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Internal Revenue Service
Attn: CC:PA:LPD:PR (Rev. Proc. 2007-71)
Room 5203
P. O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: **The SPARK Institute Comments on Revenue Procedure 2007-71**

Ladies and Gentlemen:

The SPARK Institute, Inc. appreciates this opportunity to comment on Revenue Procedure 2007-71 (the “Revenue Procedure”) relating to Section 403(b) of the Internal Revenue Code of 1986, as amended (the “Code”) and the final regulations under Code Section 403(b) issued by the Internal Revenue Service (“IRS”) and Department of the Treasury (“Treasury”) on July 26, 2007.¹ The SPARK Institute represents the interests of a broad based cross section of retirement plan vendors and investment managers who will be directly affected by the new 403(b) plan rules, including members that are banks, mutual fund companies, insurance companies, third party administrators and benefits consultants. Our members include most of the largest vendors in the 403(b) plan industry who provide recordkeeping services to plans ranging from one participant programs to plans that cover tens of thousands of employees. The combined membership services more than 80% of all 403(b) plan participants. Our members will play a significant role in facilitating plan sponsors’ compliance with the new 403(b) plan regulations.

¹ 72 Fed. Reg. 41128.

At the outset, we commend the IRS and Treasury for providing additional guidance with respect to the extremely complex issues relating to prior vendor contracts and contract exchanges under the final 403(b) regulations and providing model plan language for public school employers. The SPARK Institute believes that increased employer involvement in 403(b) plans and the sharing of information among vendors will benefit both employers and plan participants. However, 403(b) plan vendors are struggling to understand the new rules and the obligations of employers. A significant percentage of affected employers are still unaware or unsure about their obligations under the new rules and what steps they must take to comply. Although these employers may look to various sources for help, including their 403(b) vendors, in some cases there are significant differences in how practitioners and vendors understand and interpret the regulations. All of this poses significant challenges to employers and 403(b) plan vendors as they seek to facilitate consistent and reliable compliance in the 403(b) plan community.

As a result of these concerns, many of our members, as well as companies that had not previously been members of The SPARK Institute, requested that we create a forum and take a leadership role in developing practical solutions and best practices for complying with the new rules. To that end, we created a dedicated 403(b) Plans Task Force that currently includes approximately 45 individuals representing 23 major plan vendors. Our efforts include creating voluntary information sharing best practices and data standards, developing sample information sharing agreements (“ISAs”), evaluating and facilitating the potential development of a pre-approved prototype plan document program, and providing a forum to identify industry concerns and facilitate resolution by working with regulators. Our work products will ultimately be made widely available to the entire 403(b) community in order to facilitate compliance with the new rules.

The SPARK Institute respectfully requests that the IRS clarify and provide additional guidance with respect to the issues summarized below, and consider our recommended approaches with respect to the issues. The SPARK Institute believes that issuance of the additional guidance requested would enable employers and 403(b) plan vendors to more confidently comply with the new rules.

A. The IRS should clarify Section 8 of the Revenue Procedure relating to the treatment of contracts issued before 2009. - The SPARK Institute is extremely concerned about the lack of clarity under Section 8 of the Revenue Procedure. Representatives of the IRS and Treasury have previously acknowledged unofficially that the proposed 403(b) regulations were entirely silent as to the treatment of prior vendor contracts. Although the final 403(b) regulations suggested that all contracts may need to be included within the employer’s plan, questions still remain regarding prior vendor contracts that are not part of an employer’s plan as of the effective date. Both employers and vendors became concerned about prior vendor contracts given the nearly impossible task of identifying every such contract, as well as, the near mathematical certainty that there would be contracts and accounts which, if found, could not be brought within the plan for various reasons. Some of our members have participated in efforts to encourage the IRS to exclude all or a portion of the large block of existing prior vendor contracts from the regulation’s requirements. Although the Revenue Procedure sought to provide some relief with respect to certain groups of prior vendor contracts not part of the plan on January 1, 2009, a number of our recommendations were not included and important questions remain unanswered.

