



# News Release

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## **THE SPARK INSTITUTE REQUESTS GUIDANCE, FLEXIBILITY AND ADEQUATE TIME FOR COMPLIANCE AT HEARING ON DEFINITION OF FIDUCIARY**

SIMSBURY, CT, March 1 – In testimony today at a hearing before the U.S. Department of Labor’s Employee Benefits Security Administration (“EBSA”) regarding a proposed change in the definition of a fiduciary, Larry Goldbrum, General Counsel of The SPARK Institute, urged the agency to follow five guiding principles in making any changes to the definition of fiduciary and what activities constitute investment advice. The guiding principles include ensuring that any change be clear and precise, allow flexibility and choice, avoid unintended potential harm, be measured and coordinated with certain other initiatives, and allow adequate time for compliance. The Institute also urged EBSA to develop guidance regarding distribution counseling separately from the effort to redefine who is a fiduciary, said Goldbrum. The testimony is posted on the organization’s website at <http://www.sparkinstitute.org/comments-and-materials.php>.

Mr. Goldbrum explained the guiding principles further in his testimony as follows:

### Clear and Precise Guidance

“It is crucial that service providers are able to structure their products, services and compensation arrangements with reasonable certainty about whether they will be a fiduciary with respect to a plan,” said Goldbrum. “Absent clear and precise guidance, service providers will be at substantial risk of unintentionally and unwillingly becoming fiduciaries and engaging in prohibited transactions,” he noted. “The stakes for service providers are very high because a misinterpretation of the rules or an unintentional violation could affect a provider’s entire line of products and services and all of its plan relationships.”

### Flexibility and Choice

“We believe that service providers and plan sponsors should have flexibility and discretion in determining and agreeing on a service provider’s role and whether a fiduciary relationship is mutually expected,” said Goldbrum. “The proposed definition substantially lowers the threshold for when a service

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provider will be considered a fiduciary, and in some instances treats some services as investment advice that in our view should not be treated as such. As a result, service providers will be forced to discontinue providing many services that plan sponsors and participants demand or to charge substantially higher fees in order to account for the higher risk and responsibility that comes with being a fiduciary, he stated. Goldbrum noted that The SPARK Institute had included a safe-harbor recommendation in its previous comment letter to EBSA on the fiduciary definition. The safe harbor would allow service providers and responsible plan fiduciaries to determine and agree, in writing, on the service provider's role and whether a fiduciary relationship is mutually expected, he said.

Avoid Unintended Potential Harm

“Under the proposal, service providers will be forced to discontinue providing certain services or charge substantially higher fees to account for being a fiduciary’ said Goldbrum. “Additionally, service providers will be subject to the significant risk that an arrangement to provide non-fiduciary products and services will be treated, after the fact, as a fiduciary services arrangement,” he said. “Although class action lawyers have had limited success on the merits of the cases they have brought against retirement plan providers, an increased threat of litigation, and the costs associated with defending against them, will have a significant chilling and negative effect on the retirement plan community,” he added.

Measured and Coordinated Changes

The SPARK Institute noted that the proposed changes are significant and could have substantial unintended consequences. “We urge EBSA to take measured steps in changing the definition of fiduciary. We believe that significant changes to the Proposal are needed and that the retirement plan community would benefit greatly if EBSA re-proposed a modified rule.”

Adequate Time for Compliance

Goldbrum noted that the issues raised by a broad change to the definition of fiduciary and what activities constitute investment advice are very complex, raise substantial concerns about unintended consequences, will dramatically impact the products and services available to plans, plan sponsors and participants, and could have devastating consequences for any service provider who unintentionally and unwillingly becomes a fiduciary and unintentionally engages in a prohibited transaction. As a result, The SPARK Institute urged EBSA to allow 18 months from the date that any final rule is published for the retirement plan community to evaluate the rules, determine how to comply with them, and for service providers to educate their customers about the rules and to modify their service arrangements.

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The SPARK Institute also commented on the issue of distribution counseling. “The SPARK Institute supports EBSA’s efforts to safeguard the interests of participants and beneficiaries in connection with plan distributions, and encourages it to develop further guidance, but not in connection with the current effort to redefine who is a fiduciary,” Goldbrum said. “Instead, we urge EBSA to issue additional guidance that is comparable to Interpretive Bulletin 96-1 that clearly defines acceptable distribution counseling, assistance and education that can be provided by the plan sponsor and service providers to the plan, including plan fiduciaries.”

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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