October 10, 2023

Delivered via email

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

Re: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (File Number S7–12–23)

Dear Ms. Countryman:

On behalf of the SPARK Institute, Inc., we are writing to express strong concerns with the Securities and Exchange Commission's ("SEC's") proposal entitled "Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers" (the "Proposal"). As explained in more detail below, the Proposal will negatively impact a variety of powerful tools and guidance that SPARK members make available to Americans saving in 401(k), 403(b) and 457(b) retirement plans (collectively, "defined contribution plans"). These tools encourage, among other things, savings and proper investment asset diversification, and the result of the Proposal will be that Americans are less prepared for their retirement. In addition, because of the expansive scope of the tools, programs, guidance, and even spreadsheets that the Proposal covers, SPARK members that provide recordkeeping and other services to defined contribution plans but also happen to be regulated (or have an affiliate that is regulated) as an investment adviser or broker-dealer, will be required to undertake a massive compliance effort simply to identify the tools and guidance that could be impacted.

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 more than 110 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 guidance, tools, and 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.

We were pleased to provide our perspective on these tools in response to the SEC's request for information in 2021 on the use of digital engagement practices ("DEPs") by broker-dealers and investment advisers.[1] In our 2021 letter, we explained the ways in which SPARK members use DEPs to encourage healthy financial habits. The key point in our letter was 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. Our view is informed by our research that has shown that participants consistently want and need financial assistance.

We were thus very disappointed to read the Proposal, as it will definitely negatively impact many of the DEPs that we described in our 2021 letter. The Proposal is not the kind of thoughtful approach we were hoping to see when we responded to the SEC's request for information in 2021. This is particularly concerning given the many other proposals that the SEC has released, requesting interested parties to provide, with very short notice, comments on expansive proposals.

We recommend that the SEC withdraw the Proposal so it can reconsider the very broad impact and more narrowly tailor the Proposal. If the SEC decides to move forward, the Proposal needs to be significantly modified so that it does not negatively impact the very important tools and financial education that retirement plans provide to employees to help them save for their future. Our concerns in this regard are particularly acute in the case of lower-income investors who cannot afford the types of personal advice services that are available to wealthier Americans.

Background

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:

- **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

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[1] *See* the SPARK Institute's Response to the SEC's RFI on Digital Engagement Practices (Oct. 1, 2021), available at https://www.sec.gov/comments/s7-10-21/s71021-9315812-260048.pdf.

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. Another very common tool is a retirement income estimator.

- **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.
- **Targeted notifications**. With the approval of the employer, a plan provider might 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 birthday 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.

SPARK believes that the use of DEPs to encourage the behaviors described above are incredibly helpful for ordinary investors and they have helped to improve the retirement preparedness of millions of Americans saving through workplace retirement plans and IRAs.[2] In short, SPARK's members have learned from years of working with savers that *these tools work*.

Retirement plan DEPs are well-regulated under ERISA. ERISA regulates all aspects of private workplace retirement plans.[3] This includes, for example, the direct and indirect regulation of 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.[4] 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 adequately protected when service provider interactions with plan participants moves beyond education and into advice that might be relied upon by those participants.

[2] 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.

[3] 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.

[4] 29 C.F.R. 2510.3-21.

Department of Labor ("DOL") rules carefully delineate the activities that trigger fiduciary status and provide examples of activities that are considered investment education.[5] 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.

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 plan 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.[6] Instead, service provider selection is generally the responsibility of employers 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 what the SEC is attempting to regulate with the Proposal.

The Proposal is Overbroad

The Proposal applies to any "analytical, technological, or computational function, algorithm, model, correlation matrix, or similar method or process that optimizes for, predicts, guides, forecasts, or directs investment-related behaviors or outcomes." The scope of this definition is breathtaking. In the proposing release, the SEC admits that this definition could apply even to ordinary spreadsheets to the extent that they have any predictive function, or will be used to direct the behavior of an investor. In our estimation, nearly every *useful* tool that is offered to plan participants that is interactive in any way, could meet this definition. This includes tools to encourage participants to save a sufficient amount, or to adequately diversify a participant's account, or to avoid unnecessary distributions. In short, nearly every technological tool that

[5] *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 Internal Revenue Code Section 4975. 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.