The SPARK Institute applauds the IRS and Treasury for stating in the Revenue Procedure that the final 403(b) regulations and the Revenue Procedure do not apply to contracts that received no contributions after December 31, 2004. For purposes of this letter, these contracts are referred to as “grandfathered contracts.” Vendors holding grandfathered contracts are not required to collect information from an employer prior to making a loan or a distribution under the contract. Grandfathered contracts continue to exist under the rules in effect prior to the issuance of the final 403(b) regulations and the Revenue Procedure.

Specifically, some of the parameters of the relief provided in the Revenue Procedure remain unclear. For example, Section 8.01 of the Revenue Procedure states that a contract issued after December 31, 2004 and before January 1, 2009 by an issuer that does not receive contributions under the plan in a year after the contract was issued will not fail to satisfy Section 403(b) for the year merely because the contract is not part of a written plan that satisfies Section 1.403(b)(3) of the 2007 regulations if (1) the employer makes a reasonable, good faith effort to include the contract as part of the employer’s plan, or (2) the issuer takes reasonable, good faith action to obtain information necessary to satisfy Section 403(b) from the person in charge of administering the employer’s plan before making any distribution or loan to a participant or beneficiary. Multiple interpretations have been put forth in public forums about these “orphan contracts” and whether all contracts that received a contribution after December 31, 2004 and ceased receiving contributions on or before December 31, 2008 qualify for the reasonable, good faith standard described in Section 8 of the Revenue Procedure. For example, various SPARK Institute members who have heard IRS representatives discuss the definition of orphan contracts at industry conferences have informed us that their understanding of the explanations given with respect to the “reasonable, good faith standard” is that it applies: (1) only to contracts that received their first and last contribution in the same calendar year; (2) to any contract that received a contribution in 2005, 2006, 2007 and/or 2008 if contributions cease on or before December 31, 2008; and (3) only to contracts that received a contribution in 2005, 2006, and/or 2007 if the contributions ceased in a following year that is not later than 2008. These understandings are inconsistent and the regulated community will benefit greatly if these issues are resolved through additional guidance.

Recommended Approach - We encourage the IRS to give additional consideration to those earlier recommendations to exclude prior vendor contracts and accounts from the 403(b) regulations. We respectfully request that the IRS publish guidance grandfathering all prior vendor contracts that receive no contributions after December 31, 2008 and are not part of the employer’s plan on and after January 1, 2009.

As an alternative, we recommend that IRS confirm through an appropriate published pronouncement the following conclusions with respect to the guidance provided in the Revenue Procedure, which we believe will help clarify, promote uniformity of understanding, and encourage compliance by plan sponsors and vendors:

1. Confirm that the determination of the category into which a previously approved vendor’s contracts or accounts properly fall ((i) pre-2005; (ii) 2005-2008; or, (iii) 2009 and forward) is determined by the actions taken by the employer to deselect the vendor as

eligible to receive contributions and/or transfers/exchanges, and that there is no single action that will be the sole test of such a deselection other than a demonstration of a cessation of contributions.

2. Confirm that a deselection of a vendor in 2008 will properly include the vendor in the 2005-2008 category.
3. Confirm that, with respect to contracts and accounts which fall into the pre-2005 and the 2005-2008 categories and do not otherwise become part of the plan, the plan may rely upon information provided by the participant as to existing loans or other relevant information regarding those contracts or accounts, provided that the requirements of the Revenue Procedure have otherwise been satisfied.

B. All 90-24 transfers made on or before January 1, 2009 should be grandfathered. - The final regulations provide that 90-24 transfers on and after September 24, 2007, may be transferred from any current or prior 403(b) vendor to a vendor contract that is either receiving contributions as part of the plan or has an ISA with the employer on January 1, 2009. The Revenue Procedure allows a participant who violated the post-September 24, 2007 rules to self correct by doing a re-exchange as described in Section 8.03 by July 1, 2009. The SPARK Institute is concerned about the potential taxability of participant accounts where the participant violated the post-September 24, 2007 90-24 rules and fails to execute such a re-exchange.

