August 7, 2018

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: The SEC's Proposed Regulation Best Interest, Form CRS Relationship Summary, and Interpretation Regarding Standards of Conduct for Investment Advisers

Dear Mr. Fields:

The SPARK Institute, Inc. is writing in **strong support** of the Securities and Exchange Commission's ("SEC's") regulatory proposal published in the Federal Register on May 9, 2018, including the: (a) proposed Regulation Best Interest;[1] (b) proposed Form CRS Relationship Summary;[2] and (c) proposed interpretation regarding standards of conduct for investment advisers[3] (collectively the "SEC's Proposal"). The SPARK Institute has long believed that investment professionals should be required to act in the best interest of retirement investors when making recommendations to retail customers investing through retirement accounts.

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. 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 subject to proposed Regulation Best Interest or registered investment advisers, have affiliates that are broker-dealers or investment advisers, or offer the services of an unaffiliated adviser to their clients. Other SPARK members offer technology solutions that could be impacted by the SEC's Proposal.

SPARK is very pleased that the SEC, as the primary regulator of the nation's securities markets, has taken the lead on developing investment advice standards for retail investors. The SEC's actions, as evidenced by the numerous cross references in the preamble to the SEC's Proposal, pick up on the efforts that led to the Department of Labor's ("DOL's") 2016 Fiduciary

[1] 83 Fed. Reg. 21574 (May 9, 2018).

[2] 83 Fed. Reg. 21416 (May 9, 2018).

[3] 83 Fed. Reg. 21203 (May 9, 2018).

Rule recently vacated by the United States Court of Appeals for the Fifth Circuit. While we continue to believe that the SEC should be the primary regulator of investment advice standards for retail investors, we also encourage the SEC to be mindful of the investment advice standards of care already applicable to employee benefit plans under the Employee Retirement Income Security Act ("ERISA") and to coordinate with DOL, as necessary, to ensure that the SEC's updated standards of conduct do not conflict with ERISA.

I. BACKGROUND

Most modern defined contribution retirement plans are "participant-directed," meaning that individual employees (participants) have the right to direct the investment of their account, usually from a menu of investments pre-selected by the employer (plan sponsor), who serves as a fiduciary. Broker-dealers, registered investment advisers, and their associated persons and representatives, generally interact with defined contribution plans in one of three ways. First, they interact with the plan sponsor in setting up the plan or determining the plan's investment menu. Second, they assist plan participants in deciding how to allocate their accounts among available investments. Third, they assist plan participants who terminate employment and wish to roll over their accounts to an IRA or another employer's plan.

Some of these interactions involve securities recommendations, but often they do not. SPARK's members are on the front lines of providing investment education to millions of Americans, especially on the value in general of saving for retirement in tax-preferred arrangements and growing and preserving those assets for retirement.

II. REGULATION BEST INTEREST

Notwithstanding SPARK's overall support for the SEC's Proposal, we believe that there are specific areas of the SEC's Proposal, including the proposed Regulation Best Interest, that require further clarification and consideration by the SEC. With regard to Regulation Best Interest, SPARK urges the SEC to clarify the extent to which Regulation Best Interest will apply to participants in employer-sponsored retirement plans and retirement plan representatives, to carve out beneficial conversations between broker-dealers and retirement investors, and provide additional clarification on the proposed Conflict of Interest Obligations, especially in the case of rollover recommendations and broker-dealers who only recommend proprietary products or offer a limited menu of investment alternatives that may include proprietary or affiliated products.

a. Clarify Whether Regulation Best Interest Applies to Recommendations to Participants in All Employer-Sponsored Retirement Plans

The preamble to Regulation Best Interest indicates that Regulation Best Interest is intended to apply when broker-dealers make recommendations to "participants in ERISA-covered plans and IRAs."[4] We have interpreted this to include securities recommendations regarding rollovers and investment allocation within a defined contribution retirement plan.

[4] 83 Fed. Reg. at 21598.

Non-ERISA-Covered Plans. As proposed, we understand that Regulation Best Interest would not be limited to participants in ERISA-covered retirement plans and IRAs. Instead, we interpret the proposed regulation's definition of "retail customer" to also include participants in non-ERISA-covered retirement plans (e.g., church and governmental plans exempt from Title I of ERISA and non-ERISA 403(b) plans). The SEC's discussion of this issue is fairly brief in the explanatory material, essentially assuming that a recommendation to a participant in a plan would be a security recommendation.

