The SPARK Institute, Inc.
SHAPING AMERICA'S RETIREMENT

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August 6, 2020

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

Re: Application No. D-12011
Proposed Class Exemption for Investment Advice Fiduciaries &
Preamble Discussion of Five-Part Test for Fiduciary Investment Advice

Dear Sir or Madam:

The SPARK Institute, Inc. appreciates the opportunity to comment on the Department of Labor's ("the Department's") proposed prohibited transaction class exemption for investment advice fiduciaries who: (1) receive reasonable compensation as a result of their advice; and (2) engage in certain principal transactions.

The SPARK Institute supports the Department's efforts to create a workable and flexible exemption that will appropriately permit investment professionals and financial institutions that serve as fiduciaries to receive various forms of compensation, subject to appropriate conditions. We also believe, however, that there are ways in which the Department can improve its proposed exemption to make it even more workable and to add clarity for the investment professionals and financial institutions that will seek to comply with, and rely upon, the exemption.

Notwithstanding the SPARK Institute's general support for the proposed exemption, we are very concerned about the preamble's discussion of the 1975 regulation defining the circumstances under which investment professionals act as investment advice fiduciaries for purposes of the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code ("Code").[1] Specifically, we are concerned that these new interpretations, if not withdrawn or clarified, will create significant uncertainty for service providers and participants, and inappropriately lower the bar for determining when a fiduciary relationship exists based on the provision of investment advice. Collectively, these new interpretations will limit the ability of recordkeepers and other service providers to provide many beneficial forms of non-fiduciary education and assistance to retirement savers. Accordingly, we strongly urge the Department to withdraw the preamble's commentary on the five-part test or clarify its new interpretations in a

[1] Labor Regulation section 2510.3-21(c).

way that is more consistent with the text of the 1975 regulation and the traditional understanding of fiduciary relationships, which require a relationship of trust and confidence.

The SPARK Institute has long believed that 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. Instead, we believe that those interactions are more appropriately governed by a "best interest" standard of care, such as the Securities and Exchange Commission's ("SEC's") Regulation Best Interest ("Reg BI") or the model suitability rule recently adopted by the National Association of Insurance Commissioners ("NAIC").

I. General Support for an Exemption Providing a Path Forward for Advice Providers who Seek Fiduciary Status

With the growth of section 401(k) and other defined contribution plans, and the accumulation of assets rolled over to IRAs, the need for a variety of educational and financial assistance tools for plan participants and IRA owners has grown. As we have detailed in many prior letters, SPARK Institute members offer a variety of fiduciary and non-fiduciary services to address those growing needs. We believe it is critical to foster a variety of educational tools that help participants save effectively and manage their savings before, at, and through retirement.

The SPARK Institute has also long supported and continues to support efforts to create a path forward for those entities that wish to provide investment advice as fiduciaries. Because of ERISA's strict prohibited transaction regime, we believe that a widely available exemption for investment advice fiduciaries will improve outcomes for retirement savers, provided that such exemption allows for a variety of compensation types, supports a variety of products, and is available in a variety of circumstances. We believe that any such exemption should also contain conditions to protect participants, while being administratively feasible. While our comments below urge the Department to make changes to the proposed exemption, at a high level, we believe the proposed exemption uses a framework that will appropriately permit investment professionals and financial institutions to serve as fiduciaries while protecting participants.

In preparing for the application of the Department's 2016 fiduciary rule, many investment professionals and financial institutions newly assumed fiduciary status with the intention of relying on the Best Interest Contract Exemption ("BICE"). However, when the Fifth Circuit Court of Appeals invalidated the Department's 2016 rulemaking, including the BICE, some of those investment professionals and financial institutions were left without an exemption to cover various forms of compensation that they have been receiving in connection with the provision of fiduciary investment advice. We believe that the Department's proposed exemption will help ensure that these investment professionals and financial institutions can continue to operate their revamped approaches to investment advice, notwithstanding the elimination of the BICE. Further, we believe that the Department's proposed exemption appropriately builds on the framework announced in Field Assistance Bulletin ("FAB") 2018-02, while newly offering a permanent solution that provides relief from class action lawsuits, in addition to relief from Department enforcement activity.

