



Filed Electronically

June 10, 2011

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: **Requirements for Fee Disclosure to Plan Fiduciaries and Participants –
Applicability Dates**

Ladies and Gentlemen:

The SPARK Institute, Inc.¹ appreciates this opportunity to respond to the Department of Labor's (the "Department") notice of proposed extension of the applicability dates for the fiduciary-level ("408(b)(2)")² and the participant-level³ disclosure rules (the "Notice").⁴ The SPARK Institute's members include retirement plan service providers and investment managers who will be responsible for making 408(b)(2) disclosures and will also play a critical role in helping plan sponsors comply with the participant disclosure rules.

¹ 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 sponsors, trade clearing firms 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 approximately 70 million employer-sponsored plan participants.

² 75 Fed. Reg. 41600 (July 16, 2010).

³ 75 Fed. Reg. 64910 (October 20, 2010).

⁴ 76 Fed. Reg. 31544 (June 1, 2011).

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The SPARK Institute supports the proposed extensions and commends the Department for being responsive to the needs of the regulated community, including plan sponsors. We also commend the Department for recognizing the importance of having the 408(b)(2) rules go into effect prior to the participant disclosure rules.

Our members have been working diligently to understand and comply with the new disclosure requirements. However, despite all of the progress that has been made, our members remain concerned about their ability to comply with both sets of rules by the proposed extended compliance dates.

I. Concerns Related to the 408(b)(2) Rules

Our members are concerned about the possibility that the final 408(b)(2) rules could impose new requirements and include changes to the interim final rules that will require significant time and effort to comply with. For example, we anticipate that the final rules may include a summary disclosure requirement. However, without knowing what will be in the final rules, service providers cannot determine the amount of time and effort that will be needed to make changes to their systems, materials, policies and procedures. We anticipate that some of the compliance work that is already being done will have to be modified or discarded as a result of the final rules.

We understand that the Department is close to finalizing the 408(b)(2) rules for review by the Office of Management and Budget (“OMB”). Assuming that the rules are sent to OMB as of the date of this letter, final rules would not be released until mid-September 2011. As a result, the regulated community is likely to have less than four months to adapt and comply. As we have stated in prior letters to the Department, the stakes for service providers are very high and it is critical that they have adequate time to understand what is required of them and to modify their systems, materials, policies and procedures. Our members’ concerns are amplified by their working knowledge of the considerable lead time required to alter existing or implement new technology requirements. They remain concerned that inadequate time to implement these changes will result in less effective output through less efficient and more costly processes that ultimately impact sponsors and the retirement savings of plan participants. Inasmuch as even minor changes to the final rules may require significant systems changes, we believe that the Department should afford service providers and plan sponsors at least 180 days following publication of the final 408(b)(2) rules to comply with the new requirements. If major changes are made to the final rules, such as including a mandate to provide a summary disclosure form, a longer period will be required to avoid unnecessary implementation costs and burdens.

II. Concerns Related to Participant Disclosure Rules

A. Non-registered Investment Products - The SPARK Institute is working on an information sharing data standards project that is intended to address our members' concerns about being able to collect certain investment related information that plan sponsors must disclose to participants. Specifically, our members are concerned that non-registered investment products' fund information may not be available from the fund managers by the compliance date. Record keepers are also concerned that they will not be able to collect the data for plan sponsors efficiently via electronic means because no technological infrastructure or data sharing standards exist. They are faced with having to collect the information from potentially hundreds of investment managers for thousands of funds through a patchwork of methods including paper and telephone. Additionally, our members have reported to us that a significant percentage of non-registered investment product managers are either not aware of the participant disclosure requirements or are not yet cooperating with them to provide the data.

As a result of these concerns, The SPARK Institute is developing data standards similar to those we created for 403(b) plan information sharing and for lifetime income products.⁵ The goal of this project is to establish standards that will allow record keepers to gather through electronic means the information that plan sponsors must disclose. Another goal of this initiative is to help inform the managers of non-registered investment products about the information that plan sponsors must have in order to meet their participant disclosure obligations.

