The SPARK Institute, Inc.
SHAPING AMERICA'S RETIREMENT

October 1, 2021

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: SEC RFI on Digital Engagement Practices

Dear Ms. Countryman:

On behalf of the SPARK Institute, Inc., we are writing in response to the Securities and Exchange Commission's ("SEC's") request for information ("RFI") on the use of digital engagement practices ("DEPs") by broker-dealers and investment advisers. 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 100 million employer-sponsored plan participants.

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. SPARK's members may be broker-dealers, registered investment advisers, have affiliates that are broker-dealers or investment advisers, or offer services of unaffiliated advisers to their clients. SPARK's members are on the front lines of providing investment education to millions of Americans, especially on the value of saving for retirement in tax-preferred arrangements and growing and preserving those assets for retirement.

SPARK's members have long used DEPs to encourage healthy financial habits. Retirement plan service providers, including recordkeepers, have long used DEPs to encourage retirement savers to adopt healthy financial habits through financial education. This includes, for example, interactive tools and calculators, targeted electronic notifications and messages, and other architectural designs that are intended to encourage workers to: (1) overcome inertia to make the important decision to join a workplace retirement plan or save through an IRA; (2) increase contributions over time to ensure adequate savings in retirement; (3) avoid, where possible, loans and withdrawals, to preserve their retirement assets for retirement; and (4) ensure that their account is adequately diversified among the investment options available in their plan or IRA, to meet their savings horizon, goals, and risk tolerance. In many instances, these DEPs occur as part of educational campaigns and other offerings that are selected and overseen by employers that, as discussed below, are subject to significant federal regulation under the Employee Retirement Income Security Act of 1974 ("ERISA").

Examples of the kinds of tools that are often offered by SPARK's members are:

- **Targeted notifications**. With the approval of the employer, a plan provider may send a targeted email to employees who are eligible for the plan but have not chosen to join. Similarly, a plan provider may send an email to participants on their birthdays encouraging them to make retirement plan contributions, or increase contributions, as they get closer to retirement. Another common targeted notification is for retirement savers who might not be adequately diversified – for example, employees who are very heavily invested in employer stock.
- **Interactive tools**. A plan provider's website might include an interactive tool with a slider to demonstrate the long-term impact of increasing the employee's salary deferral rate. The tool might be integrated with the employer's payroll system so that the employee can easily elect to increase his or her contribution rate.
- **Advice tools**. Many plan providers offer access to third party online advice services, which can provide employees with the ability to obtain advice or management from a registered investment adviser, using easy-to-understand questions to supplement the information from the employer. These tools can be seamlessly integrated with the retirement plan website experience.

SPARK believes that the use of DEPs to encourage the behaviors described above are incredibly helpful for ordinary investors and have helped improve the retirement preparedness of millions of Americans saving through workplace retirement plans and IRAs.[1] In short, SPARK's members have learned from years of working with savers that *these tools work*.

Thus, it is critical that the SEC be thoughtful about approaching any regulation of DEPs to avoid guidance that would adversely affect creative and effective forms of education that are proven to help workers save for their own retirement and develop healthy financial habits. This type of financial education is not only important in the context of workplace savings plans, but also when it is directed towards individuals who save for retirement through an IRA. Although the RFI asks one question about these tools, we do not read the RFI in general as suggesting that the SEC is concerned with the DEPs that support the educational activities described above.

Retirement plan DEPs are well regulated under ERISA. ERISA regulates all aspects of private workplace retirement plans.[2] This includes, for example, the direct and indirect regulation of

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[1] There is research that digital engagement and improved digital design enhances outcomes. For example, one study found that simply improving the design for a retirement plan website leads to an increase in employee contributions. Bhargava, Saurabh, Lynn Conell-Price, Richard T. Mason, and Shlomo Benartzi. "Save(d) by Design," Working Paper, September 2018, referenced in https://www.voya.com/sites/voya.com/files/2020-11/Digital%20Fiduciary%20White%20Paper.PDF.