We also understand that there are investment professionals and financial institutions who have not previously offered fiduciary-level advice services, but are nevertheless interested in offering such services if the Department makes available an appropriate and workable exemption. The SPARK Institute supports the Department's efforts to make it possible for these firms to provide fiduciary-level advice services in a way that is neutral with respect to the type of investment product that is being recommended and the type of compensation being received.

The SPARK Institute's members run the gamut of financial institutions. Accordingly, we are always focused on giving plan fiduciaries and participants a range of choices and flexibility. We believe the proposed exemption does an excellent job of supporting a variety of investment products. The exemption supports nearly every investment product that is commonly used by investment professionals to build a retirement portfolio during an individual's life, and does not by its terms place its thumb on the scale in favor of one kind of compensation over another. We urge the Department to retain this feature in any final exemption.

II. WAYS TO IMPROVE AND CLARIFY THE DEPARTMENT'S PROPOSED EXEMPTION

Although the SPARK Institute is generally supportive of the Department's proposed exemption and believes that most of the impartial conduct standards, disclosures, and policies and procedures are appropriate and workable,[2] we also believe that certain aspects of the proposed exemption can be improved to make it more workable and to provide clarity for the investment professionals and financial institutions that will seek to rely upon the exemption.

A. Fiduciary Acknowledgment & Private Causes of Action

In describing the condition that would require investment professionals and financial institutions to provide a written acknowledgement of their fiduciary status, the preamble to the proposed exemption explains that, "The Department does not intend the fiduciary acknowledgment or any of the disclosure obligations to create a private right of action as between a Financial Institution or Investment Professional and a Retirement Investor and it does not believe the exemption would do so."[3]

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[2] One concern that we have with the proposed policies and procedures requirement is language in the preamble suggesting that, in order to rely on the proposed exemption, financial institutions and investment professionals that only offer proprietary products and limited menus must compare their products and menus with "other investment alternatives available in the marketplace." 85 Fed. Reg. 40834, 40847 (July 7, 2020). We request that the Department reconsider and remove this language because it would be inconsistent with the SEC's Reg BI. Reg BI does not require broker-dealers that limit their recommendations to proprietary products and limited menus "to conduct an evaluation of every possible alternative, either offered outside of the firm (such as where the firm offers only proprietary or other limited range of products) or available on the firm's platform." 84 Fed. Reg. 33318, 33381 (July 12, 2019). The Department should clarify that its proposed exemption does not require financial institutions and investment professionals to consider investment alternatives in the marketplace for which they cannot make recommendations.

[3] 85 Fed. Reg. 40834, 40844 (July 7, 2020).

The SPARK Institute agrees that a written fiduciary acknowledgment for someone who is already a fiduciary would not, by itself, create a private right of action under ERISA to the extent that an investment advice provider, in fact, provides advice as part of a fiduciary relationship that clearly exists at the time advice is provided. However, because of the Department's new interpretations of the five-part test, especially its treatment of distribution recommendations, we are very concerned that some advice providers may effectively be compelled to acknowledge fiduciary status as a purely defensive measure, even when a fiduciary relationship of trust and confidence does not exist at the time advice is given. This is because the preamble to the proposed exemption indicates that an advice provider's initial recommendation, even when not a fiduciary act when made, can subsequently be viewed as fiduciary investment advice if a fiduciary relationship develops after the initial advice or recommendation. In this context, the proposed condition requiring a written fiduciary acknowledgement may effectively compel advice providers to acknowledge fiduciary status as a defensive measure, even if a fiduciary relationship does not actually exist. Otherwise, the initial recommendation could give rise to a prohibited transaction for which there is no exemption.[4] Contrary to the preamble discussion, this fiduciary acknowledgement would effectively give rise to private rights of action that would not exist in the absence of the exemption.

If the Department does not withdraw or clarify its new interpretations of the five-part test in a way that can provide certainty to investment advice providers and recipients at the time advice is given, the Department should remove the fiduciary acknowledgment condition from its proposed exemption in order to prevent the exemption from creating any new private rights of action, whether such rights are automatically created or effectively created in application.

Additionally, regardless of whether the Department retains the written fiduciary acknowledgment as a condition for its new investment advice exemption, we request that the Department expressly state, in the text of the exemption itself, that the exemption is not intended to create a private right of action that does not already exist under ERISA as between a financial institution or investment professional and a retirement investor. This is particularly important in the context of IRAs, where there is no private cause of action under ERISA. Fiduciary "status" under the Code is a concept used solely for purposes of the excise tax in Code section 4975. Notwithstanding this limited application, we fear that an expression of fiduciary status "for purposes of the Code" might still be attacked by some class action plaintiff firms as creating some sort of obligation or private right of action under state trust law.

