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

Office of Exemption Determinations
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U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Proposed Definition of Fiduciary Investment Advice (RIN 1210-AC02)
Proposed Amendments to PTE 2020-02 (ZRIN 1210-ZA32)

Dear Sir or Madam:

The SPARK Institute is very concerned about the Department of Labor's ("the Department's") proposed definition of fiduciary investment advice and its associated amendments to prohibited transaction exemption ("PTE") 2020-02, PTE 84-24, and other exemptions that are currently available to advice providers ("the Fiduciary Proposal"). Similar to the concerns that SPARK raised in response to the Department's 2016 Fiduciary Rule ("the 2016 Fiduciary Rule"), we are concerned that the proposed definition of fiduciary investment advice would inappropriately lower the bar for determining when a fiduciary relationship exists based on the provision of investment advice, and result in negative consequences for retirement savings that could be avoided by a far more narrowly tailored rule. Accordingly, in order to avoid these negative consequences, we strongly urge the Department to withdraw its Fiduciary Proposal.

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

The SPARK Institute has long believed that, consistent with traditional fiduciary norms, persons providing investment advice in a relationship of trust and confidence should be subject to ERISA's fiduciary duties and the prohibited transaction rules that apply to such fiduciaries. However, in the case of persons who do not provide investment advice in a relationship of trust and confidence, ERISA's fiduciary standards should not apply. If the Department finalizes its Fiduciary Proposal, which is fundamentally inconsistent with such a framework, we are very concerned that, similar to the retirement industry's response to the 2016 Fiduciary Rule, retirement plan service providers will significantly reduce the availability of many forms of beneficial assistance that are currently offered to retirement plan sponsors and individual retirement savers in reliance on their treatment as non-fiduciary activity; and, to the extent that

such services continue to be offered, they will only be provided at an increased cost to plans and participants. As discussed in more detail in this letter, the availability of a generally applicable advice exemption is no cure for the wrong definition of fiduciary investment advice.

I. THE FIDUCIARY PROPOSAL WOULD INAPPROPRIATELY LOWER THE FIDUCIARY BAR

A. Fiduciary Duties Are Reserved to Relationships of Trust and Confidence

For nearly 50 years, the Department's five-part regulatory test for fiduciary investment advice has deliberately harmonized ERISA's standards for fiduciary investment advice with the common law understanding of fiduciary relationships, which requires a relationship of trust and confidence. Importantly, this test includes clear markers that prevent beneficial conversations occurring outside of a relationship of trust and confidence from being treated as fiduciary investment advice and allows service providers to interact with plans and participants to provide beneficial products and services.

This not only reflects congressional intent, but it is also an appropriate threshold for determining fiduciary status under ERISA and the Internal Revenue Code ("Code") because of the significant duties that are owed by fiduciaries, and the severe penalties that can result if a fiduciary breach or prohibited transaction occurs. 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 significant duties (prudence and loyalty) and liability through a private right of action under ERISA for breach of those duties, but also the prohibited transaction rules found in ERISA and the Code prohibit fiduciaries from receiving many forms of ordinary compensation that are perfectly legal if not paid in connection with a plan or IRA, such as commissions and proprietary fund fees, unless an exemption applies.

In reliance on this clearly defined and relatively high threshold, the retirement industry has been able to develop very beneficial non-fiduciary products and services that promote retirement savings and provide other valuable forms of education and assistance to plan sponsors and retirement investors. If the Department inappropriately lowers the fiduciary threshold in a way that is inconsistent with traditional fiduciary norms, or is otherwise unworkable, such action would threaten the continued availability of these beneficial products and services. At best, such a result would effectively require retirement plan sponsors and participants to choose between paying more for currently available products and services, and making important financial decisions without these valuable forms of non-fiduciary assistance.

B. Potential Exemptions Are No Justification for the Wrong Fiduciary Test

Given the substantial penalties for fiduciaries who breach their duties and engage in prohibited transactions, we are concerned that many recordkeepers and other service providers will conclude that the benefits derived from continuing to provide assistance that has traditionally not been viewed as fiduciary advice are outweighed by the new risks and costs that would accompany them if they are newly treated as fiduciary investment advice. The availability of PTE 2020-02, as it currently exists and especially as proposed, does not eliminate these concerns

and should not be viewed as a justification for weakening or reversing the critical distinction between interactions that reflect a fiduciary relation of trust and confidence, and those that do not.

As we have detailed in many prior letters to the Department, SPARK Institute members offer a wide variety of fiduciary and non-fiduciary services to plan sponsors, plan participants, and IRA owners. These services have encouraged plan formation, improved employer oversight, and provided a wide variety of education and assistance to help participants save effectively and manage their savings before, at, and through retirement.

In this regard, for our member who voluntarily wish to provide fiduciary-level advice services in discrete and clearly-defined circumstances, the SPARK Institute appreciates the investment advice exemption that the Department created through PTE 2020-02. Although we believe that certain aspects of that exemption could be improved, the general framework of PTE 2020-02 has created a path forward for financial services firms that wish to provide fiduciary-level investment advice services when there are clear standards for identifying fiduciary advice relationships. And we understand that some SPARK members have decided to use PTE 2020-02 in targeted ways to provide investment recommendations.

We also know, however, that there are other SPARK members that do not wish to provide fiduciary-level advice services and, therefore, have not and will not implement PTE 2020-02. The very understandable legal and business reasons for not providing fiduciary-level advice vary. Some firms may wish to avoid fiduciary status based on general concerns regarding fiduciary liability, which may arise regardless of whether a firm's advice affects its compensation, and regardless of whether an exemption may be available. For other firms, the desire to avoid fiduciary status may be directly connected to the costs and challenges associated with implementing PTE 2020-02. And for other firms, there may be a reluctance to commit to offering any fiduciary-level services until there are clear lines for identifying fiduciary advice relationships, and well-established rules governing any exemptions that may be needed to provide such advice. The Department's consistently evolving views on this area of the law have made it very difficult to determine where the final lines will be drawn.

While we appreciate that PTE 2020-02, as it currently exists, has expanded the circumstances under which financial services firms will be interested in accepting fiduciary responsibility, there are many financial services firms that will choose not to, or simply cannot, take on fiduciary status for some or all transactions that would be covered by the proposed definition of investment advice.

II. THE FIDUCIARY PROPOSAL IS CONCERNING FOR THE SAME REASONS AS THE DEPARTMENT'S 2016 FIDUCIARY RULE

A. The Proposed Definition of Fiduciary Investment Advice

Under the Department's current proposal, a person would render fiduciary investment advice if:

1. the person makes a covered recommendation;

2. the person makes investment recommendations to investors on a regular basis as part of their business;
3. the covered recommendation is provided under circumstances indicating that: (a) the recommendation is based on the particular needs or individual circumstances of the retirement investor; and (b) may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; and
4. the person receives a fee or other compensation in connection with the recommendation.[1]

For this purpose, a covered recommendation includes, among other recommendations: (i) a recommendation to acquire, hold, or dispose securities or other investment property; (ii) a recommendation as to the management of securities or other investment property, including a recommendation of other persons to provide investment advice or investment management services; and (iii) a recommendation as to rolling over, transferring, or distributing assets from a plan or IRA.[2] According to the preamble to the proposal, "the Department views a recommendation as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action."[3]

Thus, the current proposal would result in a much wider array of persons being treated as fiduciaries than under the Department's current regulatory test for fiduciary advice. Similar to the Department's 2016 Fiduciary Rule, this proposed expansion of the definition of fiduciary investment advice will impact interactions with plan sponsors, plan advisers, and plan participants alike.

B. Concerning Similarities to Invalidated 2016 Fiduciary Rule

The proposed test for fiduciary investment advice is very similar to the Department's 2016 definition of investment advice that was invalidated by the Fifth Circuit Court of Appeals. Under that test, a person could be treated as providing fiduciary investment advice for making a recommendation that was directed to a specific plan sponsor, plan participant, or IRA owner. Notable similarities between the 2016 Fiduciary Rule and the 2023 Fiduciary Proposal include:

- **Transactional Fiduciary Test.** Both rules would use a facts-and-circumstances transactional test, rather than a relationship test, to determine when a person is a fiduciary. Accordingly, one-time recommendations are treated as fiduciary advice.