If a participant makes a 90-24 transfer after September 24, 2007 and before January 1, 2009, that contract is referred to as an “intermediate contract” if, prior to July 1, 2009, the participant does a 90-24 re-exchange for a contract issued by an issuer which is either receiving contributions as part of the plan or has an ISA with the employer. We commend the IRS and Treasury for stating that the information sharing requirements in Sections 1.403(b)-10(b)(2)(i)(C)(1) and (2) of the final regulations do not apply to intermediate contracts. However, neither the regulations nor the Revenue Procedures clearly address what happens to the participant’s account balance if an intermediate contract that has violated the post-September 24, 2007 rules is not re-exchanged prior to July 1, 2009 as described in the Revenue Procedure.

Recommended Approach - The SPARK Institute requests that the IRS provide written guidance that any and all 90-24 transfers made prior to December 31, 2008 are grandfathered. Treating all 90-24 transfers made prior to the effective date as grandfathered transfers will allow 403(b) plan sponsors, participants and vendors to comply with the final regulations without the threat that a post-September 24, 2007 transfer, that is not re-exchanged pursuant to Section 8.03 of the Revenue Procedure, will cause some participant account balances to become taxable on January 1, 2009.

In the alternative, The SPARK Institute requests additional guidance that clearly states that a 90-24 transfer made after September 24, 2007 and before January 1, 2009 will not adversely affect the status of the contract or account as a 403(b) contract or account, provided that either (1) the participant re-exchanges the non-compliant contract for one with an issuer that is receiving contributions or has an ISA, or (2) the issuer who accepted the post-September

24, 2007 transfer agrees to use the reasonable good faith standard for acquiring necessary information prior to making a loan or a distribution to the participant. This approach is intended to clearly indicate when, if at all, a post-September 24, 2007 transfer pursuant to Revenue Ruling 90-24 will cause the participants account to become taxable on January 1, 2009.

- C. **The rules for “contract exchanges” on and after January 1, 2009 should be modified to mirror the rules for post-September 2007 90-24 transfers.** - The SPARK Institute is concerned about questions regarding whether amounts may be exchanged from contracts and accounts outside the plan (e.g., grandfathered or orphan contracts) into a contract or account under the plan. Some of the confusion may be arising from Section 6.4(a) of the model plan language in the Appendix to the Revenue Procedure (the “Model Plan Language”), which indicates that “a Participant or a Beneficiary is permitted to change the investment of his or her Account Balance among the Vendors under the Plan, subject to the terms of the Individual Agreements.” (Emphasis added.) Similarly, Section 1.403(b)-10(b)(1)(i) states that, “[i]f the conditions in paragraph (b)(2) of this section are met, a section 403(b) contract held under a section 403(b) plan is permitted to be exchanged for another section 403(b) contract held under that section 403(b) plan.” (Emphasis added.) This language is being read by some to mean that transfers from contracts and accounts outside the plan may not be permitted. In addition, on a more general note, the 403(b) regulations and guidance leave open the possibility, both before and after January 1, 2009, for an adverse impact of what may be considered “foot faults”. For example, an exchange may be processed after the employer has sent notice that a vendor is no longer authorized, but before that notice is received by the vendor. Also, an employer and an approved vendor seeking to comply with the rules may be simultaneously processing an exchange and an ISA, but the ISA is not executed until after the exchange.

Recommended Approach - The SPARK Institute requests that the IRS provide written guidance confirming that:

1. Nothing in the model plan language, or in the underlying regulations, would prevent an exchange from a contract or account outside the plan into a contract or account under the plan; and,
2. An ISA that is executed between the sponsor and the approved vendor as soon as administratively practicable after an exchange is received by an approved vendor will be considered to satisfy the applicable ISA requirements of the final 403(b) regulations and the Revenue Procedure with respect to that exchange.

Both clarifications will serve to advance public policy and a major goal of the final 403(b) regulations by allowing more 403(b) assets to be consolidated into vendor contracts being monitored by employers.