From a policy standpoint, we agree and support such interpretation, so the intent of this comment is to focus the SEC on the technical language issues to ensure individual retirement investors are protected. Specifically, we recommend the SEC explicitly clarify the extent to which Regulation Best Interest will apply to recommendations made to participants in non-ERISA-covered plans, where a security recommendation is involved. In general, we believe that the protections of Regulation Best Interest should be available to participants in all of these plans.

403(b) Insurance Contracts. A related issue involves broker-dealer recommendations to participants in 403(b) retirement plans funded by unregistered fixed annuity contracts. Unregistered fixed annuity contracts, unlike variable annuities, are not regulated by the SEC and may be sold to 403(b) plans by insurance professionals who are also not regulated by the SEC. In this context, the SEC should confirm that recommendations to participants in 403(b) plans funded by unregistered fixed annuity contracts are not subject to Regulation Best Interest to the extent that such recommendations are limited to unregistered fixed annuity contracts.

b. Confirm That Retirement Plan Representatives Are Not Retail Customers

The SEC's proposed Regulation Best Interest and its accompanying preamble are silent with respect to whether Regulation Best Interest will apply to discussions between broker-dealers and representatives of employer-sponsored retirement plans. By plan "representative" we mean to refer not only to the plan's fiduciaries (who determine the investments and administer the plan), but also to the variety of other entities and professionals charged with designing the plan and advising the plan fiduciaries, including the sponsoring employer and the plan's retained consultants and advisers. While we do not believe that the SEC intended to extend Regulation Best Interest to recommendations from a broker-dealer to a representative of an employer-sponsored retirement plan, it would be very helpful for the SEC to provide express confirmation of this position to avoid any doubt, for the reasons outlined below.

In order to be a "retail customer" for purposes of Regulation Best Interest, a person receiving a recommendation must use "the recommendation primarily for personal, family, or household purposes."[5] This threshold requirement should exclude retirement plan representatives from the definition of "retail customer" because retirement plan representatives do not use broker-dealer recommendations "primarily for personal, family, or household

[5] Proposed SEC Rule 15*l*-1(b)(1)(B).

purposes." Rather, plan representatives use recommendations for the benefit of the plan and its participants – e.g., by selecting a menu of investments for participant-directed accounts. Any SEC interpretation extending Regulation Best Interest to retirement plan representatives would be inconsistent with the discussion in the preamble to Regulation Best Interest expressing the SEC's concern that the new standard of care should not apply "to recommendations that are primarily for business purposes (such as any recommendations to institutions)."[6]

At one point, the preamble states that a retail customer would include persons other than natural persons, provided the recommendation is primarily for personal, family, or household purposes.[7] This has created some concern that this could be interpreted such that retirement plan representatives could be considered retail customers. In our view, even though the retirement plan is designed to help provide employee retirement security, retirement plan representatives are focused on the institutional pursuit of designing and administering the plan for other persons, which means they are not retail customers.[8]

c. Clarify Certain Conversations Regarding Retirement Accounts Do Not Involve "Recommendations of Any Securities Transaction or Investment Strategy Involving Securities"

The SEC's proposed Regulation Best Interest would require broker-dealers to satisfy a new set of obligations when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer.

Define "Recommendation." As a threshold matter, SPARK urges the SEC to define what activities and communications will be considered a "recommendation" subject to Regulation Best Interest. Under the current proposal, the SEC merely references guidance from FINRA. We would particularly encourage the SEC to incorporate formally many of the helpful exceptions that FINRA has described over the years. FINRA rule 2111, the suitability rule, does not explicitly define "recommendation," but the supplemental material does provide some exceptions. For example, 2111.03 explicitly excludes "[d]escriptive information about an employer-sponsored retirement or benefit plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan."

Exclude Beneficial Conversations Regarding Retirement Savings. In order to promote retirement savings, SPARK also urges the SEC to expressly clarify that certain conversations regarding retirement accounts do not involve a "recommendation of any securities transaction or investment strategy involving securities." While we believe that the SEC's proposal and current FINRA guidance should not implicate many of these communications, we have found that the following kinds of communications are critical to ensuring that workers participating in

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[6] 83 Fed. Reg. at 21597.