- **Elimination of Clear Fiduciary Markers.** Both rules would depart from, and eliminate, the clear fiduciary markers in the current five-part test that have greatly assisted the retirement industry in distinguishing fiduciary advice relationships from non-fiduciary assistance. That is, the 2016 Fiduciary Rule and 2023 Fiduciary Proposal would eliminate the requirements for fiduciary recommendations to be made: (1) on a "regular

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[1] Proposed Labor Reg. § 2510.3-21(c)(1).

[2] Proposed Labor Reg. § 2510.3-21(f)(10).

[3] 88 Fed. Reg. 75890, 75904 (Nov. 3, 2023).

basis;" and (2) "pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions."

- **Plan Sponsors, Plan Advisers, and Participants.** Both rules would amend the fiduciary investment advice definition as it relates to interactions with plan sponsors, plan advisers, and individual retirement savers. Unlike the 2016 rule, however, the 2023 proposal does not carve out discussions with large plan sponsors and other sophisticated fiduciaries.

- **No Ability to Define Relationships.** Both rules would prohibit advice providers and advice recipients from defining the scope of their relationship, even following appropriate disclosures. Thus, even very large and sophisticated plan sponsors and other intermediaries cannot define the scope of their relationship. If a single interaction meets the conditions of the test, the service provider is burdened with fiduciary status even if the recipient of the recommendation does not have an understanding that they are receiving a fiduciary, unconflicted, recommendation.

- **Platform Recommendations Are Advice.** Both rules would treat the recommendation of a selected list of securities – i.e., a so-called platform – as a covered recommendation. Unlike the 2016 rule, however, the 2023 proposal does not have any carveout for platforms.

- **Hire Them/Hire Me.** Both rules would treat recommendations of other persons to provide investment advice or management services as fiduciary advice, regardless of whether the person providing the recommendation has been retained to provide such advice. Also, both rules would (at least according to the preamble) exclude from the definition of fiduciary investment advice so-called "hire me" conversations, albeit in a very vague and limited set of circumstances.

- **Exercising Plan Rights.** Both rules would treat recommendations regarding the exercise of plan rights, including recommendations regarding distributions and rollovers, as investment advice, even when there are no recommendations regarding specific securities, investment strategies, or investment professionals.

The point of this comparison is to identify the specific aspects of the current Fiduciary Proposal that would effectively reinstate many of the features from the 2016 Fiduciary Rule for which SPARK expressed concerns during its rulemaking and after its finalization. Accordingly, for many of the same reasons that SPARK expressed concerns about the 2016 Fiduciary Rule, SPARK continues to be concerned about the Department's current Fiduciary Proposal. This also means that, unlike most other regulatory proposals for which the potential impact is unclear, the current Fiduciary Proposal is very unique. That is, the concerns expressed in this letter are not merely hypothetical concerns about how the proposal could impact the availability of beneficial products, services, tools, and other forms of assistance. Rather, these concerns reflect actual experience based on the 2016 Fiduciary Rule and the many changes that SPARK members actually instituted prior to the Fifth Circuit's ruling.

C. How Would the Fiduciary Proposal Negatively Impact Beneficial Forms of Assistance?

If the Fiduciary Proposal is finalized, we are very concerned about the impact that the expanded definition of fiduciary investment advice will have on many beneficial forms of assistance that are currently offered by recordkeepers and other service providers in reliance on their treatment as non-fiduciary activity. That is, we expect a significant reduction in these many beneficial forms of assistance and, to the extent these services and communications may continue to be offered, they will only be provided at an increased cost to plans and participants. The beneficial conversations and interactions that we are most concerned about generally fall into two categories: (1) individualized participant assistance that promotes healthy financial habits; and (2) clear sales conversations.

i. Beneficial Participant Assistance

First, we are very concerned about the impact that the Fiduciary Proposal would have on many forms of participant assistance that SPARK members currently provide in reliance on their treatment as non-fiduciary activity. These valuable forms of assistance include, for example, tools and communications that encourage portfolio diversification, prevent employees from depleting their accounts before retirement, and encourage employees to keep their retirement assets in the retirement system switching jobs. These types of assistance encourage participants to adopt healthy financial habits and avoid what are generally viewed as mistakes, and they are often targeted to specific individuals based on their particular circumstances. It is this individualization that makes them so effective in promoting positive outcomes, but that individualization also ensnares them in the Department's new test.

Examples. The following examples illustrate the types of beneficial participant assistance that would be negatively impacted by the Fiduciary Proposal.

- **Targeted Diversification Campaigns.** Consider a recordkeeper campaign that is intended to encourage diversification within participant accounts. In such a campaign, which is not uncommon, a recordkeeper might send a targeted or individualized communication to participants who are exclusively or heavily invested in employer stock, or heavily invested in a money market fund that is not appropriate for long-term investing. These types of communications are intended to be recommendations and are designed to trigger a response from participants who may need investment assistance.

- **Preserving Savings & Minimizing Penalties.** Consider a recordkeeper tool or call center script that is intended to help retirement plan participants make decisions about their options to receive in-service distributions and loans from the plan. In offering this assistance, a recordkeeper might ask a participant for basic information, such as the amount of their financial need, facts that might support their eligibility for an exception to the 10% early withdrawal penalty, and their anticipated ability to repay the distribution. Based on this information, the recordkeeper might recommend or suggest that a participant take a loan, instead of a hardship withdrawal, in order to minimize tax

penalties and preserve savings for retirement. Or the recordkeeper might have its call center script include a list of reasons not to take a distribution if at all possible. This type of assistance is intended to help participants avoid early distribution penalties and ensure that participants are not depleting their retirement accounts before they actually retire. And it is hoped that the information and suggestions may be relied upon by the participant as a basis for investment decisions that are in the participant's best interest. 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.

- **Preventing Employees from Leaving the Retirement System During Job Transitions.** Consider a recordkeeper tool or communication that is shared with plan participants when they are leaving their current employer or joining a new employer. These communications might suggest that, upon becoming eligible for a new employer's plan, an employee should roll over any of his or her other retirement accounts to the new employer's plan. Such a communication may cite to the plan's low investment fees, the strong performance of its investments, or its desirable features, such as a brokerage window or a managed account advice service. While the Fiduciary Proposal would treat this type of communication as fiduciary advice, it makes no recommendations as to specific investments. These types of communications help to reduce the problems associated with leakage, missing participants, and abandoned accounts.

  We know that a key driver of the Department's Fiduciary Proposal is to impose fiduciary status on a retail adviser making a rollover recommendation. But the Department must understand that its test is going to impact recommendations made by service providers to participants to *stay* in the plan, and many service providers would rather not come close to the fiduciary line.

- **Beneficial Call Center Interactions.** Consider a call center interaction in which a 35-year old participant tells a call center representative that he is very concerned about the effect of rising interest rates and wants to move all of his target date fund investments into the plan's stable value fund. In response, the call center representative explains that the market ebbs and flows, and for investors who are the participant's age and do not intend to use their retirement accounts for many years, it is typically best to adopt a long-term strategy for retirement investing and to invest in a well-diversified portfolio including stocks and bonds.

Beneficial Assistance Transformed Into Fiduciary Advice. Under the current five-part test, each of these tools and communications would generally not be treated as fiduciary investment advice. In general, this is because, at the very least, the interaction does not result in a relationship in which investment advice or recommendations will be made on a "regular basis." This is also because, for many of these conversations, there is no mutual agreement, arrangement or understanding, that the communication is a primary basis for an investment decision.

