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September 5, 2005

Joseph H. Grant
Director, Employee Plans Rulings and Agreements
Internal Review Service
1750 Pennsylvania Avenue, NW
Suite 441
Washington D.C. 20224

Re: The SPARK Institute's Comments on Relief from Hurricane Katrina

Dear Joe:

On behalf of The SPARK Institute,¹ we want to applaud the efforts that your office has made towards assisting those plan participants who have been affected by this tragic event. It is very clear from the several conversations that you and I have had over the past number of days on this matter, that your office is moving very quickly with a mind-set of getting information out to plan sponsors, plan participants, and plan service providers. The members of The SPARK Institute commend these immediate actions that your office has taken and are equally impressed by your wanting information from us, as plan providers.

Accordingly, I am respectfully enclosing The SPARK Institute's comments for your consideration. Our goal is to provide you with real-time issues that we are currently experiencing and point out the critical areas of practical concern. We both agree that you must act quickly, therefore we wanted to provide you with objective input that will help you understand plan administration issues. As we discussed, we are gathering more information and will be collecting comments from our vast membership of plan providers

¹ The SPARK Institute represents the interests of a broad group of institutions that are critical to the success of the retirement plan industry. Our members include banks, mutual fund companies, asset managers, brokerage companies, insurance companies, third party administrators and benefits consultants. Our members are responsible for servicing 97% of all defined contribution and 90% of all defined benefit plan participants.

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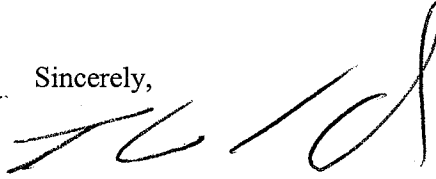
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as events continue to proceed. At your request we will be providing you and your team updates on issues facing our membership on a regular basis. Please note that I have copied the Department of Labor ("DOL") on this letter as they have also expressed an interest in receiving similar comments. Mr. Canary has been extremely helpful and very responsive to our "reaching-out" efforts with the DOL. He clearly understands the practical issues facing service providers.

Finally, we are all working to provide the right answers to this tragic situation and we are keeping in mind the balance of realities of the events as well as the legal concerns. We are most confident (especially after our recent conversations) that your office is doing the same. We look forward to working with you and the DOL in assisting those that are much less fortunate.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. G. Schendt', written in a cursive style.

Thomas G. Schendt

Enclosure

cc: Joe Canary, Chief Division of Coverage Reporting & Disclosure, US Department of
Labor
Larry, Goldbrum, General Counsel, The SPARK Institute



Memorandum

To: Thomas G. Schendt, Esq., Alston & Bird, LLP

From: Larry H. Goldbrum, General Counsel

CC: Robert G. Wuelfing

Date: September 4, 2005

Re: Hurricane Katrina Disaster Guidance – Ongoing Suggestions and Comments

I. INTRODUCTION

As you requested, this Memorandum summarizes many of the issues and concerns that The SPARK Institute (“SPARK”) members have identified and are struggling with in the aftermath of Hurricane Katrina. We can say, without doubt, that Employers/Plan Sponsors, Participants/Employees, and Service Providers (collectively the “Affected Parties”) have been severely impacted in a way that is unprecedented. Furthermore, it is also without question that such state of affairs will (with certainty) continue for an extended period of time in several ways.

Additionally, the purpose of this Memorandum is to assist the appropriate government agencies (IRS, DOL, etc.) in (1) identifying impacted areas of retirement plan administration, as well as, (2) provide practical solutions that should address these concerns. We applaud the willingness of these government agencies to review our concerns and we are certain that appropriate efforts will result in constructive actions that will benefit the security of affected participants’ retirement benefits. We recognize the published relief that has currently been provided by IRS (e.g., Notice 2005-90) and the DOL (e.g., Release Number 05-1648-NAT), but we respectfully request that additional guidance must be provided to the Affected Parties.

