



Filed Electronically

August 30, 2010

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210  
Attention: 408(b)(2) Interim Final Rule

Re: **Reasonable Contract or Arrangement Under Section 408(b)(2) – Interim Final Rule**

Ladies and Gentlemen:

The SPARK Institute, Inc.<sup>1</sup> appreciates this opportunity to comment on the Interim Final Rule regarding a Reasonable Contract or Arrangement Under Section 408(b)(2) (the “Rule”) of the Employee Retirement Income Security Act of 1974 (“ERISA”) issued by the Employee Benefits Security Administration (“EBSA”) on July 16, 2010.<sup>2</sup> The SPARK Institute members include the industry’s leading retirement plan service providers, including record keepers and investment fund managers, who will be directly affected by the Rule.

At the outset, we commend EBSA for being responsive to many of the issues and concerns we raised in our prior letters and testimony regarding the proposed regulations that were released by EBSA in December 2007. We reiterate our support for more robust fee disclosure in the retirement plan industry. We believe that fee transparency will ultimately not only benefit plan sponsors and plan participants, but also the retirement plan and investment management industries.

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<sup>1</sup> 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 and benefits consultants. Members include most of the largest firms that provide record keeping services to employer-sponsored retirement plans, ranging from one participant programs to plans that cover tens of thousands of employees. The combined membership services more than 62 million employer-sponsored plan participants.

<sup>2</sup> 75 Fed. Reg. 41600 (July 16, 2010).

We believe that the elimination of the written agreement requirement, the modified approach to disclosing potential conflicts of interest to plan sponsors, the exclusion of IRAs and investments made through participant-directed brokerage accounts from the Rule, and allowing record keepers to provide and rely on investment fund materials when making disclosures to plan fiduciaries are significant improvements that will also save significant costs that would have ultimately been passed on to plan participants. We also commend EBSA for taking a measured and generally flexible concept-based approach to address the extremely complex issues relating to fee disclosure in the retirement plan industry. As EBSA knows, plan service providers and investment managers have wrestled with these issues for years and understand the difficulty in developing clear and meaningful ways of disclosing record keeping and investment management fees.

Although we generally believe that EBSA has done a good job with the Rule, this comment letter summarizes our new or remaining issues and concerns regarding the Rule, and provides responses to some of the questions raised by EBSA for industry feedback.

**A. Definition of Direct Compensation** – The Rule defines “Direct” compensation as “compensation received directly from the covered plan.” See § 2550.408b-2(c)(1)(viii)(B)(1). The Rule defines “Indirect” compensation, as relevant here, as “compensation received from any source other than the covered plan, the plan sponsor, the covered service provider...” See § 2550.408b-2(c)(1)(viii)(B)(2). We are concerned that the combined reading of these definitions could be interpreted as excluding from the definition of direct compensation amounts paid by the plan sponsor that are then reimbursed to the plan sponsor from the plan (to the extent allowed under the terms of the plan). Since the payment of the fee noted above is not made directly from the plan, it is technically not direct compensation under the rule as written. We presume that EBSA intends that any amounts paid by the plan sponsor or some other party that is then reimbursed to such party out of plan assets are intended to be direct expenses. Treating such payments as direct compensation is consistent with EBSA’s guidance in connection with Form 5500 Schedule C, in which EBSA stated that when a plan sponsor pays a plan third-party service provider and then seeks reimbursement from the plan, the Schedule C for the plan should reflect a direct payment from the plan to the service provider. See *FAQs About The 2009 Form 5500 Schedule C*, Question No. 37 (July 2008).

As noted above, we assume that EBSA intends this to be the same interpretation under the Rule. Accordingly, we request that EBSA clarify this issue.

