Filed electronically at Regulations.gov

September 15, 2017

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712, 11713, 11850
U.S. Department of Labor
200 Constitution Avenue, N.W.
Suite 400
Washington, DC 20210

Re: 18-Month Extension of the Investment Advice Regulation's Transition Period (RIN 1210-AB82)

Dear Sir or Madam:

The SPARK Institute, Inc. is writing to express its strong support for the Department of Labor's ("the Department's") proposed 18-month extension of the Transition Period in the Best Interest Contract Exemption ("BICE") and Principal Transaction Exemption, and its proposed delay of the applicability date for certain amendments to Prohibited Transaction Exemption ("PTE") 84-24 during the same period.

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. SPARK Supports the Proposed 18-Month Extension of the Transition Period

On July 1, 2017, SPARK submitted a comment letter to the Department responding to its recent Request for Information ("RFI") regarding the Investment Advice Regulation. That letter explained in detail why we believe it is appropriate and necessary for the Department to extend the Transition Period currently scheduled to expire on January 1, 2018. We encourage the Department to review that letter (attached) as it considers its current proposal. Nevertheless, we also want to take this opportunity to reiterate some of the most important reasons identified in our previous letter explaining why the proposed extension of the Transition Period is necessary.

- ***Uncertainty Persists.*** The outcome of the Department's presidentially ordered examination of the Investment Advice Regulation is still unknown. Moreover, the Department continues to release intermittent sub-regulatory guidance, while asking the regulated public to comply with its extensive rule. Until we know whether, and how, the

Department intends to revise the Investment Advice Regulation, our implementation efforts are chasing a moving target. The Department should not permit additional portions of the Investment Advice Regulation to go into effect until after the examination is complete and affected firms have adequate time to prepare for any decisions finalized by the Department.

- ***Wasteful and Duplicative Compliance Costs***. The Investment Advice Regulation's new and amended prohibited transaction exemptions contain a number of burdensome provisions that have not yet become applicable and that are currently being reconsidered by the Department. Additionally, the Investment Advice Regulation's changes to the definition of fiduciary investment advice may be amended yet again as a result of the Department's examination.

  In the wake of this uncertainty, the retirement industry has been forced to expend valuable time and resources to prepare for a regulation that may never become fully applicable as currently drafted. Although firms cannot recover expenditures already made to comply with the revised definition of investment advice, which we still urge the Department to amend, a significant extension of the Transition Period can prevent some of our members from devoting further resources to comply with some of the most costly provisions of the new and amended prohibited transaction exemptions that have not yet become applicable. The Department must take steps 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.

- ***SEC Coordination***. Given the significant regulatory overlap between the SEC's current efforts to revise its standards for advisers and brokers, and the Investment Advice Regulation's goal of ensuring that advisers for retirement investors act in their clients' best interest, we support the proposed delay in order to allow the SEC and Department to work together to develop a single standard of care for advisers and brokers that satisfies the needs of both regulators. In order to facilitate that harmonization among regulatory regimes, the Department should extend its current Transition Period set to expire in just a few months.

For the above reasons, we support the Department's proposed 18-month extension of the Investment Advice Regulation's Transition Period. Nevertheless, consistent with our previous recommendations, if the Department releases additional proposed regulations regarding any matters affected by the Investment Advice Regulation, we would of course expect and encourage the Department to propose specific effective/applicability dates for any such provisions and to provide sufficient time for compliance efforts.

B. <u>Support for Extension of the Department's Corresponding Enforcement Relief</u>

The Department's proposed extension of the Transition Period solicits comments on whether the Department should also extend its temporary enforcement policy announced in Field

Assistance Bulletin 2017-02. Pursuant to that policy, the Department has indicated that it will not pursue claims against investment advice fiduciaries "working diligently and in good faith to comply" with the Investment Advice Regulation during the phased implementation.

SPARK strongly supports an extension of the Department's temporary enforcement policy because of all of the uncertainty surrounding the future of the Investment Advice Regulation. The Department's proposal to extend the Transition Period notes that the Department is considering an extension of the Transition Period because it is still not known whether, and to what extent, there will be changes to the Department's interpretation of "investment advice" and the new and revised PTEs. Given this rationale, it simply would not make any sense for the Department to start enforcing portions of a regulation that is actively being reconsidered.

