The SPARK Institute, Inc.
SHAPING AMERICA'S RETIREMENT

March 1, 2019

Ms. Diane Foley
Nevada Secretary of State's Office
Securities Division
2250 Las Vegas Boulevard North, Suite 400
North Las Vegas, NV 89030

Re: Nevada's Proposed Fiduciary Duty Regulations

Dear Ms. Foley:

The SPARK Institute, Inc. is writing to comment on the proposed Fiduciary Duty Regulations published by the Nevada Securities Division on January 18, 2019.

The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third party administrators, trade clearing firms, and benefits consultants. Collectively, our members serve approximately 95 million employer-sponsored plan participants. SPARK's members include broker-dealers, investment advisers, and other companies that have affiliated broker-dealers or investment advisers, or offer the services of an unaffiliated investment adviser to their clients. Our comments reflect our unique perspective as the voice of retirement plan recordkeepers and other key service providers to 401(k), 403(b), 457(b), and other defined contribution plans.

EXECUTIVE SUMMARY

The SPARK Institute has long believed that persons in a position of trust and confidence should be subject to a fiduciary standard of care when providing investment advice to retirement savers.[1] However, notwithstanding this belief, we are very concerned about Nevada's proposed Fiduciary Duty Regulations and the negative unintended consequences that could result if significant changes are not made. As further explained below, we are concerned about Nevada's proposed Fiduciary Duty Regulations for two primary reasons:

- First, the SPARK Institute believes that the fiduciary standard of care applicable to retirement plans and their participants should be established at the federal level, not the state level. Accordingly, we strongly urge Nevada's Securities Division to exclude interactions involving employer-sponsored retirement plans from the scope of its

[1] Unless otherwise noted in this letter, any reference to "retirement savers" includes participants in employer-sponsored retirement plans and IRA owners.

Fiduciary Duty Regulations.

- Second, the SPARK Institute is very concerned that the proposed regulations' definition of "Investment Advice" would inappropriately extend Nevada's fiduciary standard of care and disclosure obligations to cover a wide range of beneficial conversations that our members routinely have with their customers to educate them and encourage them to save for retirement. Unless Nevada significantly amends its proposed regulations to exclude these activities from its definition of Investment Advice, Nevada retirement savers will likely be cut off from these valuable communications or experience increased costs.

Beyond these two primary concerns, our letter also offers a series of recommendations and questions that are informed by our collective experience in providing comments during the rulemaking period for the Department of Labor's ("DOL's") 2016 Fiduciary Rule, which similarly sought to make more interactions with financial professionals subject to a fiduciary standard of care. The SPARK Institute recognizes that Nevada's Financial Planner Law differs from the DOL's rule. However, many of our comments to DOL involved the same issues we see in Nevada's proposed Fiduciary Duty Regulations. In both cases, we particularly want to: (a) ensure that non-fiduciary communications and education do not create fiduciary relationships; and (b) prevent retirement plan participants from losing access to valuable services, tools, and materials. Accordingly, our recommendations are intended to help Nevada's Securities Division avoid some of the negative unintended consequences that would have occurred if DOL's original proposed rule and, to a lesser extent, the final rule had become fully effective – e.g., reduced access to valuable financial education and other communications that have long helped Americans adequately prepare for their financial needs in retirement.

BACKGROUND ON NEVADA'S FINANCIAL PLANNER LAW & SENATE BILL 383

Nevada's Financial Planner Law has long imposed a fiduciary duty on "financial planners" – which are generally defined to include "a[ny] person who for compensation advises others upon the investment of money or upon provision for income to be needed in the future, or who holds himself or herself out as qualified to perform either of these functions."[2] Under this law, financial planners must "make diligent inquiry of each client to ascertain initially, and keep currently informed concerning, the client's financial circumstances and obligations and the client's present and anticipated obligations to and goals for his or her family."[3] Nevada's Financial Planner Law also specifies that "a financial planner shall disclose to a client, at the time advice is given, any gain the financial planner may receive, such as profit or commission, if the advice is followed."[4]

[2] Nev. Rev. Stat. Ann. § 628A.020 and Nev. Rev. Stat. Ann. § 628A.010.