Under the proposal, however, these types of individual participant assistance would be treated as fiduciary investment advice. As a result, in order to comply with such a rule, a firm must either: (1) stop engaging in these beneficial conversations; or (2) accept the responsibilities, risks, and costs associated with fiduciary status. Additionally, to the extent that such recommendations affect a recordkeeper's compensation, the advice provider would need to comply with PTE 2020-02. Based on the retirement industry's response to the 2016 Fiduciary Rule, we expect that, if these conversations are treated as fiduciary investment advice, retirement plan recordkeepers and service providers will significantly reduce these offerings, as any financial benefits that they create for the firm providing the assistance are far outweighed by the fiduciary responsibilities, risks, and costs that they would create. Moreover, to the extent that firms accept fiduciary responsibilities in order to continue offering these forms of assistance, including, if necessary, in reliance on PTE 2020-02, they will only be able to do so at an increased cost to plans and participants.

ii. Beneficial Sales Conversations

Second, we are very concerned about the impact that Fiduciary Proposal would have on a wide range of conversations that are clearly sales conversations, rather than advice. Many of these conversations, although they involve sales, are nevertheless very helpful in promoting plan formation, increasing coverage, improving participant outcomes, and bringing new products and services to plans and participants, thereby promoting healthy financial habits. For these clear sales conversations, we are especially concerned about the Fiduciary Proposal's changes because we do not believe that the reasonable expectations of plan sponsors, plan advisers, and participants would view a sales representative marketing its firm's own products and services as the provision of fiduciary investment advice in a relationship of trust and confidence. Thus, in these clear sales situations, fiduciary protections are neither warranted nor appropriate.

Examples. The following examples illustrate the types of clear sales conversations that would be negatively impacted by the Fiduciary Proposal.

- **Small Plan Sales (including MEPs and PEPs).** Consider a recordkeeper who markets its retirement plans to small employers and, as part of those activities, presents a pre-selected platform of investments as selected and appropriate for small employers. These types of conversations help promote plan formation by specifically focusing on the needs of employers who are least likely to start a plan. Because the Fiduciary Proposal does not include any carveouts for platform providers or allow plan sponsors to define the scope of their relationship, these clear sales conversations would be treated as fiduciary investment advice. According to the Fiduciary Proposal, "providing a selective list of securities to a particular retirement investor as appropriate for the investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security."[4] This would be the case even in the context of one-time recommendations that are not followed by any ongoing advice or management.

[4] 88 Fed. Reg. at 75904.

The Fiduciary Proposal would not only make it more difficult to encourage small employers to adopt their own single employer plans, it would also make it much more difficult to market multiple employer plans ("MEPs") and pooled employer plans ("PEPs"). These plan types, which commonly offer professional lineup assistance to employers who might otherwise be reluctant to start their own plan, are often arranged and sold as bundled products with a default investment platform and an investment manager to monitor the platform. To the extent that recommendations of these plans implicitly include a recommendation of an investment platform or a recommendation of an investment manager who is independent of the person recommending the plan, the proposal would treat these recommendations as fiduciary investment advice.

On the issue of PEP marketing, the preamble to the Fiduciary Proposal indicates that, "When a [Pooled Plan Provider] or another service provider interacts with an employer about investment options under the plan, whether they have made a recommendation under the proposal will turn, in part, on whether they present the investments as selected for, and appropriate for, the plan, its participants, or beneficiaries."[5] While this language may prevent generic descriptions of a potential lineup from being treated as fiduciary investment advice, it does not exclude the type of bona fide sales conversations that are clearly sales, rather than advice, and that are especially helpful in encouraging plan formation.

- **Selling Advice Services.** Consider a recordkeeper that offers third-party advice services, such as a managed account program, to plan sponsors or participants. This marketing may be directed to plan sponsors who have expressed an interest in helping their participants who are uncomfortable managing their own investments or, if already chosen by the plan sponsor, directly to those very participants.

- **Selling QLACs.** Qualifying longevity annuity contracts ("QLACs") are a type of deferred income annuity under which payments begin at or near the end of an individual's life expectancy. Because payments start so late, QLACs are a relatively inexpensive way for retirees to hedge the risk of outliving their savings in defined contribution plans and IRAs. The Obama Administration amended the required minimum distribution rules to allow plans and IRAs to offer QLACs, and as part of SECURE 2.0, Congress included a series of legislative changes that are intended to promote the availability and adoption of QLACs.

  In selling these products to individual plan participants, an insurance company's agent might recommend that a retirement saver purchase a QLAC from the agent's company based on the individual's expected income needs and the individual's stated concerns about outliving their retirement savings. While in-plan QLACs are typically rare today, based on the changes made by SECURE 2.0, there is hope that these beneficial products can become a more common in-plan offering. However, by treating their clear sale as

[5] 88 Fed. Reg. at 75908.

fiduciary investment advice, the Fiduciary Proposal would significantly inhibit these efforts.

Clear Sales Conversations Transformed into Fiduciary Advice. Under the current five-part test, each of these sales conversations would not be treated as fiduciary investment advice. In general, this is because, at the very least, each sales conversation does not result in a relationship in which investment advice or recommendations are made on a "regular basis." Additionally, in these clear sales situations, there is typically no mutual agreement, arrangement or understanding, that the communication is a primary basis for an investment decision.

Under the Fiduciary Proposal, each of these sales conversations, which are not reasonably understood as occurring in a fiduciary relationship of trust and confidence, would be converted into fiduciary investment advice for purposes of ERISA and the Code. As a result, in order to comply with such a rule, firms must either: (1) avoid fiduciary status by refraining from sales discussions that go beyond simple product descriptions; or (2) accept the responsibilities, risks, and costs associated with fiduciary status. To the extent that these sales conversations are treated as fiduciary advice and affect the compensation of the advice provider or his or her firm, the seller would also be forced to comply with PTE 2020-02 in order to engage in clear sales activity.

This is the case even when the plan is being represented by an adviser or consultant that has agreed to be a fiduciary. Nowadays, many plan committees engage an adviser or consultant who assists with selecting and monitoring investments and interacts with the plan's service provider. Even sales conversations to the plan's adviser or consultant, who has absolutely no understanding that the service provider is providing impartial advice, are captured by the Fiduciary Proposal.

Based on the retirement industry's response to the 2016 Fiduciary Rule, we expect that, firms will limit the types of sales conversations that their representatives may have with plans and participants. In response to the 2016 Fiduciary Rule, these limitations particularly (but not exclusively) impacted individual retirement savers and small plan sponsors because of the 2016 rule's carveout for sophisticated fiduciaries. However, under the 2023 Fiduciary Proposal, because there is no carveout for sophisticated fiduciaries, these sales limitations would impact individual retirement savers and plan sponsors of all sizes equally. As a result, plan participants and plan sponsors will, in some cases, no longer be encouraged through these beneficial sales conversations to take actions that improve retirement savings outcomes. Some firms may, for example, limit their representatives to only providing generic product descriptions and generalized investment education, as opposed to any discussions that could be viewed as a recommendation that is in any way based on a retirement investor's circumstance or needs. For firms that continue to engage in these ordinary and routine marketing activities, this activity could only occur in reliance on PTE 2020-02, and will only be able to continue to be offered at an increased cost to plans and participants. This would occur notwithstanding the fact that all of this activity occurs in a clear sales context in which no fiduciary relationship of trust and confidence is reasonably expected by a plan sponsor or participant.

D. A Vague Transactional Test Is Especially Concerning

Not only would the proposed definition of fiduciary investment advice result in the elimination of many beneficial communications and interactions that, as discussed above, would fit squarely within the revised definition of fiduciary investment advice, it would also result in the elimination of many beneficial communications and interactions that the revised definition would not actually treat as fiduciary advice, but that could be perceived as approaching the fiduciary line. That is, because the proposal would create a vague transactional test for determining fiduciary status, rather than reserving fiduciary status to relationships of trust and confidence, it will be much more difficult, if not impossible, for recordkeepers and other service providers to systematically distinguish non-fiduciary forms of assistance and sales from fiduciary investment advice. This is, in part, due to the fact that the proposal provides very unclear boundaries on the types of interactions that could be construed as a recommendation and it incorporates vague, yet fundamentally crucial, concepts into its preamble.

For example, one of the most unclear aspects of the proposal is the so-called "hire me" carveout for financial firms that recommend their own investment advice or management services. Under that carveout, an investment adviser or investment manager can tout its own services and recommend that a retirement investor enter into an advisory or management relationship with the provider without triggering fiduciary obligations. However, when a "hire me" recommendation effectively includes a recommendation on how to invest or manage plan or IRA assets, that recommendation must be evaluated separately and may transform a sales conversation into fiduciary investment advice.

