ERISA ADVISORY COUNCIL
RECOGNIZING COGNITIVE DECLINE AMONG PARTICIPANTS
OCTOBER 22, 2020
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My name is Tim Rouse, and I am the Executive Director of the SPARK Institute. Thank you for inviting me to testify before the Council once again. The SPARK Institute ("SPARK"), represents defined contribution recordkeepers, mutual fund companies, brokerage firms, insurance companies, banks, consultants, trade clearing firms and investment managers. My testimony will reflect the work SPARK's members have done on this issue to date, including the work of our Fraud Prevention Committee.

The protection of all our participants is central to the work that we do, and this is particularly important regarding elderly participants. In 2018, SPARK launched a new committee to identify ways that our industry could work together to help prevent fraud. This work relates to the cognitive decline of participants since many cyber criminals target the elderly with financial and romance scams. However, the larger issue of addressing all aspects of cognitive decline has broad implications and will require additional research before we can provide you a detailed and recommended approach. The SPARK Institute is committed to conducting that research and has already begun working with our members to understand how to best address the problem of cognitive decline among participants and to formulate policy recommendations intended to improve the situation.

Employee Benefits vs. Other Financial Services

Many of SPARK's members are also often regulated by other entities, because they are a broker-dealer, registered investment adviser, insurance company, or trust company. Where appropriate, members may look to those other regulatory regimes to help them address participants in defined contribution plans with diminished capacity.

You will hear later from FINRA and representatives for the AICPA about the recommended approaches they are suggesting to their members for dealing with diminished capacity and cognitive decline. We too are eager to learn more about these recommended approaches as we continue to develop similar ones for our members. However, applying the approach of a one-on-one client relationship does not align perfectly with the relationship our members have with participants. The key difference is that while a participant remains in a plan, the employer retains a fiduciary role. This can complicate the process for employees that separate from service but remain in a plan for years into retirement. In many cases, while legally still being a participant, the reality is that the employer no longer has a relationship with that participant. Our members are hired by plan sponsors as directed record keepers to process all transactions in a timely manner. So, if a participant's identity is properly validated and the participant then executes a transaction, we are obligated to process it, regardless of the wisdom of that transaction.

For example, FINRA rules allow, but do not require, a broker to place a temporary hold for up to 25 days on disbursements, when the broker suspects financial exploitation. While these rules may be a good model, our members may feel uncomfortable exercising that discretion, because the exercise of discretion over plan administration will result in fiduciary status.

<u>Reducing the Problem Before it Occurs</u>

If a participant remains employed by the plan sponsor the record keeper can alert the plan sponsor and await additional instructions when a diminished capacity or cognitive decline is observed. However, as noted previously, this is not always effective once a participant separates from service but leaves their assets in the plan. Recent regulatory trends promote the separated employee staying in the plan and for sound reasons. However, a downside to this trend is the increase in encounters with participants showing signs of cognitive issues. If employers are faced with taking on fiduciary responsibility for retired and separated employees, they will no doubt not want these former employees to remain in their plan. One possible solution might be to offer the employer a third option. This third option would allow the employer to reduce their responsibility to these former employees if at the time of separation from service, the plan obtained a "Trusted Contact." By completing a "Trusted Contact" form, the employer could reduce its fiduciary liability and the record keeper would have an alternative source for addressing diminished capacity concerns.

The idea of obtaining a "Trusted Contact" is consistent with the approach of other regulators. For example, under FINRA rules, when a client opens a brokerage account, the broker offers the customer the ability to provide a Trusted Contact (although this is not required to open the account). The broker informs the customer that the broker will be authorized to contact the trusted contact person and disclose information about the customer's account to address possible financial exploitation, or to confirm the specifics of the customer's current contact information or health status. This Trusted Contact is contacted if the broker later suspects financial exploitation, unless the broker reasonably believes that the Trusted Contact has engaged, is engaged, or will engage in the financial exploitation.

<u>Secondary Benefit to "Trusted Contact"</u>

SPARK testified last year to the ERISA Advisory Council on uncashed checks and missing participants. The process of obtaining a "Trusted Contact" at the point of separation from service could also help reduce or eliminate missing participants and uncashed checks.

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On behalf of the SPARK Institute, I want to thank the Council for seeking our input, and I am happy to take any questions.