[7] 83 Fed. Reg. at 21596.

[8] Of course, a recommendation to a retirement plan representative on investing his or her own account would be made to a retail customer.

retirement plans are adequately saving and investing for retirement. Thus, we want to ensure that Regulation Best Interest does not discourage broker-dealers in any way from having these important conversations with retirement investors. Each of the following communications should be expressly carved out from the scope of Regulation Best Interest regardless of whether a broker-dealer discusses such matters on its own or at the direction of an employer plan sponsor.

Recommendations to Contribute or Keep Money in a Retirement Account. The SEC should confirm that recommendations to, or explaining why someone should, contribute to a retirement plan or IRA, or to increase contributions, are not a recommendation of "any securities transaction or investment strategy involving securities." Those communications are simply a prompt for investors to save for a particular goal. In the absence of any recommendation regarding a particular security or securities, Regulation Best Interest should not cover these communications.

Under DOL's recently vacated Fiduciary Rule, DOL interpreted a description of "*the benefits of plan or IRA participation*" and "*the benefits of increasing plan or IRA contributions*" as permitting an investment professional to encourage contributions, or additional savings, to a plan or IRA without crossing the line into a "recommendation."[9] The regulatory language being interpreted in that case was very similar to the education carve-out described in FINRA Rule 2111.03(b). The SEC should similarly clarify that these types of discussions are not a "recommendation" for purposes of Regulation Best Interest.

Additionally, there are also circumstances in which a broker-dealer may encourage a retirement plan participant to keep money in a retirement account in order to avoid early distribution tax penalties or to help ensure that a client is on track for his or her retirement goals. This can include, for example, communications by a broker-dealer to a participant encouraging the participant to keep assets in a retirement account until it can be used during retirement. These types of communications are overwhelmingly aimed at reducing leakage from retirement accounts designed by Congress to promote *retirement* savings. Accordingly, the SEC should expressly clarify that these types of communications, in the absence of any reference to a particular security or securities, are exempt from Regulation Best Interest.

Distribution Recommendations. The SEC should also clarify that pure "distribution recommendations" involving retirement accounts are not a "recommendation of any securities transaction or investment strategy involving securities." For example, a direction by a broker-dealer to a retail customer to take a minimum required distribution under Internal Revenue Code section 401(a)(9) should not be considered "a recommendation of any securities transaction or investment strategy involving securities." Such a communication simply alerts a retirement investor to take actions required by the Internal Revenue Code in order to avoid significant tax penalties that would otherwise reduce the amount of money available to them. Similarly, a participant who has expressed a need to tap his or her retirement account may be well-advised that rather than taking a distribution, a loan may be a much more favorable option. If the

[9] U.S. Department of Labor, Conflict of Interest FAQ #2 (Aug. 2017).

communication does not reference any specific securities to be sold, or specific securities to be purchased with the proceeds of any sale, Regulation Best Interest should not apply.

Other Beneficial Conversations. In addition to the conversations already discussed, the SEC should expressly carve out other beneficial administrative conversations between broker-dealers and retirement account holders. The SEC should use its regulatory authority to expand upon FINRA's carve out for communications that are not considered to be recommendations under FINRA Rule 2111.03.

For example, DOL's recently vacated Fiduciary Rule expressly carved out the following communications from that rule's definition of what is considered a recommendation –

> "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).

While the language quoted above is similar to some of the exclusions already described in FINRA Rule 2111.03 and generally should not be considered a recommendation under existing FINRA guidance, SPARK believes the information described in the above quoted language is critical for improving retirement savings and the SEC should take action to make sure that broker-dealers are not discouraged in any way from delivering this information to their customers.

d. Clarify Conflict Mitigation Requirements for Broker-Dealers Recommending Rollovers and Offering Proprietary Products or Limited Menus

Proposed Regulation Best Interest would require broker-dealers to establish policies and procedures "reasonably designed to identify and disclose *and mitigate, or eliminate,* material conflicts of interest arising from financial incentives" (emphasis added).[10] For purposes of this requirement, the preamble to the SEC's Proposal explains that financial incentives would include "compensation practices established by the broker-dealer," "employee compensation or

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[10] Proposed SEC Rule 15*l*-1(a)(2)(iii)(B).

employment incentives," and the "sales of proprietary products or services, or products of affiliates."[11]

While incentives applicable to an individual registered representative, such as the first two referenced above, are generally relevant to all broker-dealers, the third is meaningful only when an institution offers both proprietary/affiliated products and unaffiliated products, as it is intended to avoid bias towards the former. However, when the ***only*** products offered by an institution are its own, neither the need for nor possible mitigation avenues are clear.