If an investment manager tells a potential client that the manager is great at investing retirement assets, and the client asks a simple follow-up question about *how* the manager would be great for the client's specific plan, how can the manager meaningfully respond without providing fiduciary investment advice under the proposal? If the manager responds by discussing how it would manage the plan's assets if hired, such a response could easily be viewed as a suggestion for the plan to hire the manger to implement the discussed strategy and, therefore, could be treated as a covered recommendation. In this instance, the line between fiduciary and non-fiduciary communications is very unclear and very difficult to adhere to in practice under a facts and circumstances test that can be satisfied based on a one-time recommendation. If the manager simply responds by repeating that it is great at investing retirement assets, it would not be providing the potential client with the information it needs to evaluate the manger's potential services. No investment manager ever markets itself as just being good—it discusses its approach to investment strategy and explains to potential clients why its investment philosophy would better serve the plan than other investment managers. Although clearly sales, that would be fiduciary investment advice under the Department's proposal.

Given the uncertainty surrounding many aspects of the proposal, including its "hire me" exception, we anticipate that, if the proposal is finalized, many firms will attempt to avoid conversations that come anywhere close to approaching the fiduciary line and stick exclusively to simple product descriptions and generic education. The significant duties owed by fiduciaries and the substantial penalties for violating those duties are simply too great to risk any mistakes. This will significantly inhibit the ability of recordkeepers and other service providers to interact

with plan sponsors and participants in ways that connect them to the products, services, and strategies that improve retirement outcomes by promoting healthy financial habits and avoiding common mistakes.

Worse, where there is an unclear regulatory line, market distortions are created. Some financial service providers will be much more aggressive. An unclear regulatory line, like the line that the Department has proposed, punishes companies with a robust approach to compliance.

III. The Fiduciary Proposal Conflicts with Traditional Fiduciary Norms & Deliberate Choices Made By the SEC and NAIC

In addition to limiting the beneficial forms of assistance that retirement plan recordkeepers would otherwise be permitted, or desire, to have with retirement plan sponsors, participants, and IRA owners, we are also urging the Department to withdraw its Fiduciary Proposal because it is inconsistent with traditional fiduciary norms and other deliberate choices that were made by the Securities & Exchange Commission ("SEC") and National Association of Insurance Commissioners ("NAIC") to prevent the elimination of those beneficial forms of assistance.

A. The Fiduciary Proposal Conflicts with Traditional Fiduciary Norms

If finalized, the Fiduciary Proposal would lower the regulatory test for fiduciary investment advice to a point where it would no longer be consistent with the traditional common law understanding of fiduciary investment advice, which requires a relationship of trust and confidence. This is very concerning because any regulatory interpretation that conflicts with those fiduciary norms would exceed the Department's interpretive authority. As the Fifth Circuit reaffirmed in 2018, Congress intended ERISA's fiduciary provisions to "codif[y] the touchstone of common law fiduciary status – the parties' underlying relationship of trust and confidence . . . ."[6] The 2023 Fiduciary Proposal, in contrast, would cover interactions that go well beyond those types of relationships.

Under traditional fiduciary norms, individualized investment recommendations do not, by themselves, create a fiduciary relationship, unless there is a relationship of trust and confidence. This is especially true for isolated recommendations that are not part of a broader ongoing relationship. As discussed earlier in this letter, the "regular basis," "mutual understanding," and "primary basis" prongs of the current five-part test are necessary markers for distinguishing relationships of trust and confidence from non-fiduciary forms of investment assistance and sales activity. The Fiduciary Proposal would, however, dispense with those markers and, instead, reduce the test for fiduciary investment advice to a question of whether a person who regularly makes recommendations as part to their business makes any individualized recommendations to

[6] *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360, 369 (5th Cir. 2018). *See also id*. at 372-73 ("Had Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so. This is particularly true where such abrogation portends consequences that 'are undeniably significant.'").

a plan sponsor, participant, or IRA owner. This is simply too low a bar and inconsistent with fiduciary norms.

In this regard, we would similarly be very concerned about any functional fiduciary definition that does not incorporate similar markers because it would not be consistent with traditional fiduciary relationships of trust and confidence. This is because any such test would transform non-fiduciary education, assistance, and sales into fiduciary investment advice, in conflict with the Fifth Circuit's decision invalidating the Department's 2016 Fiduciary Rule.

B. The Fiduciary Proposal Conflicts with Deliberate Choices Made by the SEC and NAIC

We are also concerned about the Fiduciary Proposal because it would conflict with deliberate choices made by the SEC and NAIC to prevent the negative consequence that will result if the Fiduciary Proposal is finalized. In promulgating its Regulation Best Interest ("Reg BI") for broker-dealers in 2019, the SEC expressly rejected calls to apply Reg BI to recommendations made to anyone other than a "retail investor" – i.e., to the exclusion of plan sponsors, trustees, or other fiduciaries. Additionally, the SEC expressly rejected a fiduciary standard of care for securities recommendations made by broker-dealers, citing the incompatibility of broker-dealer compensation models with a fiduciary standard and concerns that such a standard would result in a reduction of investor choices.[7] In a similar regard, when the NAIC updated its Suitability in Annuity Transactions Model Regulation for insurance agents in 2020, it effectively incorporated Reg BI's standard of care and declined to extend its updated standards to transactions between insurance agents and ERISA plan sponsors and fiduciaries.[8]

Contrary to these deliberate choices from the SEC and NAIC, the Fiduciary Proposal would impose fiduciary standards that go well beyond the "best interest" standard of care that applies to broker-dealers under Reg BI and to insurance agents under the NAIC's Model Regulation. While PTE 2020-02 incorporates some aspects of that best interest standard, a person or firm cannot comply with PTE 2020-02 (or PTE 84-24) by simply satisfying Reg BI or the NAIC's Model Regulation. Moreover, in addition to imposing fiduciary standards on individualized recommendations that are made to retail investors, such as plan participants and IRA owners, the

[7] 84 Fed. Reg. 33318, 33322 (July 12, 2019) ("We have declined to subject broker-dealers to a wholesale and complete application of the existing fiduciary standard under the Advisers Act because it is not appropriately tailored to the structure and characteristics of the broker-dealer business model (i.e., transaction-specific recommendations and compensation), and would not properly take into account, and build upon, existing obligations that apply to broker-dealers, including under FINRA rules. Moreover, we believe (and our experience indicates), that this approach would significantly reduce retail investor access to differing types of investment services and products, reduce retail investor choice in how to pay for those products and services, and increase costs for retail investors of obtaining investment recommendations.").

[8] The NAIC Model Regulation provides that it does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA. NAIC Model Regulation, at section 4(B)(1).

Fiduciary Proposal would contradict the SEC's and NAIC's decisions not to impose fiduciary standards on recommendations made to plan sponsors, trustees, and fiduciaries.

The SPARK Institute is concerned about the ways in which the Fiduciary Proposal would depart from, and supersede, the calculated policy decisions that the SEC and NAIC made in their recent rulemakings. Those policy decisions appropriately considered and rejected fiduciary standards that would result in the limitation of many beneficial forms of assistance, especially for interactions in which a fiduciary relationship of trust and confidence would not be expected by the advice recipient. We do not want the Department to disturb those decisions in ways would effectively accept the reduction of those beneficial services and interactions, when more narrowly tailored regulatory options are available.

IV. The Department Should Withdraw its Proposal & Only Re-Propose if Far More Narrowly Tailored to Avoid Negative Consequences

Because the Fiduciary Proposal sets the fiduciary bar too low, is inconsistent with traditional understandings of fiduciary relationships of trust and confidence, and will reduce beneficial forms of assistance, the SPARK Institute is urging the Department to withdraw its Fiduciary Proposal and not re-propose any similar rule unless it is far more narrowly tailored to avoid these problems.

The following discussion provides a non-exhaustive list of examples of the types of changes that, at the very least, the Department would need to make in order to formulate an appropriate test and avoid the negative consequences that we believe can be avoided with a much more narrowly tailored rule. To be clear, we believe that the Department's current Fiduciary Proposal is fundamentally flawed and, therefore, should be withdrawn. These flaws cannot be fixed by modifying certain aspects of the regulatory text or attempting to soften the rule's application through preamble interpretations.