[6] 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 distinction recognized in the SEC's Form CRS delivery requirements.

SPARK members offer to employers to help their employees is potentially impacted by the Proposal.[7]

Take a simple example. Many employers offer matching contributions; in that case a participant needs to save a certain percentage of his or her salary to receive the matching contribution—failure to do so is giving away free money (not considering subsequent account performance). Employers commonly deploy simple calculators on the plan's dedicated web page that shows a participant how to save a sufficient percentage of his or her salary to receive the full matching contribution. These tools often show how much of a difference this would make in assets in retirement. Such a tool is clearly contemplated by the Proposal because it is a **"computational function" that "guides…investment-related behaviors or outcomes."**

Take another example. Under the SECURE Act of 2019, ERISA-governed plans must provide participants, at least once a year, an estimate of the amount of income that the participant's account balance might generate in retirement. This calculation is made pursuant to DOL's regulations,[8] and is often prepared for the plan fiduciary by a SPARK member. The DOL itself believes that one of the key benefits of the disclosure is to strengthen retirement security "by encouraging those currently contributing too little to increase their plan contributions."[9] Thus, this fairly simple calculation, which is *required* by ERISA, would be subject to the Proposal because it is an analytical tool that could influence investment behavior.

Throughout a participant's lifecycle, providers aim to personalize the participant experience with the goal of helping them meet their retirement goals. Examples include the presentation of an automatic enrollment default rate based on a participant's age (higher rate for older participants) and a Roth vs non-Roth automatic enrollment default rate based on a participant's age. Any restrictions around this experience may have a significant negative outcome for a participant.

Based on conversations we have had with SPARK members, we believe that the expansive scope of the Proposal could potentially impact thousands of covered technologies within a particular firm, all of which need to be identified, tested, (potentially) modified to reflect the Proposal, and subjected to ongoing scrutiny. The costs of such a project are almost impossible to estimate, but are inarguably massive. Many of these technologies present no conflicts at all, but, assuming the technology is used in an "investor interaction," then such technology nonetheless must be inventoried and evaluated, without any clear basis for requiring such cost and work. On its face, there is no meaningful attempt in the Proposal to estimate the costs of that review, and certainly no proof it could possibly justify any benefits the SEC believes it might generate.

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[7] Many of the tools that are captured by the proposal are deployed by the plan sponsor, or may be offered by an entity that is not an investment adviser or broker/dealer. As a practical matter, however, if a firm has an investment adviser or broker/dealer affiliate, it will be compelled to apply the SEC's rule to all of its tools.

[8] Pension Benefit Statements—Lifetime Income Illustrations, Interim Final Rule, 85 Fed. Reg. 59132 (Sept. 18, 2020).

[9] *See* EBSA Fact Sheet, Pension Benefit Statements – Lifetime Income Illustrations (Aug. 18, 2020), available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/pension-benefit-statements-lifetime-income-illustrations.

Eliminating All Conflicts is Not Workable

Under the Proposal, every single conflict that is identified with respect to a covered technology must be eliminated or neutralized. This is a fundamental flaw with the Proposal, at least as applied to the thousands of tools that SPARK members make available to employers. This is because the vast majority of those tools are intended to help employees better prepare for retirement, which means helping employees understand (a) the amount they need to save, (b) the importance of keeping those savings in the retirement system, (c) the importance of being adequately diversified in their account, and (d) how to manage those assets in retirement. Almost all of those tools, when successful, increase the amount of savings an employee will have and preserve those savings for longer—which is a conflict for the plan's service provider. Whether the provider is paid based on a per account charge, or based on assets in the plan, or a combination, it benefits the provider when employees save more in the plan and prevent them from leaking out of the retirement system.[10] Eliminating or neutralizing means modifying the tool to prevent that benefit, which will result in less savings.