[2] Although ERISA does not regulate state and local governmental plans, these plans generally use ERISA-compliant services, either because state law imposes similar fiduciary rules or because meeting ERISA-level compliance is a best practice.

plan service providers who might be directed by employers to deploy DEPs to encourage beneficial participant behavior.

ERISA directly regulates retirement plan service providers that use DEPs by imposing fiduciary standards of care on individuals and firms that provide fiduciary investment advice to retirement plan participants. While the DEPs deployed by SPARK's members as recordkeepers are generally designed to be viewed as non-fiduciary financial education, as opposed to fiduciary investment advice, ERISA's fiduciary protections ensure that retirement plan participants are appropriately protected when service provider interactions with plan participants move beyond education and into advice that might be relied upon by those participants.

Department of Labor ("DOL") rules carefully delineate the activities that trigger fiduciary status, and provide examples of activities that are considered investment education.[3] For example, these rules specifically regulate "interactive investment materials" that are provided to participants and which provide a participant the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income. If the SEC intends to regulate DEPs in the future, it should consult with the DOL to ensure that any future SEC guidance does not deter or prohibit the various forms of financial education that have long been used by retirement plan service providers to help get participants on track for a financially secure retirement.

ERISA also indirectly regulates retirement plan service providers that use DEPs by imposing high fiduciary standards of care on retirement plan sponsors when selecting and monitoring plan service providers. This means that plans sponsors must prudently evaluate the services being provided by the plan's vendors and the compensation that will result from the provision of such services. A plan sponsor's failure to satisfy ERISA's fiduciary standards can result in private and DOL enforcement actions.

Unlike most other individual interactions with financial services firms, retirement plan participants typically do not have the ability to actively select one firm or another with respect to their workplace retirement accounts. Instead, service provider selection is generally the responsibility of the employer and any experts they might retain to assist them. And in the vast majority of workplace retirement plans, the employer acting as plan fiduciary selects and monitors the investment menu that is available in the plan. This makes the tools that might be offered under a retirement plan fundamentally different than some of the DEPs that the SEC is examining.[4]

[3] See DOL Interpretive Bulletin 96-1. It is important to keep in mind that when the Obama Administration made changes to the rules governing fiduciary investment advice, the DOL preserved Interpretive Bulletin 96-1 to ensure that critical interactive education tools are not discouraged. It is also important to keep in mind that DOL has interpretive authority over the fiduciary prohibited transaction rules that apply to IRAs through the Internal Revenue Code. Because of this, many service providers deliberately use the same interactive educational materials designed in accordance with Interpretive Bulletin 96-1 when serving participants in workplace retirement plans and IRA owners.

[4] Because of this framework, in most instances, the SEC chose to exclude retirement plan participants from the group of "retail investors" that must receive a Form CRS when newly engaging with broker-dealers and investment advisers through their ordinary participation in workplace retirement plans. We agree with the

SPARK encourages further SEC stakeholder engagement. The SPARK Institute appreciates the fact that the SEC is soliciting stakeholder input on the use of DEPs before publishing guidance on this topic. Unfortunately, the comment period on this RFI is somewhat short, so the goal of our comment letter is to highlight these issues and offer to provide you with further information. As the SEC reviews the comments submitted in response to its RFI, we encourage the SEC to continue to solicit information from the public and DOL on the important benefits that investment education, including education in the form of DEPs, can have for American workers saving for retirement. To the extent that the SEC determines that guidance is necessary for the regulation of DEPs, we ask that the SEC only do so following public notice and an appropriate opportunity for comment. We believe that such a process is critical to ensuring that any future SEC guidance does not unnecessarily disrupt the important financial education services that SPARK's members make available to their customers and clients.

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If the SEC 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

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distinction recognized in the SEC's Form CRS delivery requirements and encourage the SEC to ensure that this distinction is retained in any potential future guidance focusing on DEPs used by broker-dealers and investment advisers.