- **Relationship Based Test.** One of the fundamental flaws of the current Fiduciary Proposal is that, through a facts and circumstance functional test, it would impose fiduciary obligations on one-time interactions, as opposed to only imposing fiduciary obligations in the context of ongoing relationships. Outside of those circumstances in which the parties mutually agree to a fiduciary relationship, the Department should not advance any definition of fiduciary investment advice unless it incorporates longstanding fiduciary norms that reserve fiduciary status to those relationships in which advice or recommendations are provided on a regular basis.

  While we believe that the Department should restore its traditional formulation of the regular basis test as a condition for fiduciary investment advice, if the significantly modified regular basis test from the current Fiduciary Proposal is retained, the Department should make the test a question of whether a specific person directly makes investment recommendations to investors on a regular basis as part of their business. That is, the recommendations made by other individual persons or affiliates should not be considered in determining whether a person makes recommendations on a regular basis as part of their business.

- **Retain Other Clear Fiduciary Markers.** Another fundamental flaw of the current Fiduciary Proposal is that it treats virtually all individualized recommendations to retirement investors as fiduciary advice, regardless of how significant such advice is to any given retirement investor and regardless of the parties' reasonable expectations. In this regard, virtually any communication regarding a particular transaction that is actually received and reviewed by a retirement investor will be "a basis" of their decision. In order to prevent communications that are received by investors but not meaningfully considered from being treated as fiduciary investment advice, the Department should not advance any definition of fiduciary investment advice unless it has the "primary basis" element of the existing five-part test, or something very similar. Similarly, the Department should also retain the current "mutual understanding" requirement in order to ensure that fiduciary obligations are not created in the absence of a true meeting of the minds. It should not be enough that retirement investors simply expect a fiduciary relationship, if the circumstances surrounding the relationship clearly fall below the sort of relationship of trust and confidence that is necessary to create a fiduciary relationship. As we have previously expressed to the Department, this necessarily requires a meeting of the minds as to the scope of the relationship.

- **A Meaningful Seller's Carveout.** As discussed in this letter, the SPARK Institute is concerned about the ways in which the Fiduciary Proposal would treat clear sales conversations as fiduciary investment advice. In order to address this problem, the Department should provide a meaningful seller's carveout that would exclude from the definition of fiduciary investment advice clear sales conversations where there is no reasonable expectation that the person making the recommendation is acting in a fiduciary relationship of trust and confidence. That is, any regulatory definition of fiduciary investment advice should not cover situations in which the buyer understands that it is buying an investment product rather than advice, and the seller's invitation to buy a product is not a recommendation. In this regard, the scope of any seller's carveout should not depend on the size or other accreditation of the advice recipient. Thus, any seller's carveout should be available for interactions with all retirement investors; not just regulated financial professionals and large retirement investors. A meaningful seller's carveout would necessarily cover the types of "hire-me" conversations that are excluded from the Fiduciary Proposal, without the preamble's vague and uncertain application.

- **Hire Them Carveout.** The Department should clarify that it is not fiduciary investment advice to recommend another person to provide advice or investment management services, unless the person was specifically engaged to make such a recommendation for a fee or other compensation.

- **Plan Sponsors Should Be Permitted to Define the Scope of Their Relationships.** As SPARK has said in response to prior rulemakings regarding the definition of fiduciary investment advice, a service provider and plan sponsor should always 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.

While there may be different considerations in the context of participants and IRA owners, non-fiduciary service providers should be able to make their products and services available to plan sponsors without triggering fiduciary status.

- **Incorporation of 2016 Fiduciary Rule Carveouts.** Given the functional equivalency of the Department's 2016 Fiduciary Rule and its current Fiduciary Proposal, as detailed above, we are very surprised by the Department's decision to omit many of the carveouts that were included in the 2016 Fiduciary Rule. Those previous carveouts were intended to identify communications that failed, in the Department's view, to be recommendations or failed to fall with the meaning of fiduciary investment advice. The Department should not advance any effort to revise the definition of fiduciary investment advice unless it excludes all of the conversations and interactions that were covered by the carveouts included in the 2016 Fiduciary Rule. This includes, most importantly, the 2016 carveouts for: (1) platform providers; (2) selection and monitoring assistance; (3) transactions with independent fiduciaries with financial expertise; and (4) plan sponsor and plan fiduciary employees. The key point is that the communications covered by those carveouts should not be treated as fiduciary investment advice as they do not represent communications that occur in a fiduciary relationship of trust and confidence.

- **Recommendations Regarding Exercising Plan Rights.** The Department should exclude from the definition of fiduciary investment advice recommendations for participants to exercise various rights under their plan or IRA when there is no recommendation with regard to particular securities or investment strategies.

  - *Contribution Recommendations.* The Department should clearly exclude from the definition of fiduciary investment advice individualized recommendations to contribute to a plan or IRA. While the Department provided informal guidance on this topic before the Fifth Circuit vacated its 2016 Fiduciary Rule, it is unclear whether such informal guidance continues to reflect the Department's current views.[9] The proposal's omission of this key issue is particularly puzzling when considering that, absent additional clarification, the Fiduciary Proposal's test for investment advice could easily cover these recommendations.

    It is very common for members of the SPARK Institute to offer savings tools and regularly recommend that retirement plan participants contribute, or increase contributions, to their retirement accounts. In addition, SPARK Institute members offer calculators and projections that estimate the amount of retirement income that an individual retirement saver will need or can expect to receive based on personal information provided by the individual retirement saver. These types of conversations, which do not reference specific investments and have traditionally not been viewed as fiduciary investment advice, are indispensable approaches for getting retirement savers to act in a way that will adequately

[9] DOL Conflict of Interest FAQs # 2-3, *408B-2 Disclosure Transition Period, Recommendations to Increase Contributions and Plan Participation* (August 2017).

prepare them for retirement. More to the point, these tools and conversations are effective in large part because they can be individualized to a plan participant, for example: "Given where you are, if you want to achieve a 75% income replacement ratio at retirement, we recommend you increase your contributions by just 1%." If such recommendations can be treated as fiduciary investment advice, recordkeepers will be significantly restricted from offering such tools, to the detriment of individual retirement savers.

In fact, if service providers to defined contribution plans are left, after this regulatory process plays out, with the understanding that they cannot encourage Americans to enroll in the plan, and increase contributions, we can think of nothing more devastating to the long-term retirement security of savers.

Given the importance and effectiveness of these communications, the Department should expressly clarify that communications recommending or encouraging plan sponsors, plan participants, or IRA owners to make or increase contributions to a plan or IRA will not be treated as investment advice, provided that there is no recommendation with respect to specific investment products or recommendations with respect to investment management of a particular security or other investment property.

- <u>Distribution Recommendations.</u> It is also very common for members of the SPARK Institute to regularly discourage retirement plan participants from taking pre-retirement withdrawals. These communications are particularly helpful in preventing participants from depleting their retirement accounts before they actually retire and avoiding costly tax penalties.

  While it is not common for these conversations to bluntly say, "We recommend that you not take a distribution," they often inform participants, at the time they are inquiring about or directing distributions, about the negative impact that pre-retirement withdrawals can have over time, the application of early distribution penalties, and the tax benefits of waiting to receive tax-free withdrawals from Roth accounts. Additionally, they may present alternatives to participants, such as loans, that would avoid the need to take unnecessary pre-retirement withdrawals that cannot be repaid.

  Under the Fiduciary Proposal, these discussions could very easily be viewed as a suggestion, based on their context or presentation, for a participant to refrain from taking a withdrawal. Accordingly, in order to avoid the elimination of these helpful conversations and communications, any Department interpretation of fiduciary investment advice should clearly exclude recommendations and tools that discourage plan participants and IRA owners from taking withdrawals from their account, when there is no reference to specific investment products or recommendations with respect to investment management of a particular security or other investment property.

- *Rollover Recommendations.* Consistent with prior comments that we have shared with the Department, the SPARK Institute continues to believe that any Department interpretation of fiduciary investment advice should exclude rollover recommendations when there is no reference to specific investment products or recommendations with respect to investment management of a particular security or other investment property. As noted earlier in this letter, SPARK members make available beneficial forms of assistance that inform participants of their distribution and rollover options, encourage them to keep money in the retirement system until they actually retire, and help them connect their individual circumstances to rollover and transfer options that are available to them. These tools 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.