**B. Investment Fee Disclosure by Record Keepers and Investment Fiduciaries** – The Rule generally requires that a covered service provider (“CSP”) that provides services as a fiduciary to an investment contract, product or entity that holds plan assets and in which the plan holds a direct equity investment must make certain disclosures to the plan, unless the information is disclosed to a plan fiduciary by a CSP providing record keeping services. See § 2550.408b-2(c)(1)(iv)(F). The additional disclosures include generally, a description of the (1) compensation that will be charged directly against the amount invested in the fund (e.g., sales loads), (2) annual operating expenses (e.g., expense ratio), and (3) any additional ongoing expenses (e.g., wrap fees) (collectively “Investment Fund Information”). The Rule also provides generally that a CSP that is a record keeper and that offers an investment

platform for participant-directed plans must disclose Investment Fund Information “with respect to each designated investment alternative for which recordkeeping services ... will be provided...” See § 2550.408b-2(c)(1)(iv)(G)(1). We commend EBSA for providing that a record keeper can comply with the disclosure obligation generally by providing current disclosure materials of the issuer of the investment alternative that include the information, provided that the issuer is not an affiliate and the disclosure materials are regulated by a State or federal agency and the record keeper does not know that the materials are incomplete or inaccurate. See § 2550.408b-2(c)(1)(iv)(G)(2).

However, we are very concerned about two significant adverse implications the Rule will have for record keepers. First, the Rule appears to shift Investment Fund Information disclosure responsibility from investment fiduciary service providers with respect to investments they issue and manage to an unaffiliated, non-fiduciary record keeper. Second, we are concerned that record keepers will be obligated to provide record keeping services and, in turn, provide Investment Fund Information for investment options demanded by plan sponsors that do not have materials that are regulated by a State or federal agency. Our concerns regarding these situations are discussed more fully below.

1. Shifting Disclosure Obligations from an Investment Fiduciary to a Non-fiduciary Record Keeper – The Rule is either unclear regarding whether the investment fiduciary CSP or the record keeper would have the primary responsibility to provide the additional information to the plan fiduciary, or the Rule shifts the responsibility and potential liability from the investment fiduciary to the record keeper. In either case, we are very concerned that this aspect of the Rule requires record keepers to make important legal disclosures to a plan fiduciary on behalf of an unaffiliated plan fiduciary that is clearly in a better position to make such disclosures on its own directly to the plan, and unduly exposes the record keeper to potential litigation, liability and costs if the information is not available, not timely provided, incomplete, inaccurate or misunderstood. We recognize that EBSA’s goal may have been to provide plan sponsors with a single central source for obtaining Investment Fund Information with respect to a plan’s investment options. However, where a plan uses an investment option with respect to which another party is clearly an investment fiduciary, the plan sponsor and the investment fiduciary will have a direct relationship with each other. In that situation the investment fiduciary is clearly in the best position to provide the Investment Fund Information and be directly and solely responsible for any non-compliance issues.

It is very common for a plan sponsor to request or require, as a condition to hiring a record keeper service provider, that the record keeper maintains the records for, holds, and facilitates investments in a special asset or plan specific investment. Generally, such investment products are those that the service provider does not make widely available to the other plans it services. Rather, the plan’s named fiduciaries, acting alone or together with their investment consultants, independently select the investment as an investment option for the plan. These types of investments include, but are not limited to, limited partnerships, real estate, separate accounts managed by third-party investment advisers, and insurance products. As noted above, these arrangements usually involve a direct relationship and agreement between the plan sponsor on behalf of the plan and the investment issuer. In many cases, the investment option is managed on the plan’s behalf

by an investment adviser or other professional who is an investment fiduciary to the plan. Despite having no prior relationship with the sponsor of the product or its manager, record keepers may agree to record keep the investment option as an accommodation to the plan sponsor and in order to win or retain the business. However, unless the Rule is modified or clarified, record keepers may no longer be willing to record keep the affected investment funds. Consequently, plan sponsors could potentially find that they may have to eliminate the investment option, or find another record keeping solution for the fund.

The SPARK Institute requests that EBSA clarify or modify the Rule to provide that in the case of an investment fiduciary under Section 408b-2(c)(1)(iii)(A)(2), the investment fiduciary shall be primarily and solely responsible for providing the Investment Fund Information (other than any additional ongoing expenses, e.g., wrap fees, charged by the record keeper for its services) directly to the plan sponsor, unless the record keeper expressly agrees in writing with the investment fiduciary to make such disclosure to the plan fiduciary on its behalf. As noted above, in such situations, the investment fiduciary is in a much better position to make the disclosures and should be responsible for any failure to comply.

