxy Voting Proposal

As the SPARK Institute described in comments submitted on the Department's recent ESG Proposal, plan sponsors, fiduciaries, and service providers have relied on the existing Investment Duties regulation for more than 40 years. Although we have no objection to the Department's dual initiatives to review the existing regulation and determine whether any changes are warranted, the duties that ERISA imposes on investment fiduciaries have withstood the test of time in ensuring that plan participants are appropriately protected. This has been possible because the statute's non-prescriptive approach facilitates the application of ERISA's core fiduciary principles in any number of situations, including ones that could not have been envisioned at the time of enactment.

The crux of our concerns with both the Proxy Voting and ESG Proposals is that they take a highly prescriptive approach by proposing the addition of rigid new requirements on investment fiduciaries that we fear will actually interfere with a fiduciary's ability to fulfill his or her duties under ERISA when making investment decisions. In combination, the Proxy Voting and ESG Proposals represent a significant departure from plan fiduciaries' long-standing practices and understanding of their duties. We urge the Department to reconsider the combined impact and burden of the two proposals when determining the final form of either set of amendments, including by, for example, issuing a request for information in order to more fully understand the processes used by fiduciaries today when managing plan assets and the anticipated impact of the Department's proposals.

Suggested alternative approach. If the Department's primary intention with the Proxy Voting Proposal is to codify in regulations its position regarding the application of ERISA's fiduciary duties to the exercise of shareholder rights – including the elimination of any misunderstanding that fiduciaries are required to vote all proxies – then we believe that the Department could accomplish its goals in a much simpler and effective fashion without introducing the many challenges the current Proposal presents.[3] For example, we suggest that adding the following to the Investment Duties regulation would appropriately address a fiduciary's duties when exercising shareholder rights without triggering the several concerns we describe below with respect to the current Proposal:

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[3] The SPARK Institute recommended a similar streamlined approach with respect to the Department's ESG Proposal.

- a statement confirming that ERISA's fiduciary duties of prudence and loyalty apply when fiduciaries exercise shareholder rights with respect to a plan's investments, including proxy voting; and

- a statement that fiduciaries should vote any proxy where the fiduciary determines that the matter being voted may affect the economic value of the plan's investment, taking in account the costs involved.

Concerns with the Department's proposed approach. Instead of employing a non-prescriptive approach similar to what we recommend above, the Proxy Voting Proposal replicates a troublesome feature of the ESG Proposal in that it assumes proxy voting decisions may be reduced to a mathematical equation where the result of that equation unequivocally and precisely informs the actions that a fiduciary should or should not take. Although this may be attractive in theory, it does not reflect the challenges and uncertainties fiduciaries face in the real world where future results, including the economic impact of an action, typically cannot be predicted in advance with sufficient certainty. Our concerns with this approach, including the Proposal's mandates that fiduciaries "must vote" proxies that will have an economic impact on the plan and "must not vote" proxies without an economic impact on the plan, include the following:

- ***Challenges in determining economic impact:*** The crux of the Proposal centers around the requirement that a fiduciary must determine whether voting a proxy will or will not have an economic impact on the plan, taking into consideration the costs involved. In some cases, it may be hard to determine whether there will be any economic impact at all related to a matter being voted. And even if a fiduciary determines that there likely will be an economic impact, it may be very challenging to determine the degree of that economic impact relative to the costs involved. The binary approach taken by the Proposal is particularly concerning in that it provides no path forward for fiduciaries who are unable to determine whether a particular proxy vote must or must not be voted. At a minimum, the Department would help alleviate this concern by clarifying that a fiduciary may vote a proxy if it is unable to determine whether the matter being voted would have an economic impact after considering the costs involved.

- ***Increased costs:*** Although the preamble implies that the Department views the Proxy Voting Proposal as potentially having a deregulatory and cost-reducing effect, SPARK Institute members strongly believe that the Proposal will markedly increase the cost of a fiduciary's management of shareholder rights. For example, the costs related to the additional research that will be required in order to engage in the Proposal's mathematical exercises will be substantial, as will be the additional recordkeeping requirements.

  In addition, the Proposal's list of steps a fiduciary must take when considering whether and how to vote a proxy will force fiduciaries to take such steps even in cases where it is clear that a more abbreviated process would suffice while still being

consistent with ERISA's fiduciary requirements. This will likely result in increased costs with respect to more routine proxy votes in particular.