On a related point, we are also asking the Department to confirm that its temporary enforcement policy is available for firms "working diligently and in good faith to comply" *with the provisions of the Investment Advice Regulation that became applicable on June 9, 2017*. Specifically, we are seeking confirmation that relief under the temporary enforcement policy will not consider whether firms affected by the rule are "working diligently and in good faith to comply" with portions of the Investment Advice Regulation that are not yet applicable (such as the parts of the BICE that do not yet apply).

C. Do Not Condition Transition Relief Upon the Satisfaction of Additional Conditions

The Department's proposal to extend the Transition Period solicits comments on whether the Department should condition its extended transition relief upon a Financial Institution taking some action that is not already required for relief under the current Transition Period, like showing or promising that a firm will take steps to harness recent innovations in investment products and services. SPARK strongly opposes any additional conditions for determining eligibility under the extended Transition Period being proposed by the Department.

The circumstances necessitating the existing Transition Period have not changed in any way since its announcement in the spring. The Department has not completed its examination and it has not announced whether, and how, the Investment Advice Regulation will be amended. Until the Department has completed both of those tasks, it should not alter its existing Transition Period rules in any way, other than to extend its expiration. Any contrary decision would result in significant market disruptions, substantial confusion, and would be difficult to monitor and administer.

D. Product Specific Exemptions May Stifle Innovation

The Department's proposal to extend the Investment Advice Regulation's Transition Period references the Department's intention, "in the very near future," to propose a "new and more streamlined class exemption built in large part on recent innovations in the financial services industry." Based on the preamble to the proposed extension and questions posed in the Department's recent RFI, we understand this to mean a streamlined exemption that would be

exclusively available for specific products, like "clean" mutual fund shares or fee-based annuities.

In our view, pursuing *another* proposed exemption is not a good use of the Department's resources at this time; instead, the Department should be focused on completing the review ordered by the President and making appropriate changes to the *current* regulation and exemptions. Accordingly, we urge the Department to put this project aside for now. If the Department continues to pursue a product-specific exemption or exemptions, it must first, before issuing any proposal, perform a detailed cost/benefit analysis to determine whether a product-specific exemption or exemptions would, in fact, have a positive impact on the private retirement system without disproportionately increasing costs.

In addition, because SPARK's membership represents a cross-section of different service providers to the retirement plan market, we are particularly sensitive to product and service model neutrality. As we have expressed in the past, SPARK is concerned that the Department's interest in product-specific exemptions could freeze or stifle innovation in the retirement savings marketplace. Specifically, we are concerned that, if the Department proposes or creates product-specific exemptions, the financial services industry will only develop those products in a manner that closely adheres to the Department's conditions.[1] Although many of our members are interested in developing "clean" mutual fund shares and fee-based annuities, we believe that the market is the best driver of innovation, not a desire for relief from a poorly tailored rule. Moreover, we do not believe it is the Department's place to "put its thumb on the scale" for any particular investment option. Such a result could have negative results for individual investors who benefit most from access to a wide-range of products and services.

* * * * *

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 202-347-2230)

Sincerely,

Tim Rouse
Executive Director

Attachment

---

[1] In addition, our members report that significant questions remain about a number of these specific products, including a number of questions about the SEC's guidance on "clean" mutual fund shares.

Filed electronically at Regulations.gov

July 21, 2017

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

Re: Delay the Investment Advice Regulation's Upcoming Applicability Date

Dear Sir or Madam:

On behalf of the SPARK Institute, Inc., we are writing to express our strong support for a delay of the upcoming January 1, 2018 applicability date for certain provisions of the Department of Labor's ("the Department's") Best Interest Contract Exemption, Principal Transaction Exemption, and Prohibited Transaction Exemption 84-24. ***Specifically, we urge the Department to delay the upcoming applicability date until at least one year after the Department has made a final determination on the future of the Investment Advice Regulation.***