[4] Although the proposed exemption would provide broker-dealers, investment advisers, insurance companies, and banks an opportunity to assume these responsibilities as a means to limit prohibited transaction risks in the event that they inadvertently render fiduciary investment advice, the proposed exemption would not offer similar options to recordkeepers who are not otherwise regulated as one of those entities. Accordingly, the Department should consider whether similar relief would be appropriate for recordkeepers that regularly provide services to plans and are acting in a capacity that is not otherwise regulated as a broker-dealer, investment adviser, insurance company, or bank.

B. Avoid Unnecessary Duplication Across Regulatory Regimes

Disclosures. As a condition for the proposed exemption, prior to engaging in a given transaction, a financial institution must provide a written description of the services to be provided and the financial institution's and investment professional's material conflicts of interest. With regard to these disclosures, we request that the Department clarify that these disclosures will be deemed satisfied if a financial institution: (a) provides the disclosures required by Labor Regulation section 2550.408b-2 to a responsible plan fiduciary; or (b) provides a disclosure containing the elements required by the SEC's Form CRS or the Disclosure Obligation under Reg BI,[5] or a similar form or disclosure under banking or insurance law which is intended to describe conflicts of interest to any retirement investor who is a natural person.

Generally. Beyond the exemption's disclosure condition, we also request that the Department recognize and identify additional circumstances under which a financial institution's satisfaction of a separate regulatory standard will be treated as satisfying similar conditions under the Department's proposed exemption for investment advice. Notably, the proposed exemption's conditions requiring financial institutions to implement policies and procedures and conduct a retrospective review appear to borrow heavily from very similar standards that apply to broker-dealers and registered investment advisers under federal securities laws, and insurance companies and agents under state insurance laws. Where the requirements imposed by these existing regulatory regimes are equally protective of the rights of retirement investors, the Department should make clear that the satisfaction of those existing regulatory standards will satisfy the relevant conditions of the Department's exemption for investment advice providers. In this regard, the Department should seek to avoid any unnecessary duplication and confusion that could be created by imposing conditions that are virtually equivalent to alread imposed by existing regulatory regimes.

C. Eligible Financial Institutions

The proposed exemption would, for a period of 10 years, prohibit financial institutions and investment professionals from relying on the proposed exemption if the Department determines that such institutions or professionals: (a) systematically or intentionally violated the conditions of the exemption, or (b) provided materially misleading information to the Department in relation to their conduct under the exemption. According to the proposed exemption, the Director of the Office of Exemption Determinations would have the discretion to determine whether these criteria have been met.

The SPARK Institute is concerned that the Department's proposed exemption does not clearly identify a standard by which the Director of the Office of Exemption Determinations would seek to impose such a ban. Accordingly, if the Department retains this potential penalty in the final exemption, we request that the Department establish detailed and objective criteria by which the Department could impose this penalty and opportunities for *independent* appeal. The financial institutions and investment professionals that will rely on the proposed exemption will invest

[5] 17 C.F.R. section 240.15*l*-1(a)(2)(i).

tremendous resources in developing business models and compliance systems to satisfy the exemption's conditions. Given the potential severity of a 10-year ban, it would not be appropriate for the Department to impose such a ban unless it provides more objective and detailed standards and clear rights for an independent appeal process.

D. FAB 2018-02 – Transition Period Will Be Needed

The Department's proposed exemption would provide permanent relief for firms that have relied on the temporary enforcement policy announced in FAB 2018-02, subject to a series of new conditions. The proposal does not, however, indicate if or when the Department will end the enforcement relief announced in FAB 2018-02.

Assuming that the Department finalizes its proposed investment advice exemption, the Department should provide a reasonable transition period during which investment professionals and financial institutions may continue to rely on the relief described in FAB 2018-02. Although the proposed exemption is, in some ways, intended to align with the standards of conduct imposed on investment advice providers by other regulatory regimes, such as the SEC or state insurance or banking regulators, the exemption's conditions are not identical to those other regulatory regimes, and it will take significant time and resources for investment professionals and financial institutions to develop compliance systems to implement the new exemption. Accordingly, as part of its final exemption, the Department should make clear that the enforcement relief announced in FAB 2018-02 will apply to any conduct that occurred from June 9, 2017 until a date that is at least one year after the effective date of the Department's final exemption.