Due to the urgent need for guidance, this Memorandum also includes a brief summary outline of suggested procedural modifications and processes. Please note that we continue to receive comments from our members and will provide such comments to you as we receive them.

II. THE NEED FOR GUIDANCE

- A. Affected Parties** – As noted above, the Affected Parties includes employers, as well as participants, and plan service providers. All of these groups are dependent on practical guidance in order to be able to take reasonable and necessary steps to help

alleviate some of the hardship in the aftermath of the hurricane. For example:

1. **Employers/Plan Sponsors.** Employers are not able to access their workplaces, normal lines of communication, computer systems, records, and cannot locate their employees.
2. **Participants/Employees.** Many participants have lost their homes, have been unable to travel, and communicate with their families and employers. In many cases mail and banking systems are not operating properly thereby hindering any ability to exchange and transfer funds. Additionally, participants might not have access to their identification and personal records.
3. **Service Providers.** Because of the impact of this disaster, service providers are willing to provide alternative processes to a plan's current plan administration practices, but without some guidance, they are in the position of knowing that some viable alternative administrative methods that get benefits to affected participants could disqualify the plan.

B. Requested Guidance - SPARK requests that any guidance promulgated by the IRS or DOL include a broad statement of guiding principles. This will provide the Affected Parties with the ability to consider alternative actions – where no specific guidance is provided – but is necessary. We understand that no published guidance can be comprehensive – but it would be helpful if the guidance can articulate some principles that will assist in all situations.

In general, the following guiding principles should be established:

1. First and foremost, there should be a blanket recognition that protects plan sponsors, plan administrators, employees, participants, beneficiaries, and plan service providers who are unable to fully comply with the laws, regulations and plan rules that apply to the operation and administration of certain employee benefit plans in the aftermath of Hurricane Katrina, provided that the actions were taken to act reasonably, prudently and in the interest of the workers and their families who rely on their health, pension and other benefits for their physical and economic well-being. Plan service providers should be permitted to take reasonable steps to provide services and respond to participant and plan sponsor requests that might deviate from normal plan rules and might not fully comply with the normal plan procedures that would otherwise apply under normal circumstances.
2. In addition to a global statement, the following points should also be considered in a larger general context:
 - a. **Filings and Governance Processes.** In cases where plan sponsor worksites or technology has been disrupted, extensions should be allowed for a defined time period on all filings, and governance processes.
 - b. **Transmittal of Funds.** Similar extensions should be allowed for submissions of deposits to the plan from payrolls or company accounts (both Titles I and II).

- c. **Plan Sponsor Approvals.** A general "good faith" statement is needed to protect service providers who process participant requested transactions (e.g., loans, hardships, and distributions) without sponsor approval if the sponsor cannot be contacted during the disaster recovery period.
- d. **Participant/Employee Home Addresses.** In cases where employees no longer have a home address, protections should be available for service providers who forward funds to an alternate address if adequate participant security measures are maintained. Guidance is also requested with respect to the proper handling of undeliverable and returned mail, and returned checks. Some of the issues that arise in connection with returned checks are how to invest the returned funds pending their ultimate disposition.
- e. **Financial Penalties.** In cases where deadlines have passed since the disaster, or will pass during the disaster recovery period, extensions should be granted to prevent financial penalties for employees or employers (e.g., late compliance testing refunds, and late required minimum distribution payments.)
- f. **Certain Excise Taxes.** Early withdrawal penalties that would otherwise be imposed on certain hardship withdrawals or defaulted loans should be waived (e.g. 72(t) taxes).
- g. **Record Retention.** Protections should be available for the destruction of plan books and records, including backups that may have also been destroyed.
- h. **Proof of Eligibility for Relief.** Protection and reasonable guidelines should be provided for proving eligibility for the relief that is provided.
- i. **Required Documents and Communications.** Delivery of required documents to employees is likely to be disrupted for an extended period of time. These documents include participant statements and transaction confirmations, fund prospectuses (including delivery requirements under ERISA Section 404(c)), Summary Plan Descriptions, etc. It is likely that in attempting to deliver such documents to the impacted areas, service providers will simply receive the entire shipment back as undeliverable. Alternate methods of participant communication should be utilized such as the WEB, or alternatively, suspend mailings until a defined date post disaster recovery.
- j. **Determination of Severance from Employment.** Time delays resulting from impacted employers not being able to access employment records, and the extensive movement of individuals relocated to other areas of the country during the recovery will result in large numbers of employees no longer being employed by their pre-disaster companies, without having their status updated in the old employer's system to a terminated status. Relief in this situation would enable funds from prior employers to be made available to individuals changing employment in this critical time. Reasonable guidelines should be provided for allowing record keepers to rely upon participant certification that they are severed from employment to cover situations where the employer is no longer in business or cannot be reached.