[3] Nev. Rev. Stat. Ann. § 628A.020.

[4] Nev. Rev. Stat. Ann. § 628A.020.

To enforce these duties, Nevada's Financial Planner Law includes a private cause of action that allows clients to recover any economic loss resulting from a financial planner's advice, if the financial planner violated any element of his or her fiduciary duty, was grossly negligent in selecting the course of action advised, or violated any state law in recommending the investment or service.[5]

Until recently, Nevada's Financial Planner Law exempted broker-dealers and investment advisers from its application. In the summer of 2017, however, Nevada enacted a series of amendments known as Senate Bill 383 to eliminate the Financial Planner Law's exemption for broker-dealers and investment advisers. Additionally, Senate Bill 383 included a provision enabling the Nevada Securities Administrator to impose civil penalties of up to $25,000 upon broker-dealers and investment advisers for violations of the fiduciary duty owed to their clients. Senate Bill 383 became effective on July 1, 2017.

On January 18, 2019, Nevada's Securities Division released proposed Fiduciary Duty Regulations interpreting Nevada's Financial Planner Law, as modified by Senate Bill 383.

COMMENTS FROM THE SPARK INSTITUTE

I. Exclude Employer-Sponsored Retirement Plans from Nevada's Fiduciary Duty Regulations

One of the most critical missions of the SPARK Institute is to promote the important and substantial benefits of employer-sponsored retirement plans because those plans play a critical role in helping hardworking Americans retire with the financial security that they deserve. Employees are much more likely to save for retirement when offered a plan by their employer and workplace retirement plans allow employees to tap into lower-cost offerings that would otherwise not be available to them when trying to save through individual retirement savings vehicles. Accordingly, the SPARK Institute opposes any legislative or regulatory action that threatens the current availability or effectiveness of employer-sponsored retirement plans.

Congress chose to recognize, protect, and promote the benefits associated with employer-sponsored retirement plans when it enacted the Employee Retirement Income Security Act of 1974 ("ERISA"). One of ERISA's most important provisions is its broad preemption provision, which generally supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[6] In adopting this sweeping provision, Congress sought to prevent a patchwork system of state regulation for employee benefit plans that could create inefficiencies and potentially cause employers with existing plans to reduce benefits and employers without such a plan to refrain from adopting one. By establishing one set of rules, ERISA makes it easier for multi-state employers to offer retirement plans and significantly reduces the cost and complexity that could otherwise arise if these plans were subject to different and potentially conflicting rules at the state level. It also allows SPARK's members, who provide the vast

[5] Nev. Rev. Stat. Ann. § 628A.030.

[6] ERISA § 514.

majority of recordkeeping and other administrative services to 401(k) and other defined contribution plans, to offer services and plan designs on a nationwide basis, which significantly reduces the cost of offering an employer-sponsored plan. Over the last 45 years, ERISA's broad preemption provision has smoothed the administration of employee benefit plans across state lines, while also providing important protections for individual retirement savers.

Importantly, ERISA defines who is a fiduciary based on the provision of investment advice to a retirement plan or its participants, and it defines the standard of care owed by them. This includes proscriptive rules that limit compensation that could otherwise result from certain types of conflicted advice. Through regulations promulgated under ERISA, DOL has also created a detailed framework of disclosure for investment professionals who work with retirement plans to ensure that any direct or indirect compensation is appropriately disclosed. Finally, ERISA includes a comprehensive remedial scheme to enforce violations. This includes private causes of action that are enforceable through federal courts and other penalties that can be levied by DOL and the Internal Revenue Service ("IRS"). These features not only offer valuable protections for retirement plan sponsors and participants, they also create a national and uniform system for administering employee benefit plans that ultimately makes retirement plans more accessible, more efficient, and less costly for individual retirement savers.