E. Retrospective Review Should Not Require CEO Certification

In order to qualify for the proposed exemption, a financial institution would be required to conduct a retrospective review, at least annually, to evaluate compliance with the impartial conduct standards and other conditions of the exemption. Financial institutions would further be required to reduce the findings of their review to a written report that is provided to the financial institution's CEO (or equivalent officer) and chief compliance officer ("CCO") (or equivalent officer). Additionally, the CEO (or equivalent officer) would be required to certify that he or she has reviewed the report and that the financial institution has in place policies and procedures reasonably designed to satisfy the exemption's conditions.

The SPARK Institute does not believe that the proposed exemption should condition relief upon a CEO (or equivalent officer) making these certifications. Instead, we believe that the proposed exemption should only require any necessary certifications to be made by a financial institution's CCO (or equivalent officer). CCOs have the expertise and training that is most appropriate for evaluating a financial institution's policies and procedures. CCOs are responsible for overseeing compliance with *all* the laws and regulations that affect the firm, and ensuring that appropriate resources are deployed where needed. CEOs, by comparison, are generally not hired or trained to be experts in regulatory compliance. We see no reason why this one exemption, among all the rules that financial services firms must follow, is so critical that it must occupy the time of a CEO.

III. CONCERNS WITH PREAMBLE COMMENTARY ON 1975 FIVE-PART TEST

We are very concerned about the preamble's discussion of the 1975 five-part test for determining when the provision of investment advice makes a person a fiduciary for purposes of ERISA and the Code. Accordingly, as discussed in more detail below, we strongly urge the Department to withdraw or clarify the preamble's commentary on the five-part test.

According to the Department's 1975 regulation, a person who is not otherwise a fiduciary is deemed to render fiduciary investment advice to an employee benefit plan or IRA, *only if such person*:

1. renders advice to the plan or IRA as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property
2. on a regular basis
3. pursuant to a mutual agreement, arrangement, or understanding with the plan, plan fiduciary or IRA owner that
4. the advice will serve as a primary basis for investment decisions with respect to plan or IRA assets, and that
5. the advice will be individualized based on the particular needs of the plan or IRA.

This standard has, for the last 45 years, 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. This not only reflects congressional intent, but it is also an appropriate threshold for determining fiduciary status under ERISA and the 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 liability through a private right of action under ERISA for breach of fiduciary duty, 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 services industry has been able to develop various non-fiduciary products and services that promote retirement savings and provide other valuable forms of education and assistance to retirement investors. If the Department's newly announced interpretations abruptly lower this threshold in a way that is inconsistent with the text of the five-part test, inconsistent with traditional fiduciary norms, or is otherwise unworkable, such action would threaten the continued availability of many of these beneficial products and services. Moreover, to the extent that the Department asserts that its new interpretations are retroactive, such action would unfairly penalize firms for developing products, services, and business lines in reliance on the Department's longstanding interpretations of the five-part test.

While we appreciate that the Department's proposed exemption, if finalized, would expand the circumstances under which investment professionals and financial institutions will be interested in accepting fiduciary responsibility, there are many investment professionals and financial institutions that will choose not to, or cannot, take on fiduciary status. Accordingly, the Department should not view the potentially broad availability of its proposed exemption as a justification for significantly lowering the bar on the types of communications and relationships that will rise to the level of fiduciary investment advice. Rather, the Department should interpret the five-part test in a manner consistent with its longstanding meaning.

A. Mutual Understanding that Advice Will Serve as a Primary Basis

The preamble to the proposed exemption includes a concerning discussion describing the circumstances under which the Department will typically view the "mutual understanding" and "primary basis" prongs of the five-part test to be satisfied. Relevantly, the preamble states that:

> [T]he Department emphasizes that the five-part test does not look at whether the advice serves as "the" primary basis of investment decisions, but whether it serves as "a" primary basis. When financial service professionals make recommendations to a Retirement Investor, particularly pursuant to a best interest standard such as the one in the SEC's Regulation Best Interest, or another requirement to provide advice based on the individualized needs of the Retirement Investor, the parties typically should reasonably understand that the advice will serve as at least a primary basis for the investment decision.[6]

The SPARK Institute disagrees with this overly broad interpretation and is concerned that this interpretation, if applied literally, would significantly weaken the "mutual understanding" and "primary basis" prongs, if not render them meaningless. For instance, it suggests that a retirement investor may receive recommendations from multiple investment professionals that serve as a "primary basis" for an investment decision, notwithstanding the fact that the word primary means "of first rank, importance, or value."[7] Accordingly, we request that the Department withdraw this interpretation or clarify it in a way that appropriately recognizes *all* of the conditions of the regulatory five-part test.