k. **Abandoned Plans.** Inevitably, many small employers in the impacted area will not be able to reopen their businesses. As a result, there will be an unprecedented number of abandoned plans. Guidance on expedited methods of determining how to handle these abandoned plans will be critical to providing continued retirement benefit protection, and the smooth flow of funds to affected employees.

C. **Effective Date and Expiration** – The Affected Parties have been faced with these issues almost immediately after Hurricane Katrina occurred. Many of the Affected Parties have begun following flexible policies for the benefit of plan participants who are in desperate need of help. Therefore, SPARK proposes that any relief and guidance provided by the IRS and DOL should be retroactive to the date that Hurricane Katrina occurred. Additionally, because the scope of the disaster has not been fully determined and the time that will be required for the affected areas to recover may not be known for weeks or months, we would request that the IRS and DOL evaluate the duration of the relief periodically and take a flexible approach to extending the relief and any future enforcement actions.

III. DEFINITION OF “AFFECTED PLAN”

SPARK suggests that the definition that is included in earlier guidance provided by the IRS is **limited in scope, and should be broadened**. This disaster affects not just employer locations, but also participant homes, and service provider locations, which requires much more guidance and leniency than situations that only involve plan administration complications. Therefore, we suggest you modify the definition Affected Plans as follows:

“For purposes of the notice, a plan is an Affected Plan only if any of the following were located at the time of Katrina in any of the parishes or counties declared by the President to be eligible for individual assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988, Pub. L. No. 93-288: the principal place of business of the employer that maintains the plan (in the case of a single-employer plan, determined disregarding the rules of § 414(b) and (c) of the Code); the principal place of business of employers that employ participants or beneficiaries covered by the plan (in the case of a plan covering employees of more than one employer, determined disregarding the rules of § 414(b) and (c)); the office of the plan or the plan administrator; or the office of the primary record keeper serving the plan; or the office of the enrolled actuary or other advisor that had been retained by the plan or the employer at the time of Katrina. For purposes of the preceding sentence, the term "office" includes only the worksite of those individuals, and the location of any records, necessary to determine the plan's funding requirements for the relevant period.

In addition, an Affected Plan also includes that portion of any plan, as it relates to those participants/beneficiaries that are domiciled in the affected areas named in the previous paragraph above.”

IV. SPECIFIC TRANSACTION, REPORTING AND APPROVAL PROCESSES

Specific transactions, reporting, and approval processes should be modified as follows:

A. Defined Contribution Plans

1. Filings, Compliance & Fiduciary Practices

- a. Force-out Processes (including rollovers) – these processes should be delayed and deadlines extended until a defined time period, and extended as necessary if recovery takes longer than originally provided for.
- b. Regulatory Filings – should be extended until a defined time period after disaster recovery is completed.
- c. Discrimination Testing – deadlines should be extended until a defined time period after disaster recovery is completed.
- d. Committee Meetings and Actions – Provisions should be made to approve actions taken during disaster recovery by a defined date post-recovery.
- e. Safe-harbor hardship withdrawal provisions should be added to the plan upon verbal approvals by the plan sponsor.
- f. Plan loan rules should be relaxed in order to facilitate emergency access to plan funds (e.g., not obtaining promissory notes, not obtaining spousal consent, not providing amortization schedules, not providing truth in lending disclosures, multiple loans even if plan only allows one loan at a time, reduction of plan minimum loan amount, relaxation of collateral requirements, relaxation of default provisions on existing and new loans that will likely go into default immediately).
- g. Retroactive Plan Amendments – provide for an extended retroactive amendment period for the actions taken in the aftermath of Hurricane Katrina.
- h. After the Fact Formal Compliance - allow for documents to be provided and obtained as needed for formal compliance with plan rules and regulations after the fact.
- i. Black-out Notices – relax and provide relief and protection from failure to comply with any black-out notice requirements that would otherwise be imposed.

2. Inbound Funds

- a. Payroll Contributions – deadlines for submissions should be extended
- b. Matching Contributions – deadlines for submissions should be extended
- c. Loan Repayments – deadlines for submissions should be extended and default determinations should be delayed until a defined date post-recovery

period. Consideration should be given for lifting of interest amounts on monies borrowed for a defined time period post-recovery

- d. Rollovers Contributions - deadlines for rollovers deposits should be extended

3. Outbound Funds

- a. Hardship Withdrawals – verbal requests should be granted with appropriate verbal situation review, telephone or WEB acceptance, and without paperwork. Alternate addresses should be allowed as well as alternate payment methods. Allow plans to make such withdrawals available even if the plan does not currently allow them. Contribution suspension requirements should also be relaxed.

In addition, much attention has been given to the ability to apply the new “deemed” hardship provision before the January 1, 2006 effective date. The focus has been on permitting plans to implement it earlier without the added requirement of implementing all other provisions of the new regulations. We agree with this concern. However, we point out a further concern is that the new “deemed” approved hardship provision applies only to repair casualties to an individual’s home (as defined in the regulation). This is not broad enough as we anticipate the need for hardship distributions in this category for funds to provide alternative housing or food and supplies. Accordingly, a broader “deemed” rule must be added.

- b. In-Service Withdrawals – same as above
- c. Loans – same as above
- d. QDRO Processing – depending on the status of the account split pre-disaster, be able to accommodate requests absent final paperwork or
- e. Death Handling – be able to accommodate beneficiary requests with appropriate approval processes and verbal approvals from employers

4. Other Plan Transactions

- a. Forfeiture Reallocations – delay processing until a defined date post-recovery
- b. Election Periods – extension of election periods until a defined date post-recovery
- c. Enrollment – plan enrollment rules should be relaxed and extended as appropriate. Additionally, plans that include an automatic enrollment or negative enrollment feature will be disrupted. A flexible approach that reasonably protects all Affected Parties is needed.

B. Defined Benefit Plans

- 1. **Benefit Payments** – alternate addresses should be allowed and alternate payment methods allowed (cash or wire versus check). Additionally, relief will be needed

with respect to the 90-days rule on retirement elections and start date rules.

2. Company Contributions – timeframe should be extended until a defined date post-recovery

3. Election Periods – should be extended until a defined date post-recovery

C. Non-Qualified Deferred Compensation Plans

1. Deferrals – timeframes should be extended for deposits or elections until a defined date post-recovery

2. Distributions - alternate addresses should be allowed and alternate payment methods allowed (cash or wire versus check)

D. Equity Award Programs

1. Grant Award – Acceptance and expiration dates should be extended until a defined date post-recovery.

2. Exercises in Flight – depending on the status of the transaction prior to the disaster, completion of the transaction should be able to be accomplished via telephone or internet without written signatures or paperwork as long as adequate security measures are maintained. This would include alternate addresses for payments as well as alternate payment methods.

These issues are of great concern to the SPARK membership. We recognize that many of these issues will require joint rule making by multiple agencies. Given the importance of these issues to our members I can be available to discuss these issues and the needed guidance with you and representatives of the IRS and DOL at any time.