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March 15, 2017

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

Re: Proposed 60-Day Delay of the Department's Investment Advice Regulation

Dear Sir or Madam:

The SPARK Institute, Inc. is writing to express its support for the Department of Labor's ("the Department's") proposed 60-day delay of the Investment Advice Regulation, which is currently set to become applicable on April 10, 2017.[1] As further explained below, we believe that a delay is warranted because of developments that have transpired since the Investment Advice Regulation's publication last spring. Moreover, in order to allow the Department to conduct a thorough review of the Investment Advice Regulation and to prevent potentially duplicative and unnecessary implementation costs, which will adversely affect plan participants, we encourage the Department to adopt a delay of longer than 60 days.

The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third party administrators, trade clearing firms, and benefits consultants. Collectively, our members serve approximately 85 million employer-sponsored plan participants.

A. A delay is necessary to complete the review ordered by the Presidential Memorandum.

By memorandum to the Secretary of Labor on February 3, 2017, President Donald Trump directed the Department of Labor to examine the Investment Advice Regulation to determine whether the Investment Advice Regulation would adversely impact the ability of Americans to gain access to retirement information and financial advice.[2] The Presidential Memorandum also

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[1] For purposes of this letter, the term "Investment Advice Regulation" refers to 29 C.F.R. § 2510.3-21, as set to become applicable on April 10, 2017, and the new and amended class exemptions released by the Department on April 8, 2016, as corrected by 81 Fed. Reg. 44,773 (July 11, 2016).

[2] Fiduciary Duty Rule Memorandum, 82 Fed. Reg. 9,675 (Feb. 7, 2017) (the "Presidential Memorandum").

directed the Secretary of Labor to prepare an updated economic and legal analysis concerning the likely impact of the Investment Advice Regulation. If the Secretary of Labor determines that the Investment Advice Regulation will adversely affect retirement investors or other Trump Administration priorities, the Presidential Memorandum directs the Secretary of Labor to revise or rescind the Investment Advice Regulation.

SPARK believes that the top-to-bottom review called for by the Presidential Memorandum, if properly conducted, cannot be completed before the Investment Advice Regulation's current April 10, 2017 applicability date. The Presidential Memorandum requires the Secretary of Labor to: (1) review the nearly 300-page Investment Advice Regulation; (2) produce an updated economic and legal analysis; and (3) determine whether the Investment Advice Regulation should be revised or rescinded based on the findings of that review. The outcome of that process has the potential to affect the retirement savings of millions of Americans and should not be rushed.

Further, in response to the Presidential Memorandum, the Department is currently soliciting comments on the issues raised by the Presidential Memorandum and other substantive questions presented in the preamble to the Department's proposed delay. The SPARK Institute plans to provide comments in response to the Department's request, but the deadline for submitting comments on those substantive issues does not close until April 17, 2017 – a full week after the Investment Advice Regulation is currently set to become applicable. If the Department does not delay the Investment Advice Regulation's current applicability date, it cannot meaningfully assess the comments it receives in relation to those important questions.

We encourage the Department to delay the applicability date of the Investment Advice Regulation for as long as it takes to thoroughly review the Investment Advice Regulation in accordance with the directives outlined in the Presidential Memorandum. Without such a delay, the Investment Advice Regulation's unintended consequences – which have already compelled the President to order a comprehensive review and Congress to pass a resolution of disapproval – may affect the delivery of retirement services to millions of American workers and retirees.

B. The Department's Investment Advice Regulation FAQs warrant a delay.

In addition to the need for a thorough review of the Investment Advice Regulation, SPARK also believes that a delay is warranted in order to provide firms affected by the Investment Advice Regulation with an appropriate amount of time to comply with all of the Investment Advice Regulation guidance published by the Department, especially the Investment Advice Regulation FAQs published by the Department on October 26, 2016 and January 13, 2017.[3] That guidance, issued without notice and comment, announced new Department positions and interpretations that were not covered by the Investment Advice Regulation, or the preamble to the final rule, when published in the Federal Register on April 8, 2016.

[3] Department of Labor, Conflict of Interest FAQs (Part I – Exemptions) (Oct. 26, 2016); Department of Labor, Conflict of Interest FAQs (Part II – Rule) (Jan. 13, 2017).

Despite our many concerns with the FAQs, we focus on only one of those FAQs in this letter in order to highlight the need for the Department to reevaluate the Investment Advice Regulation's costs and its risks to Americans' retirement security. While raising our specific concerns with the FAQs below, we must note that it is not clear whether the FAQs correctly interpret the actual terms of the Investment Advice Regulation, whether the FAQs would be afforded any deference by a reviewing court, or whether the FAQs will be retained following the review ordered by the Presidential Memorandum.