<u>Mere Recommendations Do Not Satisfy the "Mutual Understanding" and "Primary Basis" Prongs.</u> The above-quoted language indicates that any recommendation by a financial service professional to a retirement investor will typically be treated as satisfying the "mutual understanding" and "primary basis" prongs of the five-part test. This fact is particularly true, according to the preamble, when a financial professional makes a recommendation that is subject to a "best interest" standard of care.

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[6] 85 Fed. Reg. 40834, 40840 (July 7, 2020).

[7] "Primary." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/primary.

We object to this overly broad statement because the text of the 1975 regulation states that fiduciary investment advice is rendered "only if" all five parts of the test are satisfied. Nothing in the 1975 regulation indicates or suggests that the satisfaction of one prong (i.e., the "recommendation" prong) will typically result in the satisfaction of any other prongs (i.e., the "mutual understanding" and "primary basis" prongs). And while the preamble discussion technically leaves open the possibility that a recommendation by a financial professional to a retirement investor might not always satisfy the "mutual understanding" and "primary basis" prongs, the preamble discussion provides no illustration of when that purportedly atypical relationship might occur.

We also object to this overly broad statement because it indicates that any recommendation covered by a separate "best interest" standard of care (e.g., the SEC's Reg BI or a best interest standard imposed by a state insurance regulator) will typically satisfy the "mutual understanding" and "primary basis" prongs of the five-part test. This is very concerning because those separate regulatory standards apply to broker-dealer and insurance agent conversations for which no fiduciary relationship exists or is expected. For example, in establishing its own best interest standard of care, the SEC expressly rejected a fiduciary standard 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.[8]

The five-part test has been in place for nearly 45 years and, at this point, it is not appropriate for the Department to newly suggest that the satisfaction of one prong will typically satisfy two separate and distinct prongs. That presumption is not supported by the text of the regulation itself and the Department cannot simply create such a presumption without amending the regulation in accordance with the Administrative Procedures Act.

We are especially concerned with the above-quoted interpretation as applied to rollover recommendations. While the preamble indicates that recommendations by financial service professionals, other than rollover recommendations, will typically satisfy the "primary basis" prong of the five-part test, it goes even further in the context of rollover recommendations. Specifically, the preamble supplements the above-quoted language by stating that "it is more than reasonable" that an "advice provider would anticipate that advice about rolling over Plan assets would be 'a primary basis for [those] investment decisions.'"[9] Again, this new interpretation is not supported by the text of the five-part test because the 1975 regulation, of course, does not include a carve-out from the "primary basis" test for rollover recommendations.

[8] 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.").

[9] 85 Fed. Reg. 40834, 40839 (July 7, 2020).

Rather, all five parts of the 1975 regulation must be satisfied in order for investment advice to create a fiduciary relationship.

These New Interpretations are Inconsistent with Traditional Fiduciary Norms. We also object to the preamble's overly broad discussion of the "mutual understanding" and "primary basis" prongs because, if retained, those interpretations will generally lower the five-part test to a point where it is no longer consistent with the traditional common law understanding of fiduciary investment advice, which requires a relationship of trust and confidence. Any Department interpretation that conflicts with those fiduciary norms would exceed the Department's interpretive authority because, as the Fifth Circuit recently reaffirmed, Congress intended ERISA's fiduciary provisions to "codif[y] the touchstone of common law fiduciary status – the parties' underlying relationship of trust and confidence . . . ."[10]

Under those traditional fiduciary norms, individualized recommendations, even when made on a "regular basis," do not create a fiduciary relationship, unless there is a relationship of trust and confidence. The "mutual understanding" and "primary basis" prongs of the five-part test are necessary markers for identifying those special relationships because they distinguish non-fiduciary forms of investment assistance from fiduciary-level investment advice. However, in light of the preamble discussion quoted above, we are concerned that the Department's new interpretation could diminish those tests in such a way that the five-part test will apply in situations that are much broader that the common law understanding of fiduciary relationships. That interpretation would not be consistent with the well-established understanding of ERISA's fiduciary provisions and could transform non-fiduciary education and assistance into fiduciary investment advice, in conflict with the Fifth Circuit decision invalidating the Department's 2016 fiduciary rule.