The text of the regulation itself provides very little detail on what mitigation policies and procedures would satisfy this new requirement. SPARK appreciates that the SEC does not want to mandate specific mitigation procedures or a "one-size-fits-all" approach and we applaud the SEC for offering broker-dealers flexibility when working to mitigate conflicts of interest. Nevertheless, we strongly believe that additional guidance is needed in this area, especially in the case of: (1) rollover recommendations; and (2) broker-dealers who only offer proprietary products or only offer limited investment menus that may include proprietary or affiliated products.

Rollover Recommendations. The SPARK Institute is concerned that the conflict mitigation (or elimination) requirements, as currently described in the SEC's Proposal, do not provide broker-dealers with adequate guidance in the context of rollover recommendations. Broker-dealers making rollover recommendations inherently have conflicts of interest arising from financial incentives – i.e., if a retirement plan participant or IRA owner does not roll over assets to the broker-dealer, the broker-dealer will not be compensated.

In the context of rollover mitigation, the preamble merely says that "broker-dealers generally should consider . . . implementing supervisory procedures that . . . involve the rollover or transfer of assets from one type of account to another (such as recommendations to rollover or transfer assets in an ERISA account to an IRA, when the recommendation involves a securities transaction)." This instruction is simply too vague.

The SEC should consider whether the conflicts involved with rollover recommendations can be more appropriately addressed through enhanced disclosures, rather than mitigation policies and procedures. As the SEC considers this issue, we must caution that vague or unworkable rollover mitigation requirements may discourage rollover recommendations and result in leakage from the tax-favored retirement savings system. To be clear, we do not have any concerns with a rollover recommendation being subject to the new Care Obligation, or to the Disclosure Obligation.

Proprietary Products and Limited Menus. The SPARK Institute is also concerned that the proposed conflict mitigation (or elimination) requirements could create unreasonable and unnecessary challenges for broker-dealers who only offer proprietary products or only make recommendations from a limited menu of investments that may include proprietary products.

[11] 83 Fed. Reg. at 21618.

For example, the preamble says that "broker-dealers generally should consider . . . minimizing compensation incentives for employees to favor one type of product over another, proprietary or preferred provider products," and "implementing supervisory procedures to monitor recommendations that . . . involve proprietary products." This provision appears to have an implicit assumption that all broker-dealers who offer proprietary products also offer unaffiliated products. While this is true in many cases, it is not universally so.

In the absence of additional guidance, it is not clear how broker-dealers that only offer proprietary products or a limited menu of investments can meaningfully satisfy the proposal's directives, especially if the mitigation requirement is interpreted broadly, such as to the firm rather than to its registered representatives' compensation.

The idea of a limited universe of investments from which recommendations may be made is particularly common in the retirement plan context. Many 401(k) and 403(b) 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. In addition, retirement plan providers assist participants exiting the plan with a rollover, but will often limit their recommendations to proprietary investments or investments on a limited IRA platform. The "rollover" service is intended to be accomplished without the need for an expensive investment adviser.

The mitigation procedures quoted above will create significant uncertainty for broker-dealers that only offer propriety products or make recommendations from a limited menu of investments that may include proprietary products. If the SEC does not provide additional clarification for these circumstances in its final rule, we are concerned that retirement plan participants may be shut off from valuable communications and education otherwise currently offered when broker-dealer affiliates of retirement industry service providers interact with retirement plan participants.

To address these concerns, SPARK recommends the SEC permit broker-dealers that only offer proprietary products or a limited menu of investments to satisfy the conflict mitigation requirements if the broker-dealer: (1) discloses to retail customers any material limitations on the investment products being offered;[12] and (2) reasonably concludes the limitations will not cause the broker-dealer (or associated persons) to recommend investments that fail to satisfy the care obligation described in proposed SEC Rule 15*l*-1(a)(2)(ii). To be clear, we are not suggesting that the Care Obligation should apply to the process that a broker-dealer uses to construct the limited set of investments upon which it will make recommendations, as this is a business decision; rather that it has concluded that it can make recommendations within that limited set consistent with the Care Obligation and it complies with the Care Obligation by recommending an investment to a retail customer only if the recommendation meets the Care Obligation based on the retail customer's investment profile.