Although we believe the Department should have delayed the applicability date for the entire Investment Advice Regulation[1] until after it completed the review ordered by the President's February 3, 2017 Fiduciary Duty Rule Memorandum ("Presidential Memorandum"), we appreciate the Department's most recent request for information ("RFI") and the Department's willingness to reconsider portions of the Regulation, including the upcoming January 1, 2018 applicability date. As we have expressed in the past, we believe that requiring those that provide investment advice to act as fiduciaries is entirely appropriate, but the imposition of a fiduciary standard of care *in inappropriate circumstances* has already created, and will continue to create, negative unintended consequences for retirement plan sponsors and retirement savers. Those unintended consequences will be particularly harmful to retirement plan sponsors and retirement savers if the Department also does not adopt a prohibited transaction exemption that is less onerous and more cost-effective than the exemption set to become applicable on January 1, 2018.

[1] For purposes of this letter, the term "Investment Advice Regulation" or "Regulation" refers to 29 C.F.R. § 2510.3-21, as currently applicable, 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) and further modified by the Department's 60-day delay regulation published in the Federal Register at 82 Fed. Reg. 16,902 (Apr. 7, 2017).

SPARK has filed a number of comment letters to the Department explaining the ways in which the Investment Advice Regulation should be changed to better support the needs of retirement investors, plan sponsors, and the service providers that make the private retirement system possible. We have also explained why the Department should not rush its efforts to redefine the definition of fiduciary investment advice or to establish new prohibited transaction class exemptions in pursuit of the Department's goal of ensuring that financial advisers act in the best interest of their retirement investor clients. In this letter, however, we will not revisit those broader concerns. Rather, we will focus primarily on the practical challenges that are directly tied to the uncertainty surrounding the Investment Advice Regulation's upcoming January 1, 2018 applicability date and the need to delay the upcoming applicability date until at least one year after the Department has made a final determination on the future of the Investment Advice Regulation.

Urgent Need for A Delay Decision. Before we move on to the merits of delaying the January 1, 2018 applicability date, we must first emphasize the urgent need for the Department to announce as soon as possible whether it intends to delay the Regulation's upcoming applicability date. Firms preparing to comply with the upcoming January 1, 2018 applicability date must currently allocate significant time and resources to ensure that they can comply with any Department mandates, including the Investment Advice Regulation's current provisions. Every day that affected firms are left to question whether the rest of the Regulation will become applicable on January 1, 2018 results in an inefficient allocation of industry resources and potentially wasteful spending to prepare for rule provisions that may never go into effect. This current deployment of resources also means that the benefits associated with any potential delay are diminished every day we get closer to January 1, 2018. For these reasons, we strongly urge the Department to announce whether it intends to delay the January 1, 2018 applicability date as soon as possible.

A. The Uncertain Future Of The Investment Advice Regulation Warrants A Delay

On February 3, 2017, President Trump directed the Department to review the Investment Advice Regulation, to prepare an updated economic and legal analysis, and to determine whether the rule will adversely affect the ability of Americans to gain access to retirement information and financial advice. If the Department concludes that the Investment Advice Regulation will result in any of the adverse consequences contemplated by the Presidential Memorandum, it is ordered to publish a proposed regulation to rescind or revise the rule.

Uncertainty regarding the future of the Investment Advice Regulation persists as the Department continues to conduct the review ordered by the President. This uncertainty stems from the fact that it is not known when such review will be completed and what the results of the review will be. This overall uncertainty also stems from the fact that the Department's position for Assistant Secretary for Employee Benefits Security remains vacant and from the continued release of new guidance that has been published by the Department – most recently, a set of FAQs released in May. Until the uncertainty created by each of these issues can be resolved, the

Department should not permit additional portions of the Investment Advice Regulation to go into effect.

The Department's recent RFI, which is an important step in soliciting information on key issues, has rekindled much of the uncertainty surrounding the Investment Advice Regulation's future. Given this overall uncertainty, and the potential for a complete or partial rescission of the rule pursuant to the instructions provided in the Presidential Memorandum, any decision not to delay the upcoming applicability date until after the Department's review could result in wasteful and unnecessary expenditures by firms preparing to comply with a rule that may never become applicable as drafted. It could also result in confusion for plan sponsors and participants if the Regulation is subsequently revised pursuant to any recommendations resulting from the Department's review.