In light of these robust federal standards and ERISA's broad preemption provision, we strongly recommend Nevada's Securities Division exclude interactions involving ERISA-covered retirement plans and their participants from the scope of its Fiduciary Duty Regulations. Failure to exclude these plans and participants raises serious preemption concerns given the wide reach of ERISA's existing fiduciary standards and its broad preemption provision.

More generally, we also recommend Nevada's Securities Division exclude all employer-sponsored retirement plans and participants – including non-ERISA 401, 403(b), and 457(b) plans – from the scope of its Fiduciary Duty Regulations. If Nevada does not exempt all employer-sponsored retirement plans from the scope of its Fiduciary Duty Regulations, it will become more expensive and complex for our members to provide plan administration services to retirement plan sponsors and participants subject to Nevada's investment advice rules. Consequently, this increased cost and complexity could result in Nevadans losing access to the retirement products and services offered by our members, including advice and education services, and more expensive products and services for any Nevadans who will continue to have access. Moreover, the failure to generally exclude employer-sponsored retirement plans from the scope of Nevada's Fiduciary Duty Regulations could dissuade multi-state employers from offering any advice services to their employees because those services could not be provided on a uniform basis to all of their employees. This would not only be a loss for retirement savers in Nevada, but also lead to a reduction in valuable education and advice for retirement savers nationwide.

To take a simple example: The proposed regulations include a disclosure requirement that is overly broad and vague. The proposed regulations would require the disclosure of any "gain," which is defined to include, but not be limited to, a list of items, and would require the calculation of actual dollar amounts. It would appear that this disclosure would be *in addition to* the fee disclosures that are already required to be provided to employers that offer a retirement plan and employees participating in such plans pursuant to a carefully developed set of fee disclosures developed by DOL over multiple administrations. These disclosures include the Schedule C disclosure (which is filed publicly), the 408(b)(2) disclosure (which is provided to employers who engage service providers), and the 404a-5 disclosure (which is provided to employees to allow them to make informed decisions in managing their 401(k) accounts). These disclosures are carefully tailored to their particular audiences, take into account the specific ways in which investment advisers and non-fiduciary service providers are paid, and were developed over many years with significant input from interested stakeholders. Moreover, these disclosures apply nationwide to allow the same information to be available to employers and employees regardless of location. The Securities and Exchange Commission has also confirmed that similar disclosures can be made to non-ERISA plans.[7] To the extent Nevada's law requires disclosures that are different from or in addition to the disclosures required by DOL, they "relate to" an employee benefit plan and are preempted by ERISA.

Other recent state efforts to enhance the standards of care applicable to investment professionals have designed rules consistent with our recommendation to exclude all employer-sponsored retirement plans. For example, in 2018, New York's Department of Financial Services revised its standard of care for insurance producers who recommend life insurance and annuities. Although New York's final regulations adopted a heightened standard of care for those professionals, they also preserved a long-standing provision that exempts transactions involving ERISA-covered plans, as well as non-ERISA 401, 403(b), and 457(b) plans.[8] Nevada should similarly adopt Fiduciary Duty Regulations that clearly exclude all employer-sponsored retirement plans from their scope.

It is important to make clear that current Nevada law and the proposed Fiduciary Duty Regulations do *not* exempt employer-sponsored benefit plans. Nevada's securities laws provide that "an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974" is not itself considered a security.[9] But this is only a partial exemption. First, even though the interest in the plan itself is not a security, 401(k) and similar plans hold underlying investments like mutual funds that are securities. Plan fiduciaries and our service provider members commonly provide education and guidance regarding those underlying securities. Second, the proposed regulations' definition of Investment Advice is, surprisingly, *not limited to recommendations regarding a security*. It includes "recommendations regarding the type of account a client should open," providing "information on a personalized investment strategy," and providing a recommendation on an "investment by comparison to a security." Put bluntly, if a 401(k) provider recommends that an individual "start saving in their 401(k) as soon as possible" that is almost certainly investment advice under Nevada's proposal.