B. "Regular Basis" – Attaching Fiduciary Obligations After Advice is Given

The preamble to the proposed exemption also includes commentary purporting to interpret the "regular basis" prong of the five-part test in a way that is similarly inconsistent with the terms of the five-part test and the traditional common law understanding of fiduciary relationships. As explained below, these new interpretations would create substantial uncertainty and are generally unworkable in the real world. Accordingly, we request that the Department withdraw or clarify these statements to prevent them from improperly recognizing fiduciary relationships where no such relationship exists.

Relevantly, the preamble to the proposed exemption states:

> [A]dvice to roll assets out of the Plan into an IRA where the advice provider will be regularly giving financial advice regarding the IRA in the course of a more lengthy

[10] *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.'").

> financial relationship would be the start of an advice relationship that satisfies the "regular basis" requirement.[11]
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> [T]he regular basis prong of the five-part test would be satisfied when an entity with a pre-existing advice relationship with the Retirement Investor advises the Retirement Investor to roll over assets from a Plan to an IRA. Similarly, for an investment advice provider who establishes a new relationship with a Plan participant and advises a rollover of assets from the Plan to an IRA, the rollover recommendation may be seen as the first step in an ongoing advice relationship that could satisfy the regular basis prong of the five-part test depending on the facts and circumstances.[12]

<u>Advice Following a Pre-Existing Relationship is Not Automatically Provided on a "Regular Basis".</u> The preamble discussion of the "regular basis" prong of the five-part test is inconsistent with the text of the 1975 regulation because it would treat advice providers as satisfying the "regular basis" prong even when advice is not, in fact, provided on a regular basis. Instead, the language quoted above indicates that the "regular basis" prong will be satisfied when advice is provided following a "pre-existing advice relationship." This overly broad statement must be corrected. The five-part test covers advice that is given on a "regular basis"; not advice that is given after "a pre-existing advice relationship."

This is particularly concerning for SPARK Institute members that provide plan services. By definition, a participant has a pre-existing relationship with their plan service provider. The plan's services might have included various forms of advice offerings, which might have involved a third-party financial expert or other computer model or a managed account. It might have included interactive tools that provide "recommendations" which may or may not have been fiduciary in nature. When the participant then seeks assistance regarding the availability of distributions and the possibility of a rollover, apparently any recommendation could trigger fiduciary status, even if the provider never intended or suggested in any way it would provide fiduciary investment advice with respect to the distribution and rollover decision.

<u>Fiduciary Duties Cannot Attach After the Fact.</u> The preamble's interpretation of the "regular basis" prong is also inconsistent with the traditional understanding of fiduciary relationships because it strongly suggests that fiduciary obligations can subsequently attach to advice that is not fiduciary in nature when it is provided. The key to any fiduciary relationship, as discussed throughout this letter, is a relationship of trust and confidence. If such a relationship does not exist at the time advice is provided, fiduciary obligations cannot retroactively apply to such advice after the fact based on how the relationship between the advice provider and recipient develops in the future.

Consider, for example, a provider or adviser who works with small employers when they are establishing and reviewing retirement savings plans for their employees. When initially approaching these employers, the provider or adviser may offer these employers individualized

[11] 85 Fed. Reg. 40834, 40839 (July 7, 2020).

[12] 85 Fed. Reg. 40834, 40840 (July 7, 2020).

lineup recommendations based on what employers of a similar size make available under their plans. According to the above-quoted preamble language, the Department could view these introductory conversations as fiduciary acts, even when no relationship of trust and confidence exists when the provider or adviser initially engages with the employer. In practice, such an interpretation would substantially increase fiduciary risks for providers and advisers and likely cause many of them, in an effort to guard against unnecessary fiduciary risks, to limit a wide range of beneficial information that they would otherwise be willing to share with employers.