[12] *See e.g.,* Proposed Item 2.B.4 of Form CRS, stating: "We offer a limited selection of investments. Other firms could offer a wider range of choices, some of which might have lower costs."

III. FORM CRS RELATIONSHIP SUMMARY

a. Clarify the Extent to Which the CRS Relationship Summary Must Be Provided to Retirement Plan Participants

Like our general support for the SEC's proposed Regulation Best Interest, the SPARK Institute also supports the SEC's proposed Form CRS Relationship Summary ("Form CRS"). Clarification is needed, however, on the extent to which the new Form CRS must be delivered to retirement plan *participants*.

As an initial matter, we first note that we do not understand the Form CRS proposal to require broker-dealers or investment advisers to deliver a Form CRS to retirement plan representatives (as we defined them earlier) in any circumstances. Because the Form CRS must only be delivered to "natural persons" or certain individuals that represent "natural persons," and retirement plans are not "natural persons," we understand that broker-dealers and investment advisers do not need to deliver a Form CRS to retirement plans and their representatives. This conclusion is supported in the preamble of the SEC's Proposal, which contrasts "retail investors" who must receive the relationship summary against "institutional investors that are not natural persons, including workplace retirement plans."[13]

Retirement Plan Participants. The Form CRS proposal generally requires broker-dealers and investment advisers to deliver Form CRS to "retail investors" at or before the occurrence of specified events (i.e., before or at the time a retail investor enters into an investment advisory agreement or first engages a brokerage firm's services, as well as at certain points during the relationship (e.g., switching or adding account types)).

The preamble to the Form CRS proposal offers potentially conflicting guidance on whether Form CRS must be delivered to retirement plan participants. For example, the preamble expressly asks commenters whether the SEC should expand the definition of "retail investor" to "cover plan participants in workplace retirement plans who receive services from a broker-dealer or investment adviser for their individual accounts within a plan."[14] Conversely, the preamble also states that "[t]he relationship summary would apply to a broad array of relationships, spanning different firms as well as both retirement and non-retirement accounts."[15]

In direct response to the SEC's request for comments on whether the definition of "retail investor" should be *expanded* to cover plan participants in workplace retirement plans, we first note that we do not understand anything in the proposed definition of "retail investor" to expressly exclude retirement plan participants. As proposed, a "retail investor" is a "customer [or client] or prospective customer [or client] who is a natural person (an individual). This term includes a trust or other similar entity that represents natural persons, even if another person is a

[13] 83 Fed. Reg. at 21422.

[14] 83 Fed. Reg. at 21423.

[15] 83 Fed. Reg. at 21486.

trustee or managing agent of the trust." Retirement plan participants are natural persons and presumably prospective clients for broker-dealers and investment advisers engaging with them.

A more relevant matter for determining the scope of the Form CRS delivery requirement would apparently ask whether broker-dealers and investment advisers interact with retirement plan participants, as "retail investors," in ways that necessarily warrant the delivery of a Form CRS. Our understanding of the SEC's Proposal with regard to those interactions is offered below:

- *Broker-Dealer Services Provided to the Plan and Not Retirement Plan Participants.* Broker-dealers generally should not be required to deliver Form CRS to retirement plan participants when broker-dealers are providing brokerage service to the plan and not directly to retirement plan participants. That is, retirement plan brokerage services at the plan level do not warrant delivery of Form CRS to retirement plan participants.

  Participants in retirement plans that permit participant-directed investment instruct the plan's trustee to allocate their interest in the plan among investment alternatives made available to them through the plan. The participant's interest in any underlying security is only derivative of any rights flowing from his or her interest in the plan. This means that any brokerage services offered to a plan occur at the plan level when a broker-dealer executes trades for the plan's account. Retirement plan participants generally do not select brokers to service the plan. Brokerage services are typically part of a bundle of services offered to the plan by the plan's recordkeeper or selected by the plan's administrator. Accordingly, broker-dealers should not be required to deliver Form CRS to retirement plan participants with respect to any activity occurring within a plan.