As evidenced by the Department's RFI and the broad parameters outlined in the Presidential Memorandum, the potential for revisions is much more than wishful thinking from those who have concerns with the Investment Advice Regulation. In fact, based on the parameters described in the Presidential Memorandum, it is hard to imagine that the Department will not find grounds to at least partially modify the Investment Advice Regulation. The Presidential Memorandum directed the Department to revise or rescind the Regulation if it determines that the Regulation is likely to result in (1) a reduction in retirement savings offerings, products, information, and advice; (2) dislocations or disruptions within the retirement services industry; or (3) an increase in litigation and in the prices that retirement investors must pay to gain access to retirement services. As we explained in our comments submitted to the Department on April 17, 2017, the Investment Advice Regulation will continue to negatively impact retirement investors and the retirement industry in the ways contemplated in the Presidential Memorandum unless significant changes are made. For example, in response to the new definition of fiduciary investment advice that became applicable on June 9, 2017, some retirement investors have already been cut off from certain retirement products, offerings, and information. Smaller plans are losing access to information and guidance from their service providers. Also, because of the increased litigation risk associated with the Regulation's provisions set to become applicable on January 1, 2018, this contraction in retirement services will only become worse if the Department fails to delay the upcoming applicability date and materially revise the Regulation.

Until we know whether the Department intends to make changes to avoid the Regulation's negative impacts, and what those changes will be, our implementation efforts will be chasing a moving target. That approach not only results in significant inefficiencies, it also may result in potentially duplicative and unnecessary compliance costs if the Department modifies the Regulation. If the Department is seriously considering ways to reduce those burdens, it must delay the January 1, 2018 applicability date. Otherwise, firms will be forced to continue preparing for a rule that may never go into effect as currently drafted.

B. The Department Should Provide Affected Firms At Least One Year To Prepare For The Regulation After It Makes A Final Determination

Given the uncertainty surrounding the fate of the Investment Advice Regulation, and the likelihood that the Department will propose revisions, we believe that the Department should provide firms affected by the Regulation **at least** one year to prepare for the Regulation after the Department makes a final determination on the Regulation's future. The relationships between separate provisions of the Investment Advice Regulation are complex, overlapping, and dynamic. Even if minor changes are made to what may be perceived as an insignificant provision of the Regulation, those changes will certainly affect how other provisions of the Investment Advice Regulation must be implemented by our members. For example, if the Department makes any of the changes contemplated by its RFI – like adopting a streamlined exemption, expanding or simplifying the exclusion for independent fiduciaries with financial expertise, or clearly indicating that it is not investment advice to recommend that a retirement investor to contribute to a retirement plan – those changes will affect the compliance systems designed to satisfy the Regulation's currently applicable provisions and many of the provisions currently set to become applicable on January 1, 2018. This kind of "ripple" effect could result in significant market disruptions if the Department makes any changes to the rule without also providing an adequate implementation period. Until our members know what the Investment Advice Regulation will say when it becomes fully applicable, it is difficult to prepare for the upcoming January 1, 2018 applicability date. In this case, the path of greatest certainty calls for our members to expand, or finalize, policies that limit offerings, choice, and access to information. Accordingly, the Department should provide an implementation period of at least one year after it has made a final determination on the future of the Investment Advice Regulation.

C. The Department Should Delay The Applicability Date To Prevent Duplicative And Unnecessary Compliance Costs

The signals being sent by the Presidential Memorandum and the Department's RFI strongly suggest that at least some changes will be made to the Investment Advice Regulation. As we have explained in prior comments on the Regulation, an unnecessarily rushed applicability date for a rule that is reasonably expected to change after it becomes applicable results in duplicative and unnecessary implementation costs. It also will likely result in serious confusion for plan sponsors and participants who will need to be educated on the impacts of any versions of the rule that become applicable. If the Department intends to amend the Regulation soon after January 1, 2018, plan sponsors will need to receive new, and potentially conflicting, messages about how the changes to the Regulation will affect the products and services available to them. That confusion should be avoided.