  Similar to our concerns regarding distribution recommendations, while it is uncommon for recordkeepers to bluntly recommend that a specific participant direct a rollover, recordkeepers do commonly provide communications and tools that could be treated as recommendations under the Fiduciary Proposal as they could very easily be viewed as a "suggestion," based on their context or presentation, for a participant to direct a rollover. When these communications occur without regard to any recommendation regarding specific investment products or strategies, these communications are not appropriately characterized as investment advice so much as they are merely recommendations about how an individual may exercise rights under the plans and IRAs that are available to them.

  More to the point, the Department cannot point to anything in ERISA that turns rollover recommendations into fiduciary status. The statute refers to "investment advice." Whether or not the Department is correct that Congress intended this term to cover the kinds of investment recommendations that are captured by the Fiduciary Proposal, it strains the English language to conclude that this includes a recommendation to roll over, or not to roll over, a plan account, where not a single investment is recommended or even discussed.

  Although SPARK previously shared these concerns in 2020 when the Department withdrew Advisory Opinion 2005-23A and reversed its position on rollover recommendations, we recognize that, if the Department's new-found interpretation is accepted as correct, the Department has already made it possible for rollover recommendations to be treated as fiduciary investment advice when they are made under circumstances in which all of the conditions of the current regulatory five-part test have been satisfied. The current Fiduciary Proposal, however, would have a far more substantial impact on the helpful rollover assistance that recordkeepers currently provide to participants in reliance on their treatment as non-fiduciary activity. That is, under the proposal, one-time recommendations or suggestions regarding rollover options would be treated as

investment advice, even if there is no recommendation of a particular product or service.

This is far different from the Department's current fiduciary interpretations that reserve fiduciary status to rollover recommendation when such recommendations are part of an ongoing advice relationship meeting the five-part test. While we continue to have concerns about the Department's fiduciary interpretations that were included in the preamble to PTE 2020-02, especially those interpretations that have already been rejected by courts, even assuming that those preamble interpretations are correct, the Department's current Fiduciary Proposal would significantly expand the types of communications involving rollovers that would be treated as fiduciary investment advice, including many beneficial forms of rollover assistance that are currently provided in reliance on their treatment as non-fiduciary activity.

- **No Automatic Ongoing Duty to Monitor.** The preamble to the proposal states that it "does not impose on [investment advice fiduciaries] an automatic fiduciary obligation to continue to monitor the investment or the retirement investor's activities to ensure the recommendations remain prudent and appropriate for the plan or IRA. Instead, the obligation to monitor the investment on an ongoing basis would be a function of the reasonable expectations, understandings, arrangements, or agreements of the parties."[10]

  If the Department does not withdraw its current proposal and one-time recommendations may be treated as fiduciary advice, the Department should clarify that for these one-time recommendations, the reasonable expectations, understandings, arrangements, or agreements of the parties typically do not include an ongoing duty to monitor unless the parties expressly agree to such a duty. Otherwise, we are concerned that the Department would conclude that the parties' reasonable expectations always include an ongoing duty to monitor, thereby rendering the quoted preamble interpretation virtually meaningless.

- **Co-Fiduciary Liability.** The Department should clarify that, due to the inadvertent fiduciaries that will be created by the Fiduciary Proposal, the Fiduciary Proposal will not require every fiduciary associated with the plan to continually monitor all others to avoid co-fiduciary liability under ERISA section 405.

- **Recommendations by Discretionary Mangers.** In this letter, we have primarily focused on one way that a person can become a fiduciary under the Department's new test—by making a recommendation that is based on a retirement investor's individual circumstances, that is, clause (c)(1)(ii) of the proposed regulation. But the proposal's test under clause (c)(1)(i) also captures a recommendation of any kind if the person, including through an affiliate, has discretionary authority or control, with respect to purchasing or selling securities or other investment property for the retirement investor. In other words, if a service provider is managing any assets for a retirement investor, regardless of

[10] 88 Fed. Reg. at 75910.

whether the assets are held through a plan or IRA, then *any* recommendation made by that service provider is covered by the test.[11] This is true even if the recommendation relates to plan assets that the person (or its affiliate) is not managing, and this is true even if the recommendation is not personalized in any way and even if there is no expectation it will be relied upon by the retirement investor.

To take a simple example, if a firm that is managing a collective investment trust ("CIT") that is an investment under a 401(k) plan sends its sales team to meet with the plan committee to suggest that the plan add other investments the firm offers, those recommendations, even if not individualized, are covered by the test. Under part (c)(1)(i) of the proposed definition, once a person is a discretionary investment manager in any context for a retirement investor, the definition's facts and circumstance component is no longer relevant. All that is required is that there is a recommendation under (c)(1). Even a non-personalized communication suggesting an investment or investment strategy would be a fiduciary recommendation. This needs to be fixed.

When a firm agrees to manage plan assets, that fiduciary obligation applies only to the assets being managed, consistent with ERISA's instruction that a fiduciary is only a fiduciary "to the extent" the fiduciary has authority or exercises authority. The Department's recent investment duties regulation reiterates this longstanding principle.[12]

Furthermore, any deviation from this fiduciary precept would also be inconsistent with traditional fiduciary norms and the fiduciary frameworks imposed by other regulatory regimes. For example, as the SEC stated in the context of federally-registered investment advisers: "Although all investment advisers owe each of their clients a fiduciary duty under the Advisers Act, that fiduciary duty must be viewed in the context of the agreed-upon scope of the relationship between the adviser and the client. In particular, the specific obligations that flow from the adviser's fiduciary duty depend upon what functions the adviser, as agent, has agreed to assume for the client, its principal."[13] In this regard, the Department's interpretation expressed in clause (c)(1)(i) for discretionary managers may be even more unprecedented than the facts and circumstances interpretation expressed in clause (c)(1)(ii).

V. THE DEPARTMENT SHOULD WITHDRAW ITS PROPOSED AMENDMENTS TO PTE 2020-02

As discussed in earlier sections of this letter, some of SPARK's members have implemented and rely on the current version of PTE 2020-02 in order to provide fiduciary-level advice services in discrete and clearly defined fiduciary relationships. Accordingly, although we believe that PTE 2020-02 could be improved, we appreciate that its general framework currently provides a path

[11] 88 Fed. Reg. at 75901 ("The proposal would broaden this provision by referencing securities or other investment property of the retirement investor, not just an investment through a plan or IRA.").

[12] *See* Labor Reg. § 2550.404a-1(b)(2)(i) (referring to "that portion of the plan portfolio with respect to which the fiduciary has investment duties").

[13] 84 Fed. Reg. 33669, 33672 (July 12, 2019).

forward for financial services firms that wish to provide fiduciary-level investment advice services. We also know, however, that some of our members cannot, or will not, provide fiduciary advice services in reliance on PTE 2020-02. For example, because PTE 2020-02 may only be relied up by broker-dealers, investment advisers, insurance companies, and banks, SPARK's members that are not one of those entities are not eligible to rely on PTE 2020-02. In other cases, some of our members may not wish to implement PTE 2020-02 because its costs outweigh the benefits that could otherwise be derived from the interactions that the exemption would cover.

Regardless of which of these camps any individual SPARK member falls into, there is a collective agreement among our members that the availability of PTE 2020-02, as it currently exists and especially as proposed, should not be used as a justification to inappropriately lower the fiduciary bar. Additionally, even for those firms that have already implemented the current version of PTE 2020-02 for specific advice relationships, such as fiduciary rollover advice, our members are very concerned that their decisions to offer advice in reliance on the revised version of PTE 2020-02 will be much different if the Department finalizes its Fiduciary Proposal.

For example, while the current fiduciary definition permits firms to decide on the specific interactions for which they will implement PTE 2020-02, the Fiduciary Proposal would effectively compel firms to rely on PTE 2020-02 for a much broader array of conversations and interactions that have traditionally not been viewed as fiduciary advice. Moreover, at the same time that the Department is expanding its fiduciary definition and forcing firms to rely on an exemption, it is also amending PTE 2020-02's conditions so that it will be more difficult to implement and there will be a much greater risk that a firm will be disqualified from using the exemption.