  We do recognize, however, that it would make sense for a broker-dealer to deliver a Form CRS to a retirement plan participant before a broker-dealer provides services directly to a retirement plan participant, including recommendations on allocating the account or recommendations in connection with rolling over assets into an IRA.

- *Investment Adviser Interactions with Retirement Plan Participants.* While investment advisers and their affiliates often provide a wide range of services to retirement plan participants, including recordkeeping, administration, and education services, investment advisory services are typically optional for participants in retirement plans. Thus, investment advisers should generally not be required to deliver a Form CRS to retirement plan participants who do not enter into an investment advisory agreement.

  If, however, a retirement plan participant hires an investment adviser to provide advice for his or her individual account, which would be the case if a participant selects a managed account service, the SEC's Proposal would seemingly require the investment adviser to deliver a Form CRS to the retail investor – i.e., the retirement plan participant. In practice, however, this additional disclosure may be unnecessary. The services made available and the fees charged by retirement plan managed account advisers are negotiated and selected by each plan's fiduciary – not by individual plan participants.

> Moreover, the possible universe of investments from which the adviser can choose has generally already been selected for participants by the plan's fiduciary. In this context, it is not readily apparent that the Form CRS would provide individual plan participants with any appreciable benefits or reduce investor confusion. Additional clarification on this issue is necessary.

At a general level, we strongly urge the SEC to clarify that broker-dealers and investment advisers are not required to deliver a Form CRS to retirement plan participants unless a participant actually receives brokerage services or enters into an investment advisory agreement with an adviser. Also, the SEC should expressly clarify that retirement plan sponsors and service providers – other than broker-dealers and investment advisers – are not required to deliver Form CRS to retail investors under any circumstances.

b. SPARK Supports Electronic Delivery of Disclosures Required by the SEC's Proposal

The SPARK Institute strongly urges the SEC to permit broker-dealers and investment advisers to use electronic delivery as the default delivery method for satisfying the disclosure requirements under the SEC's Proposal, including delivery of Form CRS. SPARK has long believed that it should be easier for retirement investors to receive information electronically and that the electronic delivery of disclosures can result in lower costs and greater engagement with a disclosure's recipients. The SEC has recently demonstrated a willingness to embrace electronic disclosure as the default delivery method for other disclosures[16] and we encourage the SEC to consider whether the disclosures added by the SEC's Proposal, including Form CRS, should be able to tap into the benefits of electronic delivery.

IV. REGISTRATION STATUS DISCLOSURE

Under the SEC's Proposal, broker-dealers and investment advisers would be required to prominently disclose their registration status in print or electronic communications to retail investors. The SPARK Institute encourages the SEC to carve out two specific types of communications from this requirement.

First, the SEC should exempt broker-dealer and investment adviser communications to retirement plan participants that are made at the *direction* of the plan fiduciary or employer plan sponsor. In many instances, employer plan sponsors contract with their retirement plan service providers to send communications to plan participants. These communications are often geared toward improving individual savings rates or asset allocations by, for example, encouraging participants to increase contributions or diversify their portfolio. Although these communications are sent directly by the service provider – which may be a register broker-dealer or investment adviser – the service provider is merely acting as an agent of the employer.[17] In

[16] *See e.g.,* SEC Rule 30e-3.

[17] In ERISA parlance, the service provider is providing "ministerial" functions under the direction of the plan's fiduciary. *See* 29 C.F.R. § 2509.75-8, Q&A D-2.

that case, the service provider should not be subject to the new registration disclosure requirements.

Second, the SEC should also exempt general communications to investors that are not personalized. For example, the preamble to the SEC's Proposal asks whether the SEC should limit the new registration status disclosure to certain types of communications that track FINRA Rule 2210. Among other designations, FINRA Rule 2210 divides communications into "correspondences" (i.e., written communications distributed or made available to 25 or fewer retail investors within any 30 calendar day period) and "retail communications" (i.e., written communications distributed or made available to more than 25 retail investors within any 30 calendar day period). Although it is an inexact measure, the distinction made by FINRA Rule 2210 between "correspondences" and "retail communications" could provide a bright-line rule for determining whether communications are personalized to a particular retail investor for purposes of the proposed registration disclosure.

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The SPARK Institute appreciates the opportunity to provide these comments to the SEC. 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