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[7] *See* SEC No-Action Letter, Reference No. 2012127934 (February 18, 2015).

[8] NY DFS Reg § 224.2.

[9] Nev. Rev. Stat. Ann. § 90.295.

II. Preserve and Promote Financial Education and Other Communications Encouraging Nevadans to Save for their Own Retirement

SPARK's members offer a wide array of retirement products and services to their customers. While many of our members do, in some capacity, provide personalized investment advice, many of the products and services that our members have found to be most helpful in preparing their customers for retirement are not typically treated as "investment advice" or securities recommendations under ERISA or the federal securities laws. These products and services include what our members and their customers generally consider to be "financial education" or other communications that encourage retirement savings, without promoting any particular security or investment. This includes, for example: (i) communications encouraging employees to save more for retirement; (ii) communications encouraging employees to take advantage of any available matching contributions; (iii) monitoring services that alert retirement savers about the benefits of diversification; (iv) interactive tools that generate asset allocation models based on participant data like age and expected retirement date; and (v) other products and services that are designed to help employees roll over retirement benefits when switching jobs.

Under the proposed Fiduciary Duty Regulations, Nevada's fiduciary standard of care and disclosure obligations would apply to Investment Advice, which among other activities, would include:

a) Providing advice or a recommendation regarding the buy, hold, or sale of a security to a client;

b) Providing analyses or reports regarding a security to a client;

c) Providing account monitoring for the purpose of potentially recommending a buy, hold, or sale of a security;

d) Providing advice or a recommendation regarding the type of account a client should open;

e) Providing information on a personalized investment strategy;

f) Providing a financial plan that includes consideration of buying, holding, or selling a security;

g) Providing a limited list of securities for consideration by a client or by a limited group of clients that is tailored to the client or group of clients; and

h) Providing information about a security that is not provided in the offering documents or is an opinion regarding the security or its potential performance

As currently drafted, we are very concerned that Nevada's proposed Fiduciary Duty Regulations could inappropriately sweep many of the beneficial conversations our members have with their clients, including some or all of the products and services discussed earlier in the section, under its definition of Investment Advice. In response, our members would likely limit the availability of these communications to retirement savers in Nevada or pass any associated costs onto their customers in Nevada. For example, a communication advising an individual to contribute to their retirement plan or IRA is almost certainly a "recommendation regarding the type of account a client should open." It is also conceivable that those conversations could be treated as a recommendation to buy any underlying securities held through a participant-directed retirement account. Moreover, it is also conceivable that asset allocation models based on an employee's age, intended retirement date, and self-selected risk tolerance could be treated as "information on a personalized investment strategy." Accordingly, we are very concerned that Nevada's proposed Fiduciary Duty Regulations could have a chilling effect on our members' ability to make these important and beneficial tools available to their customers in Nevada, unless significant changes are made. Retirement plan service providers absolutely do not want to cut off beneficial services to Nevadans saving for retirement, but if it means becoming fiduciaries, they will.

Based on our prior dealings with regulators working to craft investment advice standards at the federal level, we encourage Nevada's Securities Division adopt investment advice standards that would achieve all of the following:

- ***Develop a Comprehensive Carve-Out for Education.*** The broad definition of Investment Advice included in Nevada's proposed Fiduciary Duty Regulations is particularly concerning because it does not provide any meaningful carve-out for education. The closest thing to an education carve-out is a provision exempting "general communications," which would operate to exempt the provision of a general investment strategy to the general public. As a condition for this proposed carve-out, the communication could not be targeted to any particular group or individual clients. This limited carve-out fails to exempt a wide range of beneficial communications, including the products and services discussed above, from Nevada's fiduciary duty and its accompanying disclosure obligations. Accordingly, we strongly recommend Nevada adopt a meaningful "education" carve-out that is consistent with the principles discussed below.