C. Rollover Recommendations – Withdrawal of Advisory Opinion 2005-23A

The SPARK Institute is also very concerned with the preamble's announcement that the Department believes the analysis in Advisory Opinion 2005-23A is incorrect and the Department does not intend to apply that analysis. In Advisory Opinion 2005-23A, the Department concluded that a person who is not otherwise a fiduciary does not provide fiduciary investment advice by merely advising a plan participant to take an otherwise permissible plan distribution, even when that advice is combined with a recommendation as to how the distribution should be invested. Advisory Opinion 2005-23A specifically explains that those recommendations are not investment advice under the 1975 regulation because a recommendation to take a distribution is not advice concerning a particular investment, as contemplated by the Department's 1975 investment advice regulation.

<u>The Department's Reversal Threatens Beneficial Forms of Rollover Assistance.</u> The SPARK Institute is concerned with the Department's reversal on distribution and rollover recommendations, especially when viewed together with the preamble's other new interpretations. If an individualized distribution or rollover recommendation by a financial service professional to a retirement investor will typically be understood to serve as a primary basis for the retirement investor's decision, and such recommendation can subsequently be treated as satisfying the "regular basis" prong of the five-part test depending on the relationship that develops in the future, this new analysis creates a significant risk that some of the beneficial rollover services that recordkeepers make available to plan participants will be viewed as fiduciary investment advice.

While some recordkeepers may choose to offer fiduciary-level rollover services and structure such offerings to comply with a prohibited transaction exemption, other service providers will likely determine that any potential benefits created by their existing rollover services are outweighed by the potential fiduciary liability and costs associated with complying with a prohibited transaction exemption. As a result, we are concerned that the Department's reversal on distribution and rollover recommendations is likely to result in a reduction of the beneficial rollover services information, services, and products that are made available by our members. Those products and services are beneficial for retirement savers because they help reduce the problems associated with leakage, missing participants, and abandoned accounts.

<u>The Department's Reversal Creates Uncertainty for Other Types of Recommendations.</u> As discussed above, the analysis in Advisory Opinion 2005-23A hinges on the idea that recommendations and advice regarding a participant's ability to exercise various rights under the plan should not be considered investment advice when there is no accompanying

recommendation or advice regarding specific investments made available through the plan. It is important to reiterate that Advisory Opinion 2005-23A did not say that a rollover recommendation would not result in investment advice. What it said is that the distribution recommendation is not investment advice *with respect to the distributing plan*. Advisory Opinion 2005-23A confirms that investment advice might in fact be provided with respect to the IRA into which a rollover is made, if the five-part test is satisfied. Thus, Advisory Opinion 2005-23A is really making a rather unremarkable point that a recommendation as to whether to take a distribution from a plan might be advice, but it is not *investment* advice.

By withdrawing Advisory Opinion 2005-23A and indicating that distribution recommendations can constitute investment advice, even when there is no reference to specific investments, this new position calls into question the extent to which other types of recommendations that merely advise participants on their rights under the plan can also be treated as fiduciary investment advice, even when there is no reference to any specific investment option made available through a plan. For example, if a recommendation to roll assets out of a plan is necessarily viewed as a recommendation to liquidate or transfer the plan's property interest in the affected assets, then a recommendation to contribute to a plan could similarly be viewed as a recommendation to purchase investment options made available through the plan. And a recommendation discouraging a plan participant from taking pre-retirement withdrawals, in favor of a loan, could be viewed as a recommendation to hold investment options made available through the plan.

These issues were extensively debated during the multiple comment periods in the Department's prior fiduciary rulemaking process. The SPARK Institute and many others pointed out the unintended consequences of the Department's position, including the threats posed to the valuable services that help plan participants save and retain those savings for retirement. The Department tried, to some extent, to protect those valuable services in its final rule and surrounding commentary. For example, the Department addressed recommendations to contribute to a plan in multiple FAQs released after the final 2016 regulation was released.[13] We are very concerned that this work will be undone by the Department's recent pronouncement, without notice and comment, that Advisory Opinion 2005-23A is incorrect and that rollover recommendations are securities 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. It is also very common for members of the SPARK Institute to regularly discourage retirement plan participants from taking pre-retirement withdrawals. 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 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:

[13] U.S. Department of Labor, Conflict of Interest FAQ #2 (Aug. 2017).

"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.