Further, for the many plans that rely on ERISA 3(38) investment managers, we anticipate the Proposal will increase costs for plans as investment managers are forced to bifurcate their processes, policies, and voting to accommodate ERISA and non-ERISA accounts. Although we appreciate that the Department intended to align its Proxy Voting Proposal at least in part with recent SEC guidance on proxy voting, that alignment is not complete, and the cost for investment managers to comply with different sets of requirements will not produce the cost savings the Department is anticipating.

We strongly encourage the Department to undertake a further review of these increased costs prior to finalizing the amendments.

- ***Disregard for broader value of shareholder participation:*** The Proposal's failure to attribute any value to the act of participating in shareholder actions such as proxy voting is itself concerning. As with voting generally, it is often impossible to determine in advance whether one's vote will make a difference in the outcome, yet there remains an inherent value and importance in the act of participating in a vote. In some cases, voter participation has a very real impact beyond the economics of the outcome, such as when votes are needed to achieve a quorum. Although the Department acknowledges in the preamble that a proxy voting policy may allow for voting if needed in order to achieve a quorum at a shareholders' meeting,[4] that statement is not entirely congruous with the Proposal's repeated emphasis on only voting when there is an economic impact.

- ***Unclear impact on shareholder activism:*** The Department expresses concern in the preamble that some fiduciaries and proxy voting firms may be acting in ways that unwittingly allow plan assets to be used to support or pursue proxy proposals for environmental, social, or public policy agendas that have no positive economic impact on a plan.[5] But the Proposal would not just prohibit fiduciaries from voting in support of such shareholder activism in many cases – it would also prohibit fiduciaries from voting *against* such proposals (unless the economic impact is determined to exceed the cost of voting). In this regard, we anticipate that the Proxy Voting Proposal may have the effect of increasing the success of shareholder proposals by prohibiting fiduciaries from voting with management in many cases.

Taking each of the issues described above into consideration, we are concerned that the Proxy Voting Proposal will not be workable in a manner that is consistent with a fiduciary acting in accordance with his or her duties under ERISA. We strongly believe that any potential benefit

[4] 85 Fed. Reg. 55,226.

[5] 85 Fed. Reg. 55,222.

of the Proposal will be substantially outweighed by the added expenses and burdens created by the Proposal, as well as the worrisome precedent of interfering with a fiduciary's ability to exercise his or her best judgment under the specific facts and circumstances at hand. As noted above, we urge the Department to simplify and refocus its proposal on ERISA's basic fiduciary requirements.

II. Specific Comments and Questions on the Proxy Voting Proposal

The SPARK Institute has the following additional comments on the Department's Proxy Voting Proposal.

a. Plan Assets Held in Mutual Funds

We appreciate the clarification in the Department's Regulatory Impact Analysis ("RIA") that the Proposal would not affect plans with respect to stock that is held through registered investment companies, i.e., mutual funds.[6] Mutual funds are among the most common investments held in defined contribution plans, and they do occasionally have shareholder votes, including on independent board members and on proposed changes to key fund policies. The explanation provided in the preamble, and in the rule itself, appears focused on the activities of operating companies, so it is not entirely clear whether the proposal applies to these proxy votes to the extent they are not passed on to participants.[7] Clarity on this point would be helpful.

b. Voting Rights Passed Through to Participants

The Department's RIA states that the Proposal affects plans with respect to any stocks that the plan holds directly or through ERISA-covered intermediaries.[8] But the Proposal is silent with respect to proxy votes and other shareholder rights that the plan passes through to participants. Although we assume that the Proposal would not apply when voting rights are passed through to participants,[9] it would be helpful for the Department to clarify this point, including with respect to employer stock and self-directed brokerage windows. Correspondingly, we suggest that it would be helpful for the final regulation to include a statement, similar to proposed paragraph (e)(4)(i)(A)(1), that a trustee is not responsible for exercising shareholder rights to the extent that the trustee is subject to the directions of a participant.

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[6] 85 Fed. Reg. 55,230.

[7] The Regulatory Impact Analysis implies that mutual fund proxy votes are not within the scope of the regulation. See 85 Fed. Reg. at 55,237 ("Plans that only hold their assets in registered investment companies, such as mutual funds, will be unaffected by the proposed rule.").

[8] 85 Fed. Reg. 55,230.