2. Investment Fund Information for Investment Options That Do Not Provide Regulated Materials – As noted under Section B, 1, it is very common for record keepers to be required to record keep special assets for a plan<sup>3</sup> as a condition to maintaining or getting hired by the plan. Although the Rule generally allows record keepers to satisfy the disclosure requirements under Section 408b-2(c)(1)(iv)(G)(1) by providing unaffiliated fund company prospectuses, many investment options may not have fund materials that are regulated by a State or federal agency (e.g., bank collective investment trusts, separate accounts and private equity partnerships). As a result, record keepers may not be able to comply with the Rule and then be subject to liability when an investment fund is either unable or unwilling to provide complete and accurate information in a timely manner. Record keepers will not have access to the required information from an unaffiliated investment provider. Additionally, in most instances, the record keeper will have little if any influence over the investment provider. From a practical perspective, the record keeper will simply be unable to respond to a plan fiduciary's request for such information if it has not received it from the fiduciary. Service providers should not be required to make disclosures for unaffiliated parties regarding information they do not have access to and without the ability to rely on information provided by the third party. The SPARK Institute believes that the Rule unduly imposes obligations and potential liability on record keepers. As noted above, unless the Rule is modified, record keepers may no longer be willing to maintain plan records and trade the affected investment funds as an accommodation to the plan or plans that demand them. Consequently, plan sponsors could potentially find that they may have to eliminate the investment option, or find another record keeping solution for the fund.

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<sup>3</sup> We note that a record keeper may record keep and trade the same fund on behalf of more than one plan as an accommodation to the plans even though it does not otherwise make the fund available to plans on its investment platform for participant-directed plans. The number of plans that a CSP accommodates with respect to a particular fund should not change the outcome under the Rule.

The SPARK Institute believes that record keepers should not be obligated to make disclosures and be exposed to liability for investment options of unaffiliated investment providers that the record keeper provides record keeping services for as an accommodation to a plan or multiple plans when such funds do not have Investment Fund Information that the record keeper can reasonably rely on in satisfying the Rule. Therefore, the SPARK Institute requests that EBSA modify the rule to provide that when a record keeper agrees to provide record keeping services with respect to an investment option for a plan or multiple plans as an accommodation (i.e., an investment product, contract or entity that the record keeper does not otherwise make available to plans on its investment platform for participant-directed plans), and the investment option does not have the Investment Fund Information available in materials that are regulated by a State or federal agency, that the record keeper is only responsible for disclosing any additional ongoing expenses, e.g., wrap fees, charged by it for its services under its contract with the plan. The plan sponsor and the investment issuer are in better positions to address the issues of fee disclosure with respect to these special assets between themselves.

- C. Related Party Disclosure** – The Rule requires that a CSP disclose direct compensation, either in the aggregate or by service, that the CSP, an affiliate or subcontractor reasonably expects to receive in connection with the services described in Section 408b-2(iv)(A) (i.e., the “services to be provided to the covered plan pursuant to the contract or arrangement ...” See § 2550.408b-2(c)(1)(iv)(A) & (C)(1). Under certain circumstances, it is possible that a service provider may provide services to a plan that are not subject to the Rule. For example, a service provider that provides appraisal services to a defined benefit plan and expects to receive direct compensation of \$10,000 annually would not be subject to the Rule. The service provider would not be considered a CSP under the Rule. However, assume that an affiliate of the appraisal firm is also hired by the same defined benefit plan to provide brokerage services, and is considered a CSP under the Rule. The brokerage firm would clearly be required to disclose all of the direct and indirect compensation that it, its affiliates and subcontractor expect to receive in connection with the services any of them provide pursuant to the agreement with the plan. However, it is our understanding that the brokerage firm in the example would **not** be required to disclose any compensation that its appraisal service provider affiliate expects to receive under the affiliate’s separate appraisal contract or arrangement with the plan. Our basis for this conclusion is that Section 408b-2(c)(1)(iv)(A) expressly limits the scope of the disclosure to compensation that the CSP and its affiliates expect to receive in connection with the services provided to the covered plan pursuant to the contract or arrangement. Further, the service provider’s appraisal affiliate will be subject to its own separate disclosure obligations.