  As a model, Nevada should consider excluding from the definition of Investment Advice, any form of education that is not considered to be advice or a securities recommendation under ERISA or the federal securities law. This could, for example, exclude communications that are already excluded from the definition of "advice" or "recommendation" under DOL Interpretive Bulletin 96-1 and FINRA Rule 2111.03.[10]

[10] DOL Interpretive Bulletin 96-1 identifies categories of information and materials – including asset allocation models and interactive tools – that are not considered investment advice under ERISA, as long as certain conditions are satisfied. FINRA Rule 2111.03 describes a series of communications that are not considered to be a securities recommendation, including for example, "Descriptive information about an employer-sponsored

This could also incorporate, in its entirety, the retirement education carve-out that was adopted as part of DOL's 2016 Fiduciary Rule.[11]

- ***Protect Recommendations to Make or Increase Contributions to Retirement Accounts.*** Based on our experience with DOL's now defunct Fiduciary Rule, our members are particularly concerned about any regulatory standard that could make it more difficult for our members to encourage retirement savers to make or increase contributions to retirement accounts. And although Nevada's securities laws exclude retirement plan participation interests from the definition of "security,"[12] we are concerned that language in the proposed Fiduciary Duty Regulations could be interpreted to treat recommendations to make or increase contributions to a retirement plan or IRA as investment advice – e.g., as a recommendation regarding the type of account a client should open or a recommendation to buy the underlying securities made available through a participant-directed retirement plan. Accordingly, we strongly recommend Nevada amend its proposed Fiduciary Duty Regulations to unambiguously make clear that advice or recommendations to make or increase contributions to a retirement plan or IRA are not considered investment advice, unless there is an accompanying recommendation regarding a specific security or securities.[13]

- ***Exclude Valuable Forms of Distribution Advice.*** Nevada's Fiduciary Duty Regulations must also clearly exclude valuable forms of retirement plan distribution advice from its definition of Investment Advice, when there is no accompanying recommendation regarding a specific security or securities. This includes, for example, recommendations made to retirement plan participants about their obligations to take minimum distributions required by the Internal Revenue Code ("RMDs") and communications that explain the benefits of keeping retirement assets within a tax-favored retirement account. As currently drafted, it is not clear whether these communications would be treated as a recommendation to "sell" or "hold" a security, or as "account monitoring for the purpose

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retirement or benefit plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan."

[11] "Information and materials that, without reference to the appropriateness of any individual investment alternative or any individual benefit distribution option for the plan or IRA, or a particular plan participant or beneficiary or IRA owner, describe the terms or operation of the plan or IRA, inform a plan fiduciary, plan participant, beneficiary, or IRA owner about the benefits of plan or IRA participation, the benefits of increasing plan or IRA contributions, the impact of preretirement withdrawals on retirement income, retirement income needs, varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options (e.g., immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distributions, or describe product features, investor rights and obligations, fee and expense information, applicable trading restrictions, investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses of investment alternatives available under the plan or IRA." Former Labor Reg. § 2510.3-21(b)(2)(iv)(A).

[12] *See* Nev. Rev. Stat. Ann. § 90.295 (excluding "an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974" from the definition of "security").

[13] This clarification would be consistent with guidance released by DOL in connection with its 2016 Fiduciary Rule. *See* DOL Fiduciary Rule FAQs, *Recommendations to Contribute to a Plan or IRA* (August 2017).

of potentially recommending a . . . hold or sale of a security," which would otherwise trigger Nevada's fiduciary obligations.