- D. The SPARK Institute requests clarification with respect to the level of permissible reliance upon information provided by an employee with respect to distributions generally and to hardship distributions in particular.** - In the case of a hardship withdrawal that is automatically deemed to be necessary to satisfy the participant's financial need (pursuant to Section 1.401(k)-1(d)(3)(iv)(E) of the regulations), Section 5.5(b) of the Model Plan Language indicates that vendors and employers must exchange information necessary to ensure the required suspension of employee contributions for six (6) months. Both the Revenue Procedure and the final 403(b) regulations state that the 401(k) regulation section cited above, which does not require the collection and review of documentation, applies to hardship distributions from 403(b) plans. On the other hand, the preamble to the final 403(b) regulations clearly discourages reliance on the employees for plan compliance and indicates that participant self-certification is not acceptable in the context of hardship distributions. We believe there is the potential for reading these two provisions as being in conflict, although we do not believe such an interpretation is either correct or necessary. To the contrary, we believe that as the narrative included with the Model Plan Language states, it would be both reasonable and consistent with the letter and intent of the regulations for the plan to rely upon the participant to provide certain information without that being considered an assignment of compliance responsibilities to the participant, as permitted for 401(k) plans. As just one example, it clearly should be permissible for the plan to rely upon a participant's certifications that all loans have been exhausted to the extent that such certifications are permitted under the 401(k) hardship regulations.

Recommended Approach - The SPARK Institute requests that the IRS expressly confirm that the final regulations do not prohibit employers and vendors from relying upon any information provided by a participant, and that in particular they may rely upon employees' certifications that are permitted under the 401(k) hardship regulations with respect to requests for hardship withdrawals from 403(b) plans.

- E. The SPARK Institute requests clarification with respect to the interaction of the "Individual Agreements" (as defined in the Model Plan Language) and the Model Plan Language itself, both generally and with respect to a plan termination.**

Generally: It is well understood, and we believe it is widely agreed, that a participant's rights under an account or a contract may be limited by the terms of a plan to the extent the contract incorporates plan terms. We also believe, however, it is important for the Model Plan Language to acknowledge the limitations of such a principle, including the fact that a plan cannot unilaterally convey rights not otherwise present in the underlying contract or account. Additionally, it is likely that there will be annuity contracts and accounts that either do not recognize the authority of a plan, or do so incompletely, because the requirement did not exist for non-ERISA plans when the contracts and accounts were issued. These annuity contracts are governed by state insurance laws and cannot be amended without insurance department approval. Individual annuity contracts or individual certificates issued to a participant control the relationship between the insurance company and the participant.

Plan termination: The final regulations expressly permit the termination of a 403(b) plan. Further, "[a]ll accumulated benefits under the plan must be distributed to all participants and

beneficiaries as soon as administratively practicable after termination of the plan. For this purpose, delivery of a fully paid individual insurance annuity contract is treated as a distribution.” Treas. Reg. § 1.403(b)-10(a)(1). Section 8.2 of the Model Plan Language states unequivocally that “[t]he Employer reserves the authority to amend or terminate this Plan at any time.” Additionally, Section 9.8 of the Model Plan Language incorporates the Individual Agreements into the plan. That section states that “[t]he Plan, together with the Individual Agreements, is intended to satisfy the requirements of section 403(b) of the Code and the Income Tax Regulations thereunder. Terms and conditions of the Individual Agreements are hereby incorporated by reference into the Plan, excluding those terms that are inconsistent with the Plan or section 403(b) of the Code.”

Section 8.3 of the Model Plan Language, however, provides that the employer’s ability to terminate the plan and distribute all accumulated benefits to all participants and beneficiaries as soon as administratively practicable is subject to restrictions contained in the Individual Agreements, if any. This provision appears to properly recognize the importance of the interaction of the plan and the Individual Agreement. It may, however, leave a misimpression that, absent specific language in the Individual Agreement, distributions could not be made on plan termination. In our view, the employer’s actions of terminating the plan and relinquishing all authority over the contract or certificate, should constitute plan termination and distribution of the annuity contract to participants and beneficiaries in satisfaction of the benefit distribution requirement.