Question 10 of the January 13, 2017 FAQs asks whether an employer can recommend that a plan participant increase plan contributions to a suggested percentage of compensation in order to maximize the employer match without being treated as providing fiduciary investment advice. Although the Department's answer to Question 10 says that it would not be fiduciary investment advice for an employer to make such a recommendation, the reason given for the Department's conclusion is that employers generally do not receive fees or other compensation in connection with or as a result of such recommendations.

The implications of FAQ 10, along with related FAQ 9, suggest that it would be fiduciary investment advice for a service provider, retained by the same plan sponsor to do the same work, to make the same recommendation because the service provider was receiving compensation for its services. And this is a critical point. ***FAQ 10 implies that it is fiduciary investment advice for a 401(k) plan's service provider to simply recommend that an individual save for retirement.*** The Department could not have possibly considered this risk to overall savings or retirement preparedness in its economic analysis accompanying the Investment Advice Regulation.

The Department's Investment Advice Regulation FAQs have certainly come much too late to be properly considered and incorporated into the compliance strategies designed by affected firms. As a result of the recently released FAQs, such as FAQ 10, our members have had to quickly reevaluate the Investment Advice Regulation's impact, determine a path forward, and develop a plan to implement those decisions in a way that significantly disrupts previously designed compliance systems. Effectively, the Department's supplemental Investment Advice Regulation FAQs have shortened the Investment Advice Regulation's one-year implementation period to a three-month implementation period. Because of these **changed circumstances**, we believe that the current April 10, 2017 applicability date does not provide firms affected by the Investment Advice Regulation with an appropriate implementation timeline even if no changes are made to the Investment Advice Regulation. The Department should delay the Investment Advice Regulation's applicability date in order to allow affected firms to fully vet and understand all of the Department's guidance on the Investment Advice Regulation.

The Investment Advice Regulation FAQs released by the Department also warrant a delay because it is currently unclear whether, and how, the Department will enforce the substance of those FAQs when, and if, the Investment Advice Regulation eventually becomes applicable. One set of additional FAQs – intended for retirement investors and originally posted on January 13, 2017 – now appears to have been pulled from the Department's website. There is also considerable uncertainty among SPARK members as to whether the Department will release

other FAQs. This uncertainty is yet another reason why the Department should delay the applicability date of the Investment Advice Regulation.

C. A delay is entirely consistent with prior Department implementation timelines for less complex regulations.

In our July 21, 2015 letter regarding the Department's 2015 Investment Advice Regulation proposal, we recommended a three-year implementation period in order to allow firms affected by the Investment Advice Regulation to evaluate the final rule, determine how businesses and strategic partnerships would be reorganized, build information technology systems, train representatives, design compensation arrangements, design products, update education materials, educate customers, and amend or establish contractual agreements with clients, among other compliance activities. Although our members have worked at a feverish pace to actually design compliance systems incorporating each of those elements, we believe that the Department should extend the applicability date in order to allow our members the opportunity to refine their compliance systems over an appropriate implementation timeline (e.g., firms could automate, test, and make their compliance systems more cost-effective).

Consistent with the position expressed in our July 21, 2015 comment letter, we continue to believe that the Investment Advice Regulation's expedited one-year implementation period is not appropriate for a regulatory undertaking of this magnitude and it is not consistent with prior Department implementation timelines:

- When the Department released its updated 408b-2 fee disclosure regulations, the Department provided the industry with **nearly two years** to evaluate and implement those regulations.

- The Department's last significant round of changes to the Form 5500's Schedule C were published on November 16, 2007, and did not apply until the 2009 plan year. Because reporting for the 2009 plan year was generally not required until July of 2010 (or October of 2010 with an extension), the Department effectively gave plans and service providers **nearly three years** to implement the necessary systems.

- The Department's participant fee disclosure (404a-5) regulations were published in October of 2010 with an original effective date of more than 12 months later (the first day of the first plan year beginning on or after November 1, 2011). The Department ultimately delayed the first 404a-5 disclosures until August 30, 2012, as part of a thoughtful regulatory approach to line up the 408b-2 and 404a-5 disclosure regimes, meaning plans had **more than a year and a half** to prepare.

The Department's 408b-2, Schedule C, and 404a-5 regulations were *significantly less complex and less impactful,* by orders of magnitude, than the Department's Investment Advice Regulation, yet the Department gave the industry significantly more time to prepare for all of those regulatory changes. Although our members have worked diligently to prepare for the Investment Advice Regulation's April 10, 2017 applicability date, we believe that the

Department should consider its own precedent from previous rulemakings and issue a delay that would provide firms affected by the Investment Advice Regulation with a more appropriate implementation timeline to refine their compliance systems.

On March 10, 2017, the Department announced that it will provide temporary enforcement relief until June 9, 2017 for financial services institutions affected by the Investment Advice Regulation, in the event that the proposed 60-day delay is not finalized by April 10, 2017, or the Department decides not to delay the applicability date.[4] Although we appreciate the Department's announced enforcement relief, we continue to believe that an actual delay of the Investment Advice Regulation's applicability date is warranted in order to provide an appropriate implementation period for our members. Even with the Department's enforcement relief, our members will still be required to comply with the Investment Advice Regulation's April 10, 2017 applicability date (and the original one-year implementation timeline) in order to protect against *private lawsuits* based on the Investment Advice Regulation's expanded definition of fiduciary investment advice. The Department's enforcement relief cannot eliminate that risk.