We request that EBSA confirm that our interpretation of the Rule is correct or provide additional clarification.

- D. Indirect Compensation From Self-directed Brokerage Investments** - As noted above, The SPARK Institute commends EBSA for appropriately excluding from the definition of “designated investment alternative,” investments purchased through a self-directed brokerage account. See § 2550.408b-2(c)(1)(viii)(C). However, the Rule appears to require that indirect compensation received by a broker/dealer related to investments made through a brokerage account would have to be disclosed under Section 408b-2(c)(1)(iv)(C)(2). We

recognize the importance of disclosing to the plan fiduciary the expectation that a broker/dealer may receive compensation in connection with brokerage window investments. However, for the same reasons that EBSA included the exception mentioned above, disclosing the indirect compensation under the Rule as currently written will be extremely difficult and will overwhelm plan fiduciaries.

Plan participants have access to thousands of investment options through brokerage accounts, each with different fee arrangements for the broker/dealer. These arrangements may include sales loads, transaction fees, and service fees with varying degrees of complexity. Additionally, at the time disclosures will have to be made under the Rule, the CSP is not likely to know which specific funds that participants will purchase. Consequently, in order to comply with the Rule as currently written it appears that the CSP would have to provide the plan fiduciary with a list of every fund available through the brokerage window, and the potential broker/dealer fees for each. As noted above, this will be costly, will overwhelm plan fiduciaries, and will likely be ignored by them.

Therefore, The SPARK Institute requests that EBSA modify the Rule to allow a CSP to provide a summary disclosure to the plan fiduciary regarding the indirect compensation that a broker/dealer may receive in connection with investments purchased through a self-directed brokerage account. The required disclosure should include a general description that the CSP or an affiliate may receive indirect compensation as a result of investments purchased in brokerage accounts and the range of rates the broker/dealer may receive. The plan fiduciary can request additional specific information with respect to particular funds or arrangements.

**E. Timing of Fee Change Disclosures** – The Rule requires generally that a CSP notify the plan fiduciary of any change regarding plan fee information described under Section 408b-2(c)(1)(iv) as soon as practicable, but not later than 60 days from the date on which the CSP is informed of the change. See § 2550.408b-2(c)(1)(v)(B). At the outset, we commend EBSA for recognizing the concerns that certain record keepers had regarding being notified about fee changes that are beyond their control (e.g., unilateral changes to compensation arrangements made by proprietary and non-proprietary mutual funds), and for tying the notice timing requirement to the date that the CSP is notified of the change.

We are concerned that the Rule may result in certain plan fiduciaries receiving monthly notices regarding changes in mutual fund expense ratios, resulting in them being routinely overlooked. Many plans offer a significant number of investment options and the expense ratios can change at any time. Additionally, plan fiduciaries are not likely to want to receive and review fund prospectuses they receive on a monthly basis for expense ratio changes. Several of our members have informed us that their plan customers have specifically told them that they do not want to receive prospectuses when minor changes occur, such as small changes in the expense ratio. A constant flow of relatively insignificant information provided through prospectuses could cause plan sponsors to overlook or miss other more important disclosures. Plan sponsors prefer to receive and consider that type of information in conjunction with their otherwise scheduled plan investment review meetings (e.g., annually or semi-annually) and appreciate a consolidated report which lists each fund with the expense ratio rather than having to obtain such information from each prospectus separately.

We are also concerned that this process will be costly and such costs will ultimately be passed on to plan participants through higher service fees. Additionally, we note that many service providers make thousands of third party mutual funds available to their plan customers. As a practical matter, unless the mutual fund company makes a significant change in the fund fees, it may not specifically notify plan record keepers and, therefore, record keepers may not be specifically aware of every change that occurs.

In order to make this notification process more useful to plan fiduciaries, efficient for CSPs and to help mitigate costs, we urge EBSA to permit CSPs to be able to send a summary notice that shows the current fees of the affected funds, instead of a prospectus. Further, a CSP should be permitted to rely on the accuracy of any information provided to it by the investment company, or its affiliates and agents, or that the CSP obtains from a reliable third party service such as Morningstar or Lipper. Many CSPs have arrangements with investment companies for which it provides record keeping services to use such third party vendors (e.g., Morningstar or Lipper) to obtain data on their funds in an automated and efficient manner. This data is used currently for both plan sponsor and participant disclosures.