Recommended Approach - The SPARK Institute requests that the IRS modify the Model Plan Language consistent with the above discussion. An inconsistency between the plan and the Individual Agreement which involves no provisions which are themselves violative of the requirements of Code Section 403(b) should not adversely affect the qualification of the 403(b) plan. At a minimum, such inconsistency could be corrected through the IRS correction programs. We further request official confirmation that the existing individual contracts or certificates under group contracts may be distributed on plan termination through the relinquishment of any employer or plan authority over the existing contract or certificate.

- F. Adoption agreements.** - The Revenue Procedure clearly indicates that a public school obtains reliance to the extent it incorporates provisions from the Model Plan Language, or language that is substantially similar, into its plan document. Thus it is apparent but not stated, for example, that if 90% of a public school’s plan document consists of Model Plan Language or substantially similar provisions, it has reliance with respect to that 90% unless the remaining 10% would adversely affect the plan’s qualification. The Model Plan Language also includes several optional provisions which may be included or excluded by a plan sponsor, and identifies what other provisions of the Model Plan Language might be affected, perhaps requiring additional provisions, by the inclusion or exclusion of a particular provision. We see no reason why an employer could not pick and choose among the optional provisions, and utilize an adoption agreement or similar type of checklist to do so, without adversely affecting its reliance on the incorporated Model Plan Language (assuming the absence of other adverse provisions). An adoption agreement allows an employer to select the optional plan provisions to be included in its plan. The operative or substantive provisions of the plan are part of a static document. An employer would complete a checklist to indicate which optional provisions in the Model Plan Language, such as automatic

enrollment or loans, are to be included in their plan. This approach will save time and make plan adoption easier for employers. We note that, although the compliance deadline may seem far off, there is already very little time for public schools to get plan documents executed by January 1, 2009. Plan documents incorporating adoption agreements or similar checklists, some of which are already in use by plan sponsors, can greatly assist in facilitating compliance with this deadline.

In addition, it is also understood but not stated that references in the Revenue Procedure to "public school" includes public community colleges, colleges, and universities, as well as public K-12 institutions.

Recommended Approach - The SPARK Institute requests that the IRS expressly state in its guidance that: (1) combining Model Plan Language with other language in the employer's plan, whether that other language consists of additional or different provisions or an adoption agreement or checklist, or both, does not adversely affect a public school's ability to rely upon the Model Plan Language incorporated into the plan, provided that the other language does not itself include provisions which would adversely affect the qualification of the plan; and (2) public schools, for purposes of the Model Plan Language, include all public educational institutions, including public community colleges, colleges, and universities.

- G. The differences, if any, between the terms "Issuer" and "Vendor" should be clarified.** - Section 2.03 of the Revenue Procedure states that "[r]eferences in this revenue procedure to a contract or an issuer include a custodial account under section 403(b)(7) and an issuer of such an account, respectively." Section 1.21 of the Model Plan Language defines "Vendor" as "the provider of an Annuity Contract or Custodial Account." It is unclear whether these terms can be used interchangeably or if there is a distinction important to compliance with the final regulations and Revenue Procedure.

Recommended Approach - The SPARK Institute requests that the IRS clarify whether there are any substantive differences between an Issuer and a Vendor, as used in the Revenue Procedure and the Model Plan Language. If so, we request that the IRS clarify the distinctions.

- H. Additional guidance relating to certain Model Plan Language provisions.** - The SPARK Institute requests that the IRS provide additional guidance that clarifies the following issues relating to the Model Plan Language. As noted above, we recognize that the Model Plan Language is voluntary and can be used in whole or in part by plan sponsors as they see fit. However, the interest among 403(b) plan sponsors to be able to use and rely on the Model Plan Language should not be underestimated or dismissed. As the IRS knows, use of the Model Plan Language will provide greater comfort to plan sponsors that they are in compliance with and meeting their obligations under the new rules. Plan sponsors and participants will ultimately benefit from being able to rely on as much of the Model Plan Language as possible. In order to do so the language must deal with particular issues in a clear, consistent and practical manner. The requested guidance and proposed changes with respect to the Model Plan Language will help facilitate compliance and minimize potential conflicts among plan documents.