For these reasons, we are very concerned that all of the proposed changes to PTE 2020-02 will make it much less likely that any given firm will newly attempt to organize their client interactions to provide fiduciary level advice in reliance on PTE 2020-02. Additionally, even for firms that have already chosen to implement PTE 2020-02 for specific interactions that are currently treated as fiduciary investment advice, the Department's proposed amendments to its fiduciary advice definition and the amendments to PTE 2020-02 will discourage firms from expanding its application. That is, just because a firm has already implemented PTE 2020-02 for certain transactions that are currently treated as fiduciary investment advice does not mean that they will assume fiduciary status and implement PTE 2020-02 in all of the circumstances that would newly be treated as fiduciary investment advice under the Fiduciary Proposal.

Although the SPARK Institute appreciates the improvements reflected in a small subset of the proposed changes to PTE 2020-02, including its helpful changes for pooled plan providers and robo-advice, given our concerns about the Fiduciary Proposal's negative impacts on many beneficial forms of participant and plan sponsor assistance, we believe that the Department should withdraw its proposed amendments to PTE 2020-02 in order to prevent its overall changes from exacerbating the negative consequences that will result from a fiduciary definition that sets the bar too low. Additionally, as discussed in more detail below, we are also very concerned about the workability of some of the proposed amendments to PTE 2020-02, the significant risks and costs that those amendments would create, and the proposed changes that

would greatly expand the circumstances for which a firm could be shut out from relying on the exemption.

A. The Department Should Retain Its Model Language for Fiduciary Acknowledgements

Under the current version of PTE 2020-02, Section II(b)(1) requires Financial Institutions to provide "A written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries under Title I and the Code, as applicable, ***with respect to any fiduciary investment advice*** provided by the Financial Institution or Investment Professional to the Retirement Investor" (emphasis added).[14] Furthermore, as part of the preamble that accompanied the 2020 publication of PTE 2020-02, the Department provided a model fiduciary acknowledgment as an example of language that will satisfy this requirement. Relevantly, the preamble states:

> When we provide investment advice to you regarding your retirement plan account or individual retirement account, we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money creates some conflicts with your interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours.[15]

The text of the current exemption and the accompanying model acknowledgment clearly permit firms to acknowledge fiduciary status *when they provide investment advice*. That is, the current exemption text and model acknowledgement do not categorically state that a firm must acknowledge fiduciary status, without regard to whether and when they provide investment advice now or in the future. Furthermore, the current exemption does not, as the Department indicates in the preamble to its current proposal and in its proposed model acknowledgment, require a fiduciary acknowledgment "with respect to any investment recommendations provided by the Financial Institution or Investment Professional to the Retirement Investor."[16] Such an unconditional fiduciary acknowledgment does not match the functional fiduciary test that is contemplated by ERISA and the Code, and is especially incompatible with the inappropriately low transactional test being proposed by the Department. Also, even under the Department's proposed definition of fiduciary advice, every recommendation to a retirement investor is not fiduciary activity. Accordingly, the Department needs to eliminate its proposed amendments that would require, as a condition for PTE 2020-02, that Investment Professionals and Financial Institutions acknowledge that they are fiduciaries when they make an investment recommendation, regardless of whether a fiduciary investment advice relationship actually exists.

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[14] 85 Fed. Reg. 82798, 82863 (Dec. 18, 2020).

[15] 85 Fed. Reg. at 82827.

[16] 88 Fed. Reg. at 75984.

If, for example, a financial firm must acknowledge that they are a fiduciary, without regard to whether they actually provide fiduciary investment advice, the very act of providing the acknowledgment will make them a fiduciary; not the provision of investment advice. After all, the new test itself makes one a fiduciary by stating fiduciary status. This effectively eliminates the functional test for determining fiduciary status and forces firms who have conversations with retirement investors into fiduciary status, and therefore, into relying on the exemption. Put bluntly, this is a subterfuge for extending fiduciary duties to interactions for which such duties would not otherwise apply in the absence of the required acknowledgement.

In this regard, we are also concerned that this framework will create private rights of action where no such rights currently exist. If a firm must acknowledge fiduciary status in order to use an exemption that may or may not be necessary based on the actual interactions between the firm and its customers, the act of acknowledging fiduciary status will create a private right of action where none currently exists. This could occur, for example, in the ERISA context when a service provider markets a plan to a small employer. While the sales conversation may not actually result in a fiduciary relationship of trust and confidence, and may not even meet the lower standard contemplated by the Department's proposed advice definition, if there is a possibility that the sales conversation could be viewed as meeting the proposed regulatory test, firms will effectively be compelled to acknowledge fiduciary status, regardless of the actual character of the interaction. This is because the transactional facts and circumstance test being proposed by the Department creates too much uncertainty and the risks associated with fiduciary status are too great not to make the acknowledgement as a defensive measure. As soon as the acknowledgment is made, however, the firm that is interacting with the plan sponsor will become a fiduciary subject to ERISA's private right of action. Moreover, beyond the concerning ERISA implications of this acknowledgment, this proposed requirement is even more concerning in the case of state law causes of action that could effectively be created by the fiduciary acknowledgment in the case of interactions with IRA owners.

Given these risks, the proposed amendments to PTE 2020-02's fiduciary acknowledgement will only exacerbate the reduction of beneficial products and services that have traditionally been offered in reliance on their treatment as non-fiduciary activity. This is because, for any interaction between a service provider and a retirement investor that is not unquestionably education under Interpretive Bulletin 96-1 or a generic product description, there is a risk that the interaction will be viewed as fiduciary investment advice. This effectively leaves the regulated community with two choices: (1) stop engaging in these interactions altogether; or (2) accept fiduciary responsibility even when you might not be acting as a fiduciary. We are very concerned that, for many beneficial products and services, recordkeepers and service providers will simply cease to offer them; and for those that remain, retirement investors will be forced to pay more for non-fiduciary services in order to account for the liability that would be created by the acknowledgment.

B. Publicly Posted Disclosures & Expanded Recordkeeping Requirements

Under the current version of PTE 2020-02, Financial Institutions and Investment Professionals are required to make various disclosures to retirement investors, and Financial Institutions are required to maintain records to demonstrate compliance for a period of six years. Additionally,

Financial Institutions are required to make these records available to the Department and the Department of Treasury upon request.

As part of the Fiduciary Proposal, the Department is requesting comments on whether it should require Financial Institutions to maintain a public website containing the pre-transaction disclosure, a description of the Financial Institution's business model, associated Conflicts of Interest (including arrangements that provide Third-Party Payments), and a schedule of typical fees. Additionally, as part of the Fiduciary Proposal, the Department is requesting comments on whether it should amend PTE 2020-02's recordkeeping provisions to allow plans, unions and employee organizations, and participants and beneficiaries to request records that would support reliance on the exemption.

The SPARK Institute opposes both of these potential changes to PTE 2020-02 because they would not meaningfully benefit plans or participants, and would substantially increase litigation risks for any firm that seeks to provide advice in reliance on PTE 2020-02. Over the past decade, retirement plan sponsors and retirement plan service providers have become the targets of a harmful wave of class action litigation. While these lawsuits rarely result in any finding of wrongdoing against plan sponsors and service providers, they are nevertheless costly to defend and act as a drain on the retirement savings system. This harmful litigation has resulted in fewer dollars being available for retirement benefits and increased costs for service providers that are ultimately passed on to plans and participants. If these disclosures, including fee schedules, must be available online and all participants are permitted to request all records maintained to demonstrate compliance, we are very concerned that these rights would only be used by the plaintiff's bar to search for litigation targets. Any information that would otherwise be relevant to a plan's or participant's evaluation of an advice provider is already provided in the disclosures that are currently required under PTE 2020-02 and other disclosures that are required under the Department's existing guidance.