Given the concerns of increased fees, as well changing an established process which is currently an effective way of providing information related to certain investment options, we urge EBSA to consider relaxing the notification rules that apply to changes in investment fund fees that are not initiated by the CSP itself (i.e., changes made by third party fund companies and CSP affiliated investment funds). The SPARK Institute proposes that CSPs be allowed to provide plan fiduciaries with a quarterly summary notice of updated investment fund fees based on the most recent data provided to the CSP. Specifically, the summary notice would have to be sent to any plan that has an investment interest in any fund that had a change in its fees within 30 days after the end of the calendar quarter that the CSP was notified of the change. Alternatively, a CSP could choose to send an updated notice each quarter of all of the plan's investment fund fees.

We note that a CSP's ability to notify plan fiduciaries about investment fund fee changes is directly dependent upon the fund companies or investment managers notifying the CSP. We are concerned that CSPs will be considered to have been notified about a change at the time any mutual fund company issues or updates its prospectus even though the fund company may not send a notice or copy of the prospectus to a person responsible for such matters for the CSP. We urge EBSA to specify that a CSP shall only be considered to have been notified of an investment fund fee change when it receives actual notice from the affected fund or when it otherwise has actual knowledge (e.g., a report from a third party service).

Under our approach, a CSP would have to comply with the Rule as proposed in connection with all non-investment fund fee changes.

- F. Timing of Providing Reporting and Disclosure Information** – The Rule requires generally that, upon request from the plan fiduciary, the CSP provide any other information relating to the compensation received in connection with the contract that is required for the covered

plan to comply with reporting and disclosure requirements under Title I of ERISA. See § 2550.408b-2(c)(1)(vi)(A). Generally, the CSP must provide the information within 30 days of receipt of a written request, unless the disclosure is precluded by extraordinary circumstances beyond the covered service provider's control. See § 2550.408b-2(c)(1)(vi)(B). At the outset, we commend EBSA for modifying the Rule to limit requests to information that is "required" for the covered plan to comply with its reporting and disclosure obligations. We also commend the EBSA for noting in the preamble to the Rule that a CSP is only obligated to "furnish the information in a manner that enables effective use of the information to satisfy ERISA's Title I reporting requirements" and that "no further obligations should be inferred from this requirement." We are optimistic that this will limit the potential for plan specific requests for information in customized formats.

However, we are concerned that the Rule could potentially lead to plan fiduciaries requesting standard reporting materials generally provided by the CSP in advance of the regular distribution. Therefore, we request that EBSA modify the Rule to allow the CSP and plan fiduciary to change the required response timeframe on a case by case basis, to prevent a plan fiduciary from accelerating customary business practices and general Form 5500 information reporting practices of many service providers. We also request that EBSA clarify or modify the Rule to protect a CSP when it is unable to respond within the 30 days because it is dependent upon receiving information from the plan fiduciary or a third party.

First, The SPARK Institute requests that EBSA consider allowing a plan fiduciary and CSP to either extend or not specify a particular date for a response to an information request based on the nature of the request, the time the CSP anticipates it will take to respond to the request and potential fees associated with expediting complicated requests. This will provide sufficient flexibility for the affected parties to allow more time for a response without triggering the late response consequences under the Rule. This flexibility would not prevent a plan fiduciary from requesting a response within 30 days if it so chooses.

Second, we are concerned that the Rule in its current form could have the unintended consequence of enabling certain plan fiduciaries to accelerate and potentially disrupt a CSP's normal Form 5500 information reporting practices. We understand from our members that some provide their customers with their year-end 5500 reporting packages on a rolling basis which could be from 90 to 150 days before the 5500 is due. The timeframe is also largely dependent on when the CSP receives certain data it must receive from the plan sponsor. Under the Rule, a plan fiduciary could send a letter to a CSP requesting a Form 5500 information package well in advance of when normal business practices and procedures would otherwise obligate the CSP to provide the information.

We request that EBSA modify the Rule with respect to Form 5500 reporting information to provide that any request from a plan fiduciary shall not obligate the CSP to provide the requested information earlier than 90 days before the filing deadline, including extensions.