1. **Definition of “Account Balance.”** - It is essential that the definition of "Account Balance" in Section 1.2 of the Model Plan Language include amounts separately accounted for as Section 403(c) amounts for purposes of the IRS “investor control” rules and the Code Section 817(h) diversification rules (e.g., these amounts may be invested in "public funds"). If non-vested amounts separately accounted for as Section 403(c) amounts are not treated as amounts contributed to a Section 403(b) variable annuity contract, significant operational difficulties will be created.

Additionally, Section 6.4(b) of the Model Plan Language states that a contract or custodial account exchange is permitted so long as, among other things, “(b) the Participant or Beneficiary must have an Account Balance immediately after the exchange that is at least equal to the Account Balance of that Participant or Beneficiary immediately before the exchange (taking into account the Account Balance of that Participant or Beneficiary under both section 403(b) contracts or custodial accounts immediately before the exchange).” Neither this language nor the definition of Account Balance takes into account any fees that would be assessed on the exchange itself. The SPARK Institute is concerned that this requirement differs from the “accumulated benefit” requirement in Sections 1.403(b)-10(b)(2)(i)(B) and 1.403(b)-10(b)(2)(ii) of the final 403(b) regulations to such an extent that it will negate the ability of any participant to request an exchange.

Recommended Approach - The SPARK Institute requests that the IRS revise the definition of Account Balance in the Model Plan Language to include Section 403(c) amounts and to clarify that it is the Accumulated Benefit, as defined in the regulations, that should be the appropriate measure for compliance with the requirements under Section 6.4(b).

2. **Interaction of Model Plan Language and terms of annuity contracts and custodial accounts.** - A number of the Model Plan Language provisions define terms or subject certain plan provisions to the terms of the Individual Agreements. Many annuity contracts and custodial accounts agreements, on the other hand, defer to the plan document to determine which optional plan provisions have been adopted by the employer. In addition, many 403(b) plans permit participants to invest through multiple vendors, each of which may offer products containing differing contract provisions. If a public school adopts the Model Plan Language that states optional provisions are available only if available under the Individual Agreements, the resulting circular references will make administration impossible.

Examples of sections of the Model Plan Language that could cause significant administrative and operational problems include, but are not limited to:

- The definition of “Disabled” in Section 1.9;
- Timing of becoming a participant is inconsistent between the Administrator and the Individual Agreements in Section 2.2;
- Change in elective deferral election in Section 2.4;
- The special Section 403(b) catch-up limitation in Section 3.2;
- The availability of loans in Section 4.1;

- The loan terms in Section 4.3;
- Distributions at severance and other distributable events under Section 5.1;
- Distribution of small account balances under Section 5.2;
- Minimum distributions under Section 5.3;
- In-service distribution of rollover accounts in Section 5.4;
- Hardship withdrawals under Section 5.5;
- Eligible rollover contributions under Section 6.1(a);
- Plan to plan transfers to the plan under Section 6.2(c);
- Contract and custodial account exchanges under Section 6.4(a); and
- The right to terminate the plan and make distributions to participants and beneficiaries in Section 8.3.

Recommended Approach - In addition to its recommendations under Section E above, The SPARK Institute recommends that the IRS issue guidance which clarifies that the mere fact of different plan and contract or account terminology will not itself be considered a violation of the terms of the plan, in the absence of a violation of the requirements of Code Section 403(b), and that for purposes of determining compliance with the plan, reasonable interpretations of the plan, contracts and accounts will be respected.

3. **Definition of “Disability.”** - The definition of "Disabled" in Section 1.9 of the Model Plan Language refers to a definition in the Individual Agreements, which could result in a person being considered disabled for only a portion of his or her 403(b) plan benefits.

Recommended Approach - Employers should be allowed to include a uniform definition of disability in the plan document which would apply to all Individual Agreements, except that such definition would not apply to existing Individual Agreements that cannot be changed.