It is important to emphasize again that, with respect to the tools discussed in our comment letter, in the vast majority of workplace retirement plans, the employer, acting as plan fiduciary, oversees the service provider and any technologies deployed with respect to plan participants. The plan fiduciary is perfectly capable of understanding that these tools may have the effect of increasing the compensation to the plan service provider and overseeing these tools appropriately. The "conflict," to the extent this scenario can be called such, is obvious, and not at all harmful to plan participants. In any event, the SEC routinely allows all manner of conflicts to be addressed through disclosure.

The Proposal Confuses Fiduciary and Non-Fiduciary Tools

Another fundamental flaw with the Proposal is that, because of its broad scope, it impacts tools that are not considered to provide fiduciary investment advice with respect to plans. As noted earlier, DOL rules carefully delineate the activities that trigger fiduciary status and provide examples of activities that are considered investment education. 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 potential impact of different asset allocations on retirement income. Most of the tools described in this letter are *not* considered to provide fiduciary investment advice under DOL rules.

But these tools *are* captured by the Proposal, including *any* analytical tool that might better educate a participant about the plan, the value of compounding, general investment principles, or retirement income. Thus, we strongly urge the SEC, before finalizing the Proposal, to consult with DOL to ensure the SEC does not deter or prohibit the various forms of financial education that have long been used by retirement plan service providers to help participants stay on track for a financially secure retirement.

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[10] The proposing release specifically states that a conflict could exist *irrespective* of whether the action is in the best interest of the investor. *See* 88 Fed. Reg. at 53982, n.159.

In the proposing release, the SEC asks whether the requirement to eliminate or neutralize conflicts should be limited to "investor interactions involving, as applicable, investment advice or recommendations."[11] In the context of retirement plans, any conflict of interest rule should be limited to circumstances in which the investment adviser or broker-dealer is acting as an investment advice fiduciary under ERISA or similar state law.

Even where the tool provides actual investment recommendations, the Proposal may nonetheless still be inappropriate. For example, a common service that many SPARK members provide is a "SunAmerica model" in-plan investment advice service. The name derives from a DOL Advisory Opinion issued to SunAmerica Retirement Markets.[12] Under this model, a service provider will offer advice or a managed account that uses a computer model developed and managed by an independent financial expert. Although a registered investment adviser and affiliate of the service provider is offering the model to plan participants, because the algorithm is developed and managed solely by an independent financial expert, the DOL has ruled that the service provider is not violating ERISA's conflict of interest rules. This is a very common service offered to plan participants, which has resulted in many Americans having access to advisory services they otherwise could not afford. It would, however, appear to be negatively impacted by the Proposal. We have significant concerns that the Proposal, if finalized without significant changes, would cause fewer defined contribution providers to offer this highly successful advice model that has already been constructed to mitigate conflict of interest concerns.

SEC Should Withdraw

We believe that the SEC should withdraw the Proposal. This clearly requires much more study, with a focus on emerging AI technologies that present a new and meaningful concern, not longstanding tools and guidance that have been a cornerstone of saving and investing in defined contribution plans.

At a minimum, any rule should be narrowed to artificial intelligence and not broadly apply to any technology being used. In addition, any rule:

- would need to be carefully coordinated with existing DOL guidance on non-fiduciary educational tools;
- should exempt any technology overseen by a plan sponsor or other plan fiduciary;
- should clearly and unambiguously exclude any technology not being offered as part of an entity's role as an investment adviser or broker-dealer;
- should be limited to technology used to make fiduciary investment recommendations; and
- should not apply to tools that simply assist a plan participant in determining the appropriate amount to contribute to a plan, assist in estimating lifetime income needs, or assist the participant in achieving overall financial wellness.

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[11] *See* 88 Fed. Reg. at 53989.

[12] Advisory Opinion 2001-09A (Dec. 14, 2001), available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2001-09a.

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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