As noted above, the Rule includes an exception to the 30 days deadline when disclosure is precluded because of circumstances beyond the covered service provider's control. We are concerned about potential adverse consequences to a CSP that cannot respond completely, accurately or timely when its ability to do so is dependent upon information from the plan

sponsor or another third party. For example, if a plan is on accrual basis accounting and the plan sponsor has not sent its final contribution for the year to the CSP, the CSP cannot provide the plan's year-end 5500 reporting information.

We request that EBSA modify or clarify that the exception already provided in the Rule applies when a CSP cannot respond completely, accurately or timely because it is dependent on receiving information from the plan fiduciary or a third party. Under such circumstances, the CSP should be allowed to respond to the information request within 30 days after it receives the required information from the plan fiduciary or third party.

**G. Electronic Disclosure** – The Rule requires that a CSP make required disclosures to the plan fiduciary in “writing.” See e.g., § 2550.408b-2(c)(1)(iv). However, the preamble to the regulations proposed by EBSA specifically stated that the required disclosures can be made electronically. See 72 Fed. Reg. 70990. The SPARK Institute, and others, considered that to be a positive development for several reasons including, (1) cost effective compliance, (2) enhanced plan sponsor experience, particularly with respect to complex documents (e.g., prospectuses), and (3) facilitating electronic proof of delivery of materials.

While the Rule does not include a similar statement, the preamble to the Rule includes several assumptions regarding the use of electronic methods for the delivery of required disclosures. Thus, it would appear that electronic delivery of materials is acceptable to EBSA. As noted above, The SPARK Institute believes that the ability to deliver disclosures electronically is critical.

The disclosure requirements are significant under the Rule and, as discussed throughout this letter, will require service providers to deliver a substantial amount of written material to plan sponsors. Most plan sponsors do not want to receive written prospectuses and other technical fund materials, in addition to the other written disclosures that CSPs are required to provide. The vast majority of these materials are available electronically over the internet 24 hours a day 7 days a week and can be downloaded and printed for free. Moreover, these materials can be updated instantaneously making it more likely that the plan fiduciary has the most current materials. Electronic versions of these materials are also easier to search and navigate to find exactly what a plan fiduciary wants to view because of the electronic capabilities and search features. Without question, electronic materials provide a better reader experience and are more cost effective for all affected parties. Further, a plan fiduciary is always able to request a written copy at no charge.

Additionally, many of the other materials that a CSP is required to provide under the Rule can be provided in an electronic format. As noted above, this allows for more robust disclosures because of the technology, a better plan sponsor experience, cost effective compliance, more timely delivery of information including updates, and electronic proof of delivery.

The SPARK Institute urges EBSA to clarify that the “written” rule requirement can be satisfied by a CSP by making the required disclosures through electronic media that a plan fiduciary can print out as it so chooses at no charge. Additionally, the CSP should be required to provide printed copies of the material to the plan fiduciary upon request at no

charge. Specifically, a CSP should be able to satisfy the investment disclosure requirements under Sections 408b-2(c)(1)(iv)(F) & (G), by (1) making the materials available at any time on a website, provided that the CSP expressly notifies the plan fiduciary that the materials are available and how to access them, (2) by sending an electronic version of the materials to the plan fiduciary via electronic mail, or (3) by sending a link to such materials to the plan fiduciary via electronic mail. All other disclosures required under the Rule could be satisfied electronically using methods 2 and 3 noted above, but not method (1).

**H. ERISA-Covered Plan Status and Compliance with the Rule** – The SPARK Institute commends EBSA for clearly identifying and limiting the plans that are subject to the Rule. ERISA-covered plans are “covered plans” under the Rule. See § 2550.408b-2(c)(1)(ii). As EBSA knows, there is still significant concern in the 403(b) plans community about a number of issues that raise questions about whether a plan is or is not ERISA-covered, and whether a plan that was not ERISA-covered may have done something in an effort to comply with new Internal Revenue Service rules that jeopardizes their non-ERISA status.<sup>4</sup> A CSP must rely on what the plan sponsor tells it regarding the status of the plan. Some plan sponsors may not know what their status is, may be mistaken, or may not be willing or able to tell the service provider because they may not view it as their responsibility to determine. We are concerned that a service provider that either relies on representations of a plan sponsor that is not ERISA-covered or is unable to get a representation from a plan sponsor will be subject to liability and loss of compensation if the plan is later determined is subject to ERISA.