- ***Exclude Rollover Advice.*** Nevada's Fiduciary Duty Regulations should also make clear that recommendations to roll over retirement plan assets to another retirement account are not investment advice, unless there is an accompanying recommendation to buy or sell a specific security or securities. Retirement account distributions that are not rolled over to another retirement account are subject to immediate taxation and potential early withdrawal penalties. These pre-retirement withdrawals and penalties can be especially damaging to an employee's retirement savings and generally should be avoided, except in the case of financial emergencies. Our members often discuss these kinds of distributions with their clients by emphasizing the benefits of keeping retirement assets within tax-favored retirement accounts until such amounts can actually be used for retirement. Without changes to the proposed Fiduciary Duty Regulations, we are concerned that these discussions could, in some circumstances, inappropriately be treated as investment advice. For example, a recommendation to roll over assets from one retirement account to another retirement account in the middle of an employee's career could be viewed as "a recommendation regarding the type of account a client should open."

- ***Exempt Targeted Communications That Are Not Personalized.*** As currently drafted, Nevada's proposed Fiduciary Duty Regulations say that it is not investment advice to provide the general public with a general investment strategy that applies to the general public. This carve-out is far too narrow and should be expanded to cover valuable forms of education and other communications our members provide to encourage greater retirement savings. Accordingly, we recommend that Nevada amend its proposed Fiduciary Duty Regulations to make clear that it is not investment advice to send targeted communications to retirement account holders as long as they are not personalized to a particular individual.

  For example, some of our members send non-personalized communications to retirement savers who do not contribute to their plan, or who only contribute a small percentage of their salary. These communications encourage individual employees to save more for their retirement and are based on general assumptions about the average worker's income replacement needs during retirement. These communications may be targeted to specific groups of participants but they are not personalized to an individual's particular retirement needs or risk tolerance. This type of communication is not sent to the "general public," yet it clearly should not be treated as investment advice.

  As another example, some of our members send non-personalized communications to retirement savers who only invest in one asset class. These communications might provide the recipient with a list of target date funds ("TDFs") available under the plan, and explain that a TDF is designed to provide diversification and age-appropriate allocations within a single fund so that it may be appropriate for someone looking for a simple way to diversify their account with a "one fund" investment approach. These kinds of communications, although not provided to the general public, should not be treated as investment advice, for example under Nevada's proposed rules, as "account monitoring for the purpose of potentially recommending a buy, hold, or sale of a security" or "information about a security that is not provided in the offering documents."

- ***Exclude Recommendations Directed by Plan Sponsors.*** Nevada should also exclude from the definition of Investment Advice communications that are made by a retirement plan service provider to an individual participant when the communication is directed by an employer plan sponsor. In that circumstance, the service provider is only acting as an agent for the plan sponsor ultimately responsible for the administration of the plan.

III. Clarify Whether Plan Sponsors Are "Clients"

Nevada's Financial Planner Law says that "[a] financial planner has a duty of a fiduciary toward a client" and the term "client" is defined to mean "a person who receives advice from a financial planner."[14] Like similar fiduciary standards of care currently under consideration at the state and federal levels, we generally understand that Nevada's efforts have been driven by public policy concerns over the standards of care applicable to investment professionals when working with retail investors.

Nevada's Financial Planner Law and the proposed Fiduciary Duty Regulations are ambiguous on the extent to which retirement plan sponsors, which are generally not considered to be retail investors, are going to be treated as "clients" that could trigger a fiduciary relationship and any accompanying disclosures. Given this ambiguity, the SPARK Institute recommends Nevada expressly exclude retirement plan sponsors from the definition of "client" for purposes of Nevada's Financial Planner Law. Moreover, Nevada should similarly consider whether it is appropriate to exclude additional persons from the definition of its proposed Fiduciary Duty Regulations as institutional or accredited investors. If Nevada does not exempt plan sponsors from this definition of "client" by default, it should at least permit retirement plan sponsors to agree, by contract, to engage with financial professionals without creating the sort of fiduciary relationship described in Nevada's Financial Planner Law (see below for further comments on agreements limiting the scope of any relationship).