4. **Compensation reduction election.** - Section 2.2(a) of the Model Plan Language contains requirements in the last and third from the last sentences that appear to be inconsistent. One sentence states the following: "Each Employee will become a Participant in accordance with the terms and conditions of the Individual Agreements." The other sentence states the following: "An Employee shall become a Participant as soon as reasonably practicable following the date applicable under the employee's election."

Recommended Approach - The SPARK Institute requests that the IRS modify the language by eliminating the reference to the Individual Agreements. Although it is worthwhile to note that, for practical purposes, the participant needs to have an account into which the deferrals will be deposited, nevertheless, the narrow question of making such elections should be within the control of the employer under the terms of the plan. In the alternative, we request that the IRS modify the Model Plan Language to provide that an employee can participate in the plan as soon as reasonably practicable following the date applicable under the employee's election, subject to, and in accordance with, the terms of the Individual Agreements.

5. **Special rule for new employees.** - Employers that establish automatic enrollment arrangements pursuant to Section 2.2(b)(1) of the Model Plan Language will generally be required to choose a default investment option, which may be a more specific choice than the selection of a "Funding Vehicle or Vehicles." For example, an employer may need to choose the custodian or insurance company that will receive employees' automatic contributions, as well as the specific investment option in which such contributions are to be invested, such as a target retirement date fund or a fixed group or individual annuity contract.

Recommended Approach - The Model Plan Language should be modified in order to address the circumstances described above, or in the alternative, the language of the Revenue Procedure could be clarified to indicate that the additional selection of the custodian or insurance company offering the designated investment option would not adversely affect the employer's reliance upon this provision.

6. **Beneficiary designation under automatic enrollment.** - Section 2.2(b)(1) of the Model Plan Language contains the following statement: "Any Employee who automatically becomes a Participant under this Section 2.2(b) shall file a designation of Beneficiary with the funding Vehicle or Vehicles to which contributions are made." Since employees who are automatically enrolled are not actively engaged in saving for retirement, flexibility must be built into the plan for participants who do not file beneficiary designations.

Recommended Approach - In situations where the employee automatically becomes a participant in the plan and fails to provide a beneficiary designation form, the plan document should contain a facility of payment clause. For example, a plan should be permitted to provide that, if the participant dies without a designated beneficiary (either designated by the participant or under the terms of the annuity contract used as the funding vehicle), the beneficiary shall be deemed to be the surviving spouse, if any, or if not, the participant's estate. Moreover, general provisions of the Model Plan Language which require beneficiary designations to be made on the salary reduction agreement should be revised to recognize the same practical reality currently expressed in Section 2.2(b)(1), that such designations generally are made pursuant to the Individual Agreement and not at the plan level.

- I. **The SPARK Institute requests that the Model Plan Language be expanded to provide for employer contributions and voluntary plans.** - A number of K-12 employers currently include employer non-elective or matching contributions in their 403(b) plans. Many employers would benefit from having model plan language that they can rely upon for plans that include employer contributions, employer matching contributions, designated Roth contributions or one time non-elective contributions. Likewise, tax-exempt employers intending to maintain an exemption from the Employee Retirement Income Security Act of 1974 ("ERISA") under 29 C.F.R. Section 2510.3-2(f) and FAB 2007-2 would benefit from

having model plan language that they can rely upon to satisfy both the final regulations and FAB 2007-2.²

Recommended Approach - The SPARK Institute requests that the IRS expand the Model Plan Language to include provisions for employer contributions, designated Roth contributions and one time non-elective contributions for school districts and tax-exempt employers. We also request that the IRS provide model plan language for voluntary tax-exempt employer plans exempt from ERISA. As noted above, the interest among 403(b) plan sponsors to be able to use and rely on the Model Plan Language should not be underestimated or dismissed. As the IRS knows, use of the Model Plan Language will provide greater comfort to plan sponsors that they are in compliance and meeting their obligations under the new rules. Plan sponsors and participants will ultimately benefit from being able to rely on as much of the Model Plan Language as possible.