[9] In a plan meeting the requirements of ERISA section 404(c), the participant is not treated as a fiduciary. The regulations under section 404(c) make clear that proxy voting and other shareholder rights may be passed through to participants, and in the case of employer securities, this is required.

c. Additional Time Needed to Implement Changes

The Proposal states that the amendments would be effective 30 days after the publication of a final rule. SPARK Institute members have expressed significant concern that 30 days provides insufficient time to review the final rule and make any changes necessary to comply with the regulation. We expect this to be particularly problematic with respect to paragraph (e)(4)(ii), which provides that an investment manager of a pooled investment vehicle may develop an investment policy statement consistent with Title I of ERISA and the Investment Duties regulation, and require participating plans to accept the manager's investment policy (including a proxy voting policy) before the plans are allowed to invest.

The option for an investment manager to develop and seek plan fiduciaries' acceptance of the manager's own investment policy statement is a very helpful alternative to what would otherwise be a requirement that investment managers of pooled investment vehicles reconcile conflicting investment policies among plans and vote proxies to reflect such policies in proportion to a plan's interest in the pooled investment vehicle. In the real world, managers of pooled investment vehicles do not agree to vote proxies based on specific plan needs; the investment manager makes decisions with the needs of all investors in mind, that is, maximizing the return given the risk profile of the fund. For existing pooled investment vehicles, SPARK Institute members believe it will in many cases be impossible for investment managers to secure the required acceptance of the participating plans' fiduciaries within 30 days of publication of a final rule, as such fiduciaries will need time to "assess whether the investment manager's investment policy statement and proxy voting policy are consistent with" ERISA and the final regulation.

We therefore urge the Department to provide stakeholders with additional time to implement all aspects of the rule, but in particular the provision regarding pooled investment vehicles. The Department could accomplish this by, for example, (1) delaying the effective date, (2) providing a transition rule, or (3) announcing a temporary non-enforcement policy. Regardless of the approach, we ask that the Department provide stakeholders with at least one year to comply with a final rule.

d. Relief for Fiduciaries When Plan Adopts Proxy Voting Policy in Accordance With the Regulation

Paragraph (e)(3)(iii) of the Proposal provides that plans may adopt proxy voting policies that the Department indicates would help reduce the costs associated with determining whether a fiduciary "must" or "must not" vote a proxy. However, the requirements to vote or not vote a proxy in paragraph (e)(3)(i)-(ii) of the Proposal include a requirement that the fiduciary take into consideration the multiple factors described in paragraph (e)(2)(ii). As a result, the same fiduciary analysis, documentation, and general voting considerations and processes will have to be pursued by plans in making a proxy voting determination, regardless of whether a plan has adopted the type of proxy voting policy that the Department envisions as reducing the costs and burdens associated with meeting such requirements. We therefore ask the Department to

consider providing a safe harbor or other fiduciary relief for plans that adopt proxy voting policies as contemplated by the Department.

e. Records on Proxy Voting

Paragraph (e)(2)(ii)(E) of the Proposal would require fiduciaries to "[m]aintain records on proxy voting activities and other exercises of shareholder rights, including records that demonstrate the basis for particular proxy votes and exercises of shareholder rights." We ask the Department to consider providing more specificity and/or examples of the types of documents or documentation that the Department contemplates with respect to this requirement.

f. Flexibility in Determining Economic Impact

The Proxy Voting Proposal would require fiduciaries to determine the economic impact on the plan, if any, of a particular matter being voted on. If the Department retains this approach in the final rule, then we urge the Department to clarify that fiduciaries have flexibility in terms of how they evaluate and determine such economic impact.

As one example, SPARK Institute members have noted that it is unclear under the Proposal whether a fiduciary should focus its determination of economic impact on the market value or book value of a stable value fund (or both).[10] More broadly, we would point out that a plan's investment horizon may be very long, and thus the fiduciary should be able to consider the economic impact based on the goals and timeframe of the investment. Rather than dictating precisely how the regulation should be applied with respect to specific types of investments, including in the context of pooled investment vehicles, we believe that fiduciaries should be afforded flexibility in deciding upon the best approach for a plan given the particular facts and circumstances at hand.

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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 our comments, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP, at mlhadley@davis-harman.com.

Sincerely,

Tim Rouse
Executive Director

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[10] Although stable value funds generally hold fixed income, they may in some cases include investments to which voting rights attach.