IV. Clarify What is Considered "Advice" or a "Recommendation"

As currently drafted, we are concerned that Nevada's proposed Fiduciary Duty Regulations do not adequately define what is considered "advice" or a "recommendation." This is striking given the critical importance that such terms will play in determining whether the fiduciary duty imposed by Nevada's Financial Planner Law will apply. Much of the debate surrounding DOL's Fiduciary Rule focused on drawing lines between those communications and activities that should be considered "advice" or a "recommendation," and those that should not. This debate at the federal level prompted a wide range of views from different stakeholders because different people have different notions of what is meant by the terms "advice" and "recommendation."

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[14] Nev. Rev. Stat. Ann. § 628A.020 and Nev. Rev. Stat. Ann. § 628A.010.

Accordingly, the SPARK Institute strongly recommends Nevada provide a more detailed explanation of the types of activities and communications that would be considered "advice" or a "recommendation." As we repeatedly expressed during DOL's rulemaking process, this sort of line drawing must not jeopardize valuable forms of retirement education and other communications designed to encourage individuals to save for their own retirement.

V. Clarify "Best Interest" Standard

The proposed Fiduciary Duty Regulations say that a broker-dealer or investment adviser breaches his or her fiduciary duty by "recommend[ing] to a client a security or an investment strategy that is not in the client's best interest . . . ." As currently drafted, this language could easily be interpreted to mean that a broker-dealer or investment adviser breaches his or her fiduciary duty when recommending a security or investment strategy that underperforms a comparable security or strategy. Such an interpretation would clearly contradict common law fiduciary norms, which dictate that fiduciaries are to be judged based on their process and the prevailing circumstances at the time of their advice. Put differently, fiduciaries are supposed to be judged on their conduct, not on the actual performance of any recommended investment. This concept of procedural prudence is not clearly expressed in Nevada's proposed "best interest" standard and Nevada should amend its regulations to make clear that its "best interest" standard is a test of fiduciary process, not a performance test judged with the benefits of hindsight.

VI. Limiting the Scope of Any Fiduciary Relationship

In a similar regard, another issue that attracted significant debate during DOL's fiduciary rulemaking revolved around the extent to which investment professionals should be permitted to, by contract, limit the scope of their fiduciary relationship and any potential legal liability that could arise if a client seeks legal remedies against the advice provider – i.e., whether a service provider can disclaim fiduciary responsibility in certain circumstances and whether a client can waive their right to pursue litigation, either individually or as part of a class, or their right to pursue certain types of damages.

We strongly urge Nevada to clarify that service providers can contract with their clients to limit the scope of any fiduciary relationship that would otherwise be created under Nevada's Financial Planner law and to limit potential liabilities. For example, under Nevada's proposed Fiduciary Duty Regulations, broker-dealers would have an ongoing fiduciary duty to their clients unless certain conditions are satisfied. And although this ongoing duty would apply by default, Nevada should make clear that individuals are permitted to define, by contract, the scope of any relationship with a fiduciary.

If Nevada's Fiduciary Duty Regulations treat retirement plan sponsors as "clients" to whom a fiduciary duty is owed, it is especially critical that Nevada allows those plan sponsors to limit the creation of a fiduciary relationship altogether. This will be necessary to prevent plan sponsors from being shut off from important forms of guidance and education that promote plan creation.

VII. Platform Providers Do Not Provide Investment Advice

Nevada’s proposed regulations define Investment Advice to include “providing a limited list of securities for consideration by a client or by a limited group of clients that is tailored to the client or group of clients.” The SPARK Institute is concerned that this definition could inappropriately extend a fiduciary relationship to retirement plan service providers who limit the possible universe of investments available to their retirement clients, or a subset of their retirement clients. Specifically, many 401(k) and 403(b) retirement plan service providers offer a platform of investments from which retirement plan fiduciaries can select the plan’s menu. Even if the platform is not limited to proprietary funds, it may not offer every mutual fund, ETF, or other security available in the market. Under federal standards, putting together a platform of investments that is not tailored to any particular investor is not treated as investment advice or a securities recommendation simply because the platform includes some investments and excludes others. (No one would think, for example, that the New York Stock Exchange is providing investment advice because it allows for the trading of some securities and not others.)

