



News Release

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THE SPARK INSTITUTE SEEKS CHANGES TO EBSA FIDUCIARY DEFINITION; PROPOSES SAFE HARBOR

SIMSBURY, CT, February 2 -- The SPARK Institute has submitted a 23-page letter to the Employee Benefits Security Administration (“EBSA”) requesting modifications to the proposed regulation changing the definition of a fiduciary under ERISA. “While we support EBSA’s objective of clarifying the scope of the definition of fiduciary to include certain retirement plan service providers, we are concerned that the proposed rule may have significant unintended consequences that will adversely affect the products and services available to plan sponsors and participants,” said Larry H. Goldbrum, general counsel. Goldbrum said the Institute also responded to EBSA’s questions about distribution counseling services. The comment letter is posted on The SPARK Institute website at <http://www.sparkinstitute.org/comments-and-materials.php>.

General Concerns

We are concerned that the scope of the proposal is very broad and the availability and scope of the exceptions are unclear,” said Goldbrum. “It is crucial that service providers be able to structure their products, services and compensation arrangements with reasonable certainty about whether they are a fiduciary with respect to a plan and its participants, he said. “Service providers must have greater certainty than the Proposal provides so that they can reasonably avoid unintentionally and unwillingly becoming fiduciaries, and engaging in prohibited transactions.”

Goldbrum added that if the proposal is finalized as written, it is likely that plan sponsors will be unable to cost effectively get the information and support they need with respect to their plan investment options. He said The SPARK Institute urged EBSA to take a more measured and restrained approach in changing the definition of investment advice and fiduciary so that the agency and the entire regulated community can evaluate the implications for everyone affected. The SPARK Institute also recommended that EBSA consider adding a safe harbor under any final rule.

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Safe Harbor

The key features of The SPARK Institute’s proposed safe harbor are:

1. Unless a service provider has or exercises discretion with respect to plan assets, the service provider and a plan, plan sponsor, plan participant or beneficiary should be permitted to agree upon and define, in writing, the service provider’s role and whether a fiduciary relationship is intended or expected and, if so, the scope of that fiduciary relationship.
2. Any written agreement regarding a service provider’s role as a fiduciary or non-fiduciary should include an express statement that the products and services are not investment advice or fiduciary service, except as specifically provided otherwise in the agreement.
3. The service provider should disclose in any such agreement and consistent with the regulations under Section 408(b)(2) of ERISA, the financial interests it may have regarding any decisions that the plan, plan sponsor, plan participant or beneficiary may make in connection with the plan and plan assets.
4. A service provider should be permitted to provide advice, recommendations, and information to a potential customer during the sales process if the selling party expressly discloses that the seller is providing such in a non-fiduciary capacity as a seller and that it has a financial interest regarding any decisions that the potential customer may make in connection with the plan and plan assets.

Specific Concerns

Specific concerns raised by The SPARK Institute in its letter include the potential unintentional fiduciary status of investment adviser affiliates, the scope and clarity of the platform provider and seller exceptions, and the scope of the valuation services provisions and limitations on the exception included in the proposal.

With regard to the platform provider exception, The SPARK Institute recommended that EBSA clarify or modify the proposal to allow for service providers to provide assistance and information to a plan, plan sponsor, participant and beneficiary about plan investment options in a non-fiduciary capacity provided that any such assistance is based on “objective criteria” including criteria recommended by the service provider.

Regarding the seller’s exception, the Institute recommended that EBSA clarify that the exception is intended to cover the advice and recommendations of the seller until the recipient makes a decision with respect to an unresolved matter, even if an agreement has been signed or decisions have been made by the recipient with respect to other matters.

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Regarding the scope of valuation services, The SPARK Institute asked EBSA to withdraw the sections of the proposed rule that define valuation services as investment advice and that provide exceptions. Additionally, The SPARK Institute requested that the agency study these issues and their impact on the retirement plan community before issuing a final rule and offered modified language to the proposal in the event that EBSA does not accept its request.

Compliance Deadline

Goldbrum said The SPARK Institute urged EBSA to allow 18 months from the date that any final rule is published in the *Federal Register* for the regulated community to comply. “Because the issues raised by the proposed changes to the definition of fiduciary and what constitutes investment advice are so complex and will dramatically impact the products and services available to plans and participants, the entire regulated community will need substantial time to work with their customers regarding the impact on their services arrangements,” he noted.

Distribution Counseling

The SPARK Institute asked EBSA to handle this issue separately and urged EBSA to maintain its current position that distribution counseling services and recommendations that a person take a distribution are not investment advice under ERISA. “We also asked EBSA to issue additional guidance that clearly defines distribution counseling, assistance and education that can be provided by the plan sponsor and service providers to the plan, including plan fiduciaries,” said Goldbrum.

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. Through the combined expertise of its member companies, the Institute provides research, education, testimony and comments on pending legislative and regulatory issues to members of Congress and relevant government agency officials. Collectively, its members serve approximately 70 million participants in 401(k) and other defined contribution plans.

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