The SPARK Institute requests that EBSA modify the Rule to provide that a service provider can rely on the representations of the plan sponsor regarding the status of a 403(b) plan as being non-ERISA-covered, and that the service provider will not be considered to have violated the Rule by not complying with it if the plan is later determined to be subject to ERISA. When a plan sponsor determines that, or changes the status of its plan to be ERISA-covered, the plan sponsor should be required to notify the service provider. The service provider should then have no less than 90 days to comply with the Rule.

Similarly, EBSA provided transitional relief in FAB 2009-02 with respect to certain “frozen” pre-2009 403(b) contracts and accounts, and permitted plan administrators to exclude certain 403(b) contracts and accounts from the plan’s Form 5500 or Form 5500-SF filing. EBSA recognized that plan administrators may be unable to identify all participant contracts and accounts to be included as plan assets and reflected on Form 5500 or Form 5500-SF. We are concerned that this same situation may result in per se prohibited transactions under the Rule. Consequently, the SPARK Institute requests that EBSA extend the transition relief of FAB 2009-02 to the disclosures required under the Rule.

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<sup>4</sup> The SPARK Institute notes that we are preparing materials for submission to EBSA as a follow-up to our prior written request regarding these issues and in response to EBSA Field Assistance Bulletin 2010-01. We are concerned that many 403(b) plans may have inadvertently become ERISA-covered plans while trying, in good faith, to comply with the new rules.

**I. Compliance Date** – The effective date of the Rule is July 16, 2011. We commend EBSA for being responsive to our concerns about the amount of time it will take service providers to prepare to comply with the new Rule. Although eliminating the written agreement requirement will reduce the time needed to comply, our members are still very concerned about their ability to comply with the Rule by the effective date, particularly for all of their existing customers. Our members have thousands to tens of thousands of existing plan customers that will be affected. Many service providers are still devoting significant time and resources to complying with the new Form 5500 rules for defined contribution and 403(b) plans. We also note that the anticipated participant disclosure rules will ultimately require service providers to do a significant amount of work in order to help plan sponsors comply with those rules within the same time frame.

This is an unprecedented time of activity in the retirement plan community. Service providers should not be put in the position of having to drastically increase staff and costs in order to meet compliance deadlines that are too aggressive because of the combined effect of multiple initiatives that impose simultaneous demands on the same staff and resources. Increased compliance costs will ultimately be passed on to, and absorbed by, plan sponsors and plan participants. Accordingly, every effort should be made to facilitate cost effective compliance within reasonable timeframes.

Our members have advised us that there are a number of time consuming tasks that must be accomplished before they will be in a position to begin complying with the Rule. The tasks may include, for example, revising customer agreement forms for every affected product and service model, preparing form amendments for use with existing customers for every product and service model, developing the detailed disclosures that comply with the Rule, identifying and preparing amendments for every affected plan customer, making system changes, revising internal practices, policies and procedures, and training employees about such changes and the new Rule. Record keepers and third party administrators will also have to amend some or all of their agreements with their subcontractors and their investment fund trading partners in order to prepare for the new disclosure requirements. Accordingly, the time required by our members to complete these tasks will be significant.

The SPARK Institute requests that EBSA modify the compliance deadline for contracts and arrangements between a plan service provider and existing customers, to the earlier of January 1, 2012, or the date the contract is renewed or extended. This will give service providers a little more time to spread out the work load of complying and being better able to respond to questions from plan sponsors. Our members anticipate that their customer service representatives and telephone service representatives will be inundated with questions from existing customers. Allowing service providers a little more time to comply for existing customers will result in a better customer experience with little downside effect. Additionally, some of our members have stated that they would like to be able to coordinate complying with the Rule with the 2010 Form 5500 reporting cycle for some, if not all, of their existing plans. In order to do this, the compliance deadline would have to be extended. To the extent that service providers are willing and able to do this it will result in a much better and more understandable experience for plan sponsors.