In a similar regard, the SPARK Institute is concerned with the language in Section 8(m) of the proposed Fiduciary Duty Regulations, which indicates that a broker-dealer or investment adviser would breach its fiduciary duty if it “limits the availability of securities to certain clients unless based upon a client’s investment goals, a client’s investment strategy, a firm’s limitation of quantity or type of investment that can be sold to a client, or the security’s own sales limitations.” Like the definition of investment advice, we strongly recommend Nevada eliminate this provision from its Fiduciary Duty Regulations because it could operate to prevent our members from offering limited platforms that do not include all available securities.

These limitations would be particularly harmful for small businesses who want to offer a retirement plan to their employees. Many of our members make available special offerings for small businesses that, by design, limit the universe of investments to a platform that provides employees with the opportunity to create a well-diversified portfolio. Nevada’s proposed Fiduciary Duty Regulations would seemingly treat these limited menu offerings as investment advice and it is unclear whether the proposed regulations would treat these arrangements as a per se breach of that duty in the absence of additional due diligence by any firm making such platforms available.

VIII. Selling Your Own Services Is Not Advice

The proposed Fiduciary Duty Regulations would define Investment Advice to include “recommending a broker-dealer, sales representative, investment adviser, representative of an investment adviser, or financial planner.” As currently drafted, we are concerned that this definition would inappropriately transform routine sales conversations promoting a financial professional’s own services, or the services of his or her firm, into investment advice covered by Nevada’s Fiduciary Duty Regulations. Accordingly, we encourage Nevada to clarify that it is only investment advice to recommend *another person* to be a broker-dealer, sales representative, investment adviser, representative of an investment adviser, or financial planner.

Moreover, even if Nevada clarifies that this part of its investment advice definition excludes recommendations of one's self to provide services, this definition could still operate to limit the availability of certain advice and financial planning services that our members make available to their clients, like managed account services or free financial planning tools. For example, it is common practice for SPARK Institute members to coordinate their technology and other systems with independent third-party investment advisers to offer managed account services to individual retirement plan participants. We are concerned that, under the proposed regulations, ordinary sales conversations promoting the benefits of these products and encouraging participants to use these products could be treated as investment advice subject to Nevada's fiduciary standards and disclosures. If changes are not made, our members could choose to stop promoting these types of products to retirement plan participants in Nevada. To resolve this uncertainty, we encourage Nevada to clarify that it is only investment advice to recommend another financial professional if the person making the recommendation was specifically engaged to make such a recommendation for a fee or other compensation.

IX. Any Final Fiduciary Duty Regulations Should Apply Prospectively and Offer Transition Relief

The changes to Nevada's Financial Planner Law giving rise to the proposed Fiduciary Duty Regulations were signed into law on June 2, 2017 and became effective one month later on July 1, 2017. However, the proposed Fiduciary Duty Regulations do not explain whether Nevada's Fiduciary Duty Regulations will apply prospectively once finalized and whether Nevada will offer a transition period for affected firms that choose to build the systems necessary to comply with any final rules.

The SPARK Institute strongly urges Nevada to make its Fiduciary Duty Regulations prospective only and to offer adequate transition relief. If adequate transition relief is not provided, it is likely that Nevada investors, including retirement savers, will be shut off from beneficial products and services while service providers affected by the rule build systems to comply with the new rules.

Any transition period must provide at least 2 years from the date of any final regulations.

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The SPARK Institute appreciates the opportunity to comment on the proposed Fiduciary Duty Regulations. 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 or 202-347-2230).

Sincerely,

Tim Rouse
Executive Director