J. The effective date in the Revenue Procedure and the final 403(b) regulations should be extended to include a longer transition and compliance period for employers and vendors. - The SPARK Institute is extremely concerned about employers' ability to identify and enter into ISAs with the appropriate vendors by January 1, 2009. Among the factors that contribute to our concern about the compliance deadline are the following:

1. The number and complexity of the issues described in this comment letter that remain unresolved, including the fact that the regulated community does not have a clear understanding regarding when an ISA is necessary. Employers do not have the time and resources to enter into ISAs with every vendor regardless of whether or not one is necessary. Moreover, entering into these agreements should not be considered a simple matter of signing a document that is provided by either party to the agreement. The ISAs will likely have to be reviewed and negotiated by counsel in order to ensure compliance and consistency for the parties to the agreement.
2. There are a number of issues that must be addressed by the Department of Labor that impact certain employers' exemption from Title I of ERISA. These issues relate to an employer's ability to control and limit the terms of the plan without becoming subject to Title I. Absent such additional guidance, employers are in the untenable position of having to adopt a plan document without knowing to what extent they can limit the plan's options and features, without subjecting the plan to Title I of ERISA.
3. As discussed more fully below, the amount of time, cost and effort involved with respect to compliance with the plan document and information sharing provisions is significant and the amount of work that needs to be done by employers and vendors is substantial.

² As noted below, an Employer's ability to control or limit certain of these plan features and provisions may affect whether the plan is exempt from Title I of ERISA. The SPARK Institute has raised such issues directly with the Department of Labor.

The SPARK Institute believes that the amount of time, cost and effort that will be involved in the information sharing process among multiple vendors and employers will be very significant, potentially disruptive to the retirement plan industry and could hurt plan participants. The potential burden the Revenue Procedure could place on the retirement plans and vendors is illustrated by the industry's experience with SEC Rule 22c-2, which imposed, among other things, new contract requirements between mutual fund companies and plan record keepers. The retirement plan industry and the SEC learned in connection with SEC Rule 22c-2 that compliance rules that impose new contract requirements involve significant time, cost and effort. Eventually, the SEC recognized the significance of the burden that Rule 22c-2 would have imposed and amended the rule.

We believe that the time, cost and effort that it will take for plan sponsors and vendors to comply with the Revenue Procedure and final 403(b) regulations' information sharing requirements are greater than the IRS and Treasury estimated when setting the compliance deadline. Our members have advised us that there are several potentially time consuming tasks that must be accomplished before they will be in a position to draft ISAs and either amend or restate their agreements. The tasks include, for example, determining the contracts that must be covered by the ISAs, drafting ISAs and arranging for all vendors of one employer to execute an identical ISA, preparing services amendments for use with existing and new customers allocating and describing the responsibilities of the parties, developing the detailed data standards that must be shared between employers and vendors, and identifying the employers that require a new or amended agreement. Our members have also advised us that system changes must be made in order to facilitate automated compliance with the information sharing requirements. These tasks, and others that may ultimately be required, will take a significant amount of time to complete.

We note that the requirements under Rule 22c-2 generally affected fund companies and record keepers who already had agreements with each other that, for the most part, only had to be amended. In contrast, absent modification or clarification, the Revenue Procedure would require annuity contract issuers and custodial account issuers to enter into new agreements with thousands of plans. We urge the IRS to consider our concerns and provide the much needed relief requested below.

Recommended Approach - The SPARK Institute respectfully requests that the IRS extend the deadline for the execution of ISAs between vendors and employers for a minimum of twelve months following the receipt of additional written guidance from the IRS clarifying the definition of orphan contracts and contract exchanges. The SPARK Institute believes that even the most diligent employers and vendors will have a difficult time meeting the compliance deadline given the uncertain circumstances described in this letter. Our proposed compliance deadline is intended to provide all of the affected parties a reasonable amount of time to develop new agreements and amendments, and facilitate an orderly transition to the new regulatory structure.

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

Respectfully,

A handwritten signature in black ink, appearing to read "L. Goldbrum", followed by a long horizontal line extending to the right.

Larry H. Goldbrum
General Counsel

cc: Mr. James E. Holland (Internal Revenue Service)
Mr. W. Thomas Reeder (Department of the Treasury)
Ms. Marilyn Collister (Great-West Retirement Services)