Additionally, we note that if the Rule is changed,<sup>5</sup> the compliance deadline may need to be extended for existing and new plan customers. Many service providers will be reluctant to begin devoting significant resources to making changes that are needed to comply with the Rule if they anticipate that changes are needed and may be forthcoming. We urge EBSA to consider this fact and to also communicate its intentions publicly and clearly so that service providers can plan accordingly and use their resources cost effectively as they work towards complying with the Rule and any future modifications.

## **J. Responses to Certain EBSA Questions**

1. \$1,000 CSP Threshold – The Rule provides that a service provider, that otherwise meets the definition of a CSP, must expect to receive \$1,000 or more in compensation before it is considered a CSP. EBSA requested comments on the amount of the threshold. The SPARK Institute is satisfied with the amount. We would not object to the amount being raised and urge EBSA not to lower it.

However, we request that EBSA specify or clarify that the \$1,000 threshold is an annual amount. The Rule does specify the time period that the service provider must take into account when making a determination about whether it will exceed the threshold. This creates uncertainty that can easily be resolved.

The Rule defines “Compensation” which includes an exception for non-monetary items valued at \$250 or less received during the term of the contract or arrangement. See § 2550.408b-2(c)(1)(viii)(B). We request that EBSA modify the definition to apply the exception on an annual basis.

With respect to both thresholds, an annual determination period provides greater certainty to all affected parties and will make it easier and more cost effective to track the information. The amounts involved are generally immaterial and specifically providing an annual determination period will not significantly alter the intended purpose of the Rule.

2. Prescribed Form or Format for Disclosure – The SPARK Institute commends EBSA for not prescribing a format for making the required disclosures under the Rule and for recognizing the challenges to do so because of the range and complexity of service models, investment options and compensation arrangements that are available. We reiterate our support for a flexible concept-based approach to fee disclosure, as has been taken by EBSA to date.

As EBSA noted in the preamble to the Rule, plan fiduciaries may benefit from increased uniformity. However, prescribing a format will increase costs for all plans and participants without clear and significant proof that the potential benefit will be

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<sup>5</sup> As noted in our comment letter, we believe a number of changes are needed that will impact how CSPs prepare to comply with the Rule.

appreciated by all plan fiduciaries and outweigh the burdens to everyone who is affected. Additionally, we reiterate our concern that any prescribed format has the potential to inadvertently disrupt the competitive balance in the retirement plan services and investment management industries by requiring fees to be disclosed in a way that favors one group over another. Further, any prescribed format would have to be designed to anticipate, or otherwise changed to accommodate future innovations and changes to compensation arrangements, service models and investment products. For example, regulatory changes such as the SEC's pending changes regarding Rule 12b-1 fees would have to be anticipated or will require changes to any prescribed form. Additionally, product innovations such as lifetime income solutions would have to be addressed. The form would have to be changed and updated quickly by EBSA in response to innovations and other changes so that a CSP is not put in the position of having to provide disclosures that are outdated or potentially confusing because they are required to follow an outdated format. We are also concerned that any prescribed form or summary disclosure would likely have to be very simplistic and generic in order to avoid the concerns we have identified such that it would be of little or no value to plan fiduciaries.

Additionally, the costs associated with evaluating future changes to a prescribed form and making system modifications to accommodate the changes will affect all service providers, including those who are not otherwise responsible for the innovations or affected by the changes. As noted above, the costs associated with the changes will be passed on to plan sponsors and participants.

CSPs should be permitted to comply with the Rule and present the required information in their own formats, including summary formats that they develop specifically for their products and services, and customers' needs. As a practical matter, a CSP has an incentive to present the disclosures in a manner that their customers (i.e., plan fiduciaries) will understand and that will ultimately drive a useful reporting format. This will be an evolving process as new products and services are developed, and as their customers' needs change. As described above, a regulatory requirement that does not allow flexibility may actually impair that process.

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The SPARK Institute appreciates the opportunity to provide these comments to EBSA. If you have any questions or need additional information regarding this submission, please feel free to contact us at (704) 987-0533.

Respectfully,



Larry H. Goldbrum  
General Counsel