"Gearing up" for a new regulation 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. These unnecessary costs can be avoided if the Department delays the applicability date for the remaining portions of the Regulation until at least one year after the Department has made a final determination on the future of the Investment Advice Regulation. Simply put, it is unfair to ask an entire industry to spend millions of dollars in compliance costs for a regulation that the Department intends to change.

To put this problem in context: One SPARK member, one of the well-known retirement plan providers, told us that ***it expects to spend $35-40 million for the remaining effort to build for the January 1, 2018 requirements***. Another well-known retirement plan provider told us to date, it has spent approximately $20 million to prepare for the Investment Advice Regulation, including compliance, training, and information technology, and, ***unless the Department announces a delay, it will be forced to spend another $8.5 million dollars***. Simply to do the programming to integrate the BICE requirements into its broker/dealer platform is expected to cost the second provider $1 million between now and January 1, 2018.

A one-year delay tied to the Department's final determination on the future of the Investment Advice Regulation would also give firms affected by the Regulation a more appropriate amount of time to comply with any potential changes. In considering a delay for this purpose, the Department must be cognizant of the way in which firms worked to prepare for the Investment Advice Regulation's initial April 10, 2017 applicability date. Firms affected by the Regulation prepared to fully comply with the rule when it was initially rushed to become applicable on April 10, 2017, despite the short implementation period. However, as we have cautioned in the past, this rush to be ready for the April 10, 2017 applicability date required some service providers (a) to prepare compliance systems that were not as efficient or automated as they could have been, and (b) to reduce services or information when the provider could not be certain that the services or information could be offered in a way consistent with the new rules. If the Department revises any portions of the Investment Advice Regulation, it must give affected stakeholders enough time to consider, design, and implement fully automated compliance systems from the beginning. We believe that an implementation period of at least one year from the date any changes are published in final form will be necessary.

D. Delay Is Warranted Because The Provisions Set To Become Applicable On January 1, 2018 Will Significantly Disrupt The Ability Of Retirement Investors To Receive Services

The January 1, 2018 applicability date must be delayed because the provisions that are expected to go into effect on January 1, 2018 have the ability to drastically affect the ability of Americans to obtain retirement information, advice, and other services. The Department's transition rules and accompanying non-enforcement relief have allowed firms affected by the Regulation to currently operate in an environment that does not require them to contractually agree to a series of warranties or to become subject to a private breach of contract action. As we have explained throughout the Department's rulemaking process, the Best Interest Contract warranties and its private right of action severely increase compliance costs and litigation risks for our members. The costs associated with those provisions will impact the products and services made available to retirement investors and will result in many retirement investors being

cut off from valuable retirement information and other services. Strikingly, the severity of the provisions currently set to become applicable on January 1, 2018 is part of the reason why the Department hesitated to have the full Investment Advice Regulation become applicable on June 9, 2017. Also, those provisions were a driving force in causing both houses of Congress to pass a resolution of disapproval attempting to completely rescind the entire Investment Advice Regulation rule prior to its initial April 10, 2017 applicability date. Until the Department has had an opportunity to fully review all of the comments it has received in response to the issues raised in the Presidential Memorandum and the Department's recent RFI, the Department should not permit any new provisions to become applicable.

E. A Delay Is Necessary To Allow The Department And SEC To Coordinate Their Efforts To Establish A Uniform Standard Of Care

On June 1, 2017, Securities and Exchange Commission ("SEC") Chairman Jay Clayton released a public statement expressing his desire to work collaboratively with the Department as the SEC examines and develops its own standards of conduct for investment advisers and broker-dealers. Given the significant regulatory overlap between the SEC's goal of broadly redefining its standards for advisers and brokers, and the Investment Advice Regulation's goal of ensuring that advisers for retirement investors act in the best interest of their clients, we strongly urge the SEC and Department to work together to develop a single standard of care for advisers and brokers that satisfies the needs of both regulators. Accordingly, in order to prevent the provisions of the Investment Advice Regulation set to become applicable on January 1, 2018 from unnecessarily causing further negative consequences and to allow for harmonized rules for affected stakeholders, the Department should delay the applicability date for the Investment Advice Regulation's remaining provisions until after the Department can appropriately coordinate its efforts with the SEC.

* * * * *

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