C. In-House Plans

Under the current version of PTE 2020-02, and as proposed, a Financial Institution is not eligible to use PTE 2020-02 if it is the employer of employees covered by the Plan. As a result, Financial Institutions are unable to use PTE 2020-02 to provide advice to their own "in-house" plans and their participants if the advice affects their compensation. In explaining this exclusion in 2020, the Department stated that it is of the view that "employers generally should not be in a position to use their employees' retirement benefits as potential revenue or profit sources, without additional safeguards."[17] Given PTE 2020-02's rigorous disclosures, substantive standards, and penalties for misconduct, we disagree with the Department's assessment that additional safeguards are needed for Financial Institutions that are also a plan's sponsoring employer. Additionally, we are concerned that the retention of PTE 2020-02's exclusion for advice to in-house plans will prevent retirement investors from obtaining products and services that they understand and trust.

[17] 85 Fed. Reg. at 82818.

As discussed earlier in this letter, the Fiduciary Proposal will transform many beneficial forms of participant assistance into fiduciary activity, thereby requiring adherence to an exemption in order to continue providing such assistance. However, if a service provider is not eligible to use PTE 2020-02 because a recommendation is made to an employee in the Financial Institution's own plan, employees participating in these plans will no longer be able to receive these beneficial forms of assistance. As noted above, this problem could extend to recommendations encouraging additional contributions, asset diversification, and the retention of retirement assets in the retirement savings system. We believe that this puts employees in the financial services industry at a disadvantage and unfairly penalizes participants in retirement plans sponsored by recordkeepers, broker-dealers, and other plan service providers. The employees of Financial Institutions should not be completely shut out from these beneficial forms of assistance and Financial Institutions should not be forced to retain third-party vendors when in-house services appropriately serve the interest of their plan and its participants.

D. Expansion and Acceleration of 10-Year Disqualification

Under the current version of PTE 2020-02, Financial Institutions and Investment Professionals are prohibited from relying on the exemption for 10 years if convicted of a crime described in ERISA section 411 arising out of a person's provision of investment advice to Retirement Investors. While PTE 2020-02 currently offers Financial Institutions and Investment Professionals a chance to avoid disqualification by petitioning DOL, this relief is only available if the Department determines, in its sole discretion, that continued reliance on the exemption would not be contrary to the purposes of the exemption.

The SPARK Institute is concerned about the proposed amendments to PTE 2020-02 that would expand the circumstances under which this type of disqualification will occur and limit the circumstances in which a Financial Institution may petition the Department for individual relief. More specifically, we are concerned about the changes that would cause disqualification regardless of whether any misconduct arose in an advice context and cause disqualification in the case of misconduct by Affiliates. Also, we are concerned about the proposed change that would eliminate the ability for Financial Institutions to petition for relief in the case of any U.S. federal or state convictions covered by the rule.

Because the Fiduciary Proposal's expanded definition of investment advice will compel many more firms to use PTE 2020-02 for many more interactions with retirement investors, these proposed changes could effectively halt a Financial Institution's retirement business by eliminating reliance on the exemption for conduct that is completely unrelated to advice to retirement plans or accounts. Moreover, disqualification could occur for conduct that involves a distant corporate affiliate under a large corporate umbrella that is far removed from the portion of the business that actually provides advice to retirement investors. If these changes are adopted, they would introduce new and significant risks for any firm that seeks to rely on the revised version of PTE 2020-02.

Furthermore, when considering the devastating consequences that could result from one of these remote convictions involving an Affiliate, it is very concerning that the Department is eliminating the ability for Financial Institutions to petition for relief in the case of any U.S.

federal or state convictions that are covered by the rule. It is no consolation that the Department might be willing to entertain individual exemptions that would presumably include more restrictive conditions and additional obligations.

In order for financial services firms to commit the resources that are needed to comply with PTE 2020-02, they need to have certainty that the exemption will be available and will not be eliminated by remote events that are unrelated to the transactions that are covered by the exemption. Accordingly, we are concerned that the proposal's eligibility changes discussed in this section of our letter will discourage firms from providing fiduciary level advice in reliance on the exemption.

Furthermore, aside from expanding the events that will result in disqualification and restricting the ability of impacted parties to petition for relief, we are also concerned with how the proposed changes to PTE 2020-02 would cut the wind-down period in half for Financial Institutions and Investment Professionals that are actually disqualified – from one year to six months. Even a one-year wind-down period is incredibly short and, if applicable, would likely result in significant disruption to plans and IRAs that have service providers that provide advice in reliance on PTE 2020-02. If the intent of the Department's changes is to penalize Financial Institutions that are associated with misconduct, it is not clear what purpose is served by accelerating the associated penalty that disqualification also imposes on retirement investors who have hired a disqualified firm.

E. <u>Written Ineligibility Notices</u>

The SPARK Institute also remains very concerned about the Department's recent attempts, through its authority to grant prohibited transaction exemptions, to unilaterally and in its sole discretion disqualify financial services firms from serving retirement plans and accounts by issuing Written Ineligibility Notices. The notion of Written Ineligibility Notices, which is also a key component of the Department's ongoing effort to revise its exemption for qualified professional asset managers ("QPAM"), is concerning because, while providing very little by way of due process, it threatens to shut out financial services firms from being able to serve retirement plans and accounts.

Under the proposed version of PTE 2020-02, the Department, or any of its regional offices, could issue a Written Ineligibility Notice at any time when the Department determines that a Financial Institution or Investment Professional is: (A) engaging in a systematic pattern or practice of violating, or intentionally violating, the conditions of the exemption; (B) engaging in a systematic pattern or practice of failing to correct prohibited transactions; or (C) providing materially misleading information to the Department in connection with the conditions of the exemption.

This process starts with what the Department calls a "written warning," but this is not a warning in the normal sense of the word. If an Investment Professional or Financial Institution does not take what is, in the Department's view, "appropriate action" within six months, the Investment Professional or Financial Institution is only entitled to one chance to be heard, which could be a single telephone call. There is no chance for a hearing before an impartial administrative judge,

no right to a day in court, no chance for appeal, and no formal procedures to present evidence. At the end of this process, the Department may, in its sole discretion, issue a Written Ineligibility Notice that prohibits the Investment Professional or Financial Institution from relying on PTE 2020-02.

While these procedures were similarly concerning when the Department first issued PTE 2020-02, it is even more concerning today given that the Department's proposed definition of fiduciary investment advice will force many more firms into accepting fiduciary status for many more interactions that have traditionally not been viewed as fiduciary activity. Accordingly, we are urging to Department to remove the Written Ineligibility Notice procedures from PTE 2020-02. If the Department does not believe that an Investment Professional or Financial Institution can fulfill its obligations, it should exercise its statutory authority to remove fiduciaries under section 409 and 502 of ERISA, a power that the Department utilizes when necessary.[18] The Department should not be using exemptions to effectively create similar results in contexts that ignore procedural protections that are otherwise available when the Department exercises its authority under ERISA sections 409 and 502.

VI. Effective Date

The Fiduciary Proposal indicates that its changes would become effective 60 days after publication of the final rule. The Fiduciary Proposal also requests comments on whether additional time is needed before the rule becomes applicable.

SPARK's members will undoubtedly need much longer than 60 days in order to understand and comply with any final rule. The current Fiduciary Proposal would impact how businesses are organized, how service providers work with each other to meet the needs of plan sponsors and participants, how representatives are trained and monitored, how individuals and firms are compensated, how products are designed, how firms interact with their clients and customers, and more. Our members will need time understand and implement all of these changes, and then communicate any changes to their customers. Additionally, to the extent that a final rule necessitates new or amended contracts, this will entail an even more challenging timeline, as agreements will need to be renegotiated and executed.

As we pointed out in response to the 2016 Fiduciary Rule, the retirement industry has spent almost 50 years organizing itself around the current definition of fiduciary investment advice. This cannot be undone in just a few months. Accordingly, SPARK is urging the Department not to make the changes in its Fiduciary Proposal effective or applicable any earlier than 36 months after the final rule is published.

On this issue, we strongly urge the Department to consider and learn from the rushed attempt to implement the 2016 Fiduciary Rule roughly one year after it was finalized. That initial deadline ultimately had to be delayed, and even after the rule became applicable following a delay, the

[18] The Department also routinely enters into settlement agreements where one of the conditions is that a person cannot serve as a fiduciary for any ERISA plan for a period of time.

Department's unnecessarily quick implementation period resulted in unnecessary disruption that could have been avoided with an appropriate timeline.

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

Sincerely,

Tim Rouse
Executive Director