If the Department does not reinstate Advisory Opinion 2005-23A and withdraw its preamble discussion on rollover recommendations, it should expressly clarify that communications encouraging 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 a specific investment product. This guidance should also clearly exclude retirement income estimators and illustrations, even when they are personalized based on an individual retirement investor's information. Similar guidance should also expressly confirm that the same analysis applies to recommendations and tools that discourage plan participants and IRA owners from taking withdrawals from their account, when there is no reference to any specific investment product. Further, such guidance should expressly clarify that this analysis applies even when individualized recommendations are provided by financial services firms to retirement investors on a regular basis pursuant to a mutual agreement, arrangement, or understanding that such recommendations will serve as a primary basis for the participant's decision.

D. New Interpretations Will Limit Beneficial Products and Services

Taken together, the preamble's newly announced interpretations of the five-part test create significant uncertainty for advice providers and lower the bar for fiduciary investment advice in ways that are not supported by the text of the 1975 regulation and are inconsistent with common law understandings of fiduciary relationships. Further, these new interpretations may simply be unworkable in some circumstances. Accordingly, if the Department does not withdraw these interpretations or clarify them in a way that is more consistent with the traditional understanding of the five-part test for fiduciary investment advice, we are very concerned that these new interpretations will limit the ability of recordkeepers and other service providers to make available beneficial products, services, and tools that are currently offered to retirement savers in reliance on the belief that they are not fiduciary-level investment advice.

As discussed above, the preamble discussion of the five-part test would diminish the traditional understanding of the "mutual understanding," "primary basis," and "regular basis prongs" of the five-part test. Thus, if these interpretations are retained, it will be much more difficult, if not impossible in some cases, for recordkeepers and other service providers to distinguish common forms of assistance, which have significant benefits for retirement savers, from the communications and advice that the Department will view as fiduciary investment advice. Given the substantial penalties for fiduciaries who breach those duties and engage in prohibited transactions, we are concerned that recordkeepers and other service providers will conclude that any benefits created by those various forms of investment assistance are outweighed by the new fiduciary risks that would accompany them. The Department's proposed prohibited transaction exemption does not lessen these concerns and should not be viewed as a justification for weakening or reversing these critical distinctions.

For example, consider a recordkeeper campaign to encourage diversification within participant accounts. In such a campaign, which is not uncommon, a recordkeeper might regularly send targeted or individualized communications to participants who are exclusively or heavily invested in employer stock or a single asset class. These types of communications are intended to be recommendations and are designed to trigger a response from participants who may need investment assistance. The preamble discussion indicating that recommendations should typically be understood to serve as at least a primary basis for the retirement investor's decision may cause some service providers to reduce or eliminate these types of services out of a concern that the Department would view this type of assistance as fiduciary investment advice, especially when such communications are sent regularly to retirement investors.

As another example, consider a participant who regularly calls the plan's recordkeeper and asks whether he or she should take a distribution from the plan. If a financial service professional regularly discourages the participant from taking pre-retirement withdrawals, or encourages the participant to take a loan instead of a distribution, the preamble discussion of the five-part test and the Department's withdrawal of Advisory Opinion 2005-23A make it uncertain whether the Department would view these conversations as fiduciary investment advice.

IV. Retroactive Application of New Interpretations Would Create Unfair Surprise

One of the most concerning aspects of the preamble's discussion of the five-part test is the fact that the Department's newly announced interpretations would appear to apply retroactively. For example, unless the Department indicates otherwise, it would appear that the Department intends to analyze all past recordkeeper conversations with plan participants regarding roll over options in accordance with the interpretations discussed in the preamble to the proposed exemption, including conversations that occurred long before the Department ever announced these new positions. This includes the Department's announcement that it will not follow the analysis described in Advisory Opinion 2005-23A.

This retroactive application of these newly announced positions would be very surprising and completely unfair to recordkeepers and other industry service providers who have designed and implemented various products, services, and business lines based on longstanding understandings of the 1975 five-part test. There would be no way to unwind those past transactions now that the Department has announced that it has changed its mind on the types of activities that constitute fiduciary investment advice. Accordingly, if the Department does not withdraw or clarify its new positions on the five-part test, at the very least, it should announce that it will not seek to enforce these new positions retroactively.

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Again, the SPARK Institute appreciates the opportunity to provide comments on the Department's proposed exemption for investment advice fiduciaries. If you have any questions or would like more information regarding this letter, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com).

Sincerely,

Tim Rouse
Executive Director