D. The Department should seriously consider extending the applicability date beyond June 9, 2017 to avoid regulatory whiplash.

As discussed throughout this letter, SPARK supports the Department's proposed delay of the Investment Advice Regulation's applicability date. In supporting this proposed delay, we find it critical to note that any delay of the Investment Advice Regulation's applicability date must also provide a parallel delay for the Best Interest Contract Exemption's transition period, which is currently set to run from April 10, 2017 to January 1, 2018. By this, we mean that any delay of the Investment Advice Regulation's applicability date must also preserve, or expand, the amount of time between the Investment Advice Regulation's initial applicability date and the last day of the Best Interest Contract Exemption's transition period. For many companies affected by the Investment Advice Regulation, the first day after the expiration of the Best Interest Contract Exemption's transition period is the first day that such companies must fully comply with all of the changes contemplated by the Investment Advice Regulation.

Beyond our support for the proposed 60-day delay, we also believe that the Department should seriously consider extending the Investment Advice Regulation's applicability date beyond 60 days in order to give the Department enough time to thoroughly review the Investment Advice Regulation and to prevent duplicative and unnecessary implementation costs that could result if the Department fails to adopt an adequate delay. Moreover, a longer delay could prevent the Department from having to issue multiple delays in the event that more time is necessary to complete the Department's review of the Investment Advice Regulation. A single delay for an appropriate amount of time would provide greater certainty for firms affected by the Investment Advice Regulation, foster efficiency, and result in a more cost-effective implementation than multiple short delays.

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[4] Field Assistance Bulletin 2017-01 (Mar. 10, 2017).

We believe the Department should issue a delay that is longer than 60 days in order to allow the Department to review and evaluate all of the comments it will receive in relation to the issues raised by the Presidential Memorandum and in response to the Department's questions in the preamble to the proposed delay. The Department has set April 17, 2017 as the deadline for submitting comments on all of those issues. SPARK is concerned that the Department's proposed 60-day delay, which would extend the Investment Advice Regulation's applicability date to June 9, 2017, will only give the Department 53 days to review and respond to all of the comments received by the Department. That 53-day review period is unlikely to give the Department enough time to meaningfully consider all of the comments submitted by interested stakeholders and determine whether the Department should revise or rescind the Investment Advice Regulation. Accordingly, we urge the Department to delay the Investment Advice Regulation's applicability date beyond 60 days.

Additionally, we believe that a 60-day delay of the Investment Advice Regulation's applicability date may lead to duplicative and unnecessary implementation costs if the Department's review leads to the revision or rescission envisioned by the Presidential Memorandum. "Gearing up" for a new regulation's applicability date is expensive and disruptive. It is important to avoid regulatory costs associated with operationalizing two separate and distinct compliance systems – one system based on the Investment Advice Regulation as it is currently drafted, and another system based on the Investment Advice Regulation as it may be amended.

Any costs associated with implementing multiple successive compliance systems, which could result if the Department does not adopt an adequate delay, will be passed on to retirement plans and their participants. The Department's regulatory impact analysis accompanying the proposed delay included "illustrations" intended to estimate the overall effect of the proposed 60-day delay based on figures previously used by the Department to support the final Investment Advice Regulation in 2016. The Department's estimates do not take into account the costs that would result if the Department forces financial institutions to implement multiple successive compliance strategies based on two different sets of rules or multiple short delays. Any regulatory impact analysis associated with the proposed delay must take those potentially significant and unnecessary costs into account. To avoid those costs, SPARK urges the Department to delay the Investment Advice Regulation's applicability date far enough into the future that the Investment Advice Regulation will not become applicable until after a new Secretary of Labor and Assistant Secretary for Employee Benefits Security have been confirmed and given adequate time to determine whether, and how, to modify the Investment Advice Regulation.

Not only would a longer delay minimize implementation costs for our members, it would also prevent serious confusion and disruption for plan sponsors and participants. Assuming that the Investment Advice Regulation will become applicable on April 10, 2017 as drafted, our members will comply with the terms of that rule, and communicate with plan sponsors and participants accordingly. If the Investment Advice Regulation is subsequently revised or rescinded, our members would likely adapt to those changes in a way that could be difficult for

participants and plan sponsors to understand in light of other recent changes. Accordingly, the Department should adopt a delay that is long enough to avoid these unintended consequences.

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The SPARK Institute appreciates the opportunity to provide these comments to the Department. If the Department has any questions or would like more information regarding this letter, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com or 202-347-2210).

Sincerely,

Tim Rouse
Executive Director