Although we are expediting this initiative, it is likely to take several more months to complete.⁶ Once finalized, the data standards will be available to everyone in the regulated community to use at no charge. However, investment managers and record keepers will require time to evaluate the standards and make changes to their systems, practices and procedures. Though we are currently unable to estimate when the affected parties will be able to share information using the data standards, we know from other similar initiatives we have undertaken that the timing will ultimately be driven by the non-registered investment product providers' ability and willingness to adopt the standards and provide the information. In this instance, the lengthy time lines required for technology changes generate concern for our members.

⁵ The SPARK Institute developed information sharing standards for 403(b) plans (released in 2008) and lifetime income solutions (released in 2010), both of which are widely accepted industry standards.

⁶ Some of the time we need to complete this initiative will be devoted to soliciting and responding to comments on a draft of the data standards that we currently intend to release through the media and our web site to non-SPARK Institute member companies. Although this process can be time consuming, it ultimately results in a better end product and broader acceptance in the industry.

Ultimately, plan sponsors/plan administrators are responsible for ensuring compliance with the new participant disclosure rules. However, meaningful compliance will, in large part, depend on the support, information and data they receive from the plan's service providers. For this reason, we believe it is important that plan sponsors not be required to comply with the new disclosure rules earlier than 120 days from the date service providers are required to satisfy their obligations under the new 408(b)(2) rules, which should take effect no earlier than 180 days following publication of those rules.

B. Impact of Non-calendar Year Plans - The proposed extension will give plans 120 days after the applicability date to provide initial disclosures to participants (i.e., April 30 for calendar year plans). However, we are concerned that plan sponsors and service providers that have plans with October 31 or November 30 plan year ends will not get the full benefit of the 120 days after the effective date of the 408(b)(2) rules. Under the proposed extension, a plan that has an October 31 plan year end would be required to provide the initial disclosures by February 29, 2012 because the applicability date for that plan is November 1, 2011. A similar disparity exists for participant statements. Plans with a November 1, 2011 applicability date will have to provide statements by March 16, 2012, but calendar year plans will have until May 15, 2012. Moreover, service providers must have their systems, materials, policies and procedures in place before the earliest compliance date that applies to any plan that it services. Therefore, any plan sponsor and service provider that has a plan with an October 31 or November 30 year end will not get the full benefit of the 120 day gap period. As noted above, service providers will play a significant role in helping plan sponsors meet their disclosure requirements and should have the full benefit of the 120 day gap period for every plan that they service. Our recommendations under Section IV address this concern.

C. Multi-vendor 403(b) Plans - 403(b) plans that use multiple vendors for plan administration and investments are faced with unique challenges in complying with the participant disclosure rules. One of the most significant challenges they face is providing participants with investment option information in a comparative chart. Plan sponsors that work with multiple vendors must figure out how to (1) collect data from multiple active and legacy providers, (2) consolidate the information and (3) present it to participants in a consistent and understandable fashion. These efforts will be complicated by differences in record keeping systems and practices among the vendors, and different investment classifications used across the industry, among other things. Our recommendations in Section IV will provide 403(b) plan sponsors additional time to work with their service providers on solutions to these challenges, but longer extensions may eventually be needed.

D. Electronic Disclosures to Participants - Our members are also concerned about their ability to make greater use of electronic communications for providing required materials to participants. On June 1, 2011, The SPARK Institute submitted a response to the Department's Request for Information regarding Electronic

Disclosure by Employee Benefit Plans.⁷ In our letter, we urged the Department to act quickly to issue new rules so that they will be available in time to assist plan sponsors' and service providers' compliance with the participant disclosure rules. We reiterate the concern we expressed in our June 1st letter that new and more permissive electronic disclosure rules may not be available before the participant disclosure rules' compliance date.

E. Coordination with 404(c) Regulations - The proposed transitional rule is intended to provide a limited extension for the delivery of the initial participant disclosures. However, the Notice indicates that amendments to the Department's 404(c) regulations are not affected by the proposed changes to the transitional rule.⁸ We request that the Department clarify that the 404a-5 disclosures are not required to be provided under the 404(c) regulations before they would otherwise have to be provided under the revised transitional rule.

III. Impact of Pending Regulations for Target Date Fund Disclosures

The Department has not finalized the proposed target date fund disclosure regulations that were published on November 30, 2010.⁹ The SPARK Institute submitted a comment letter regarding the proposal on January 13, 2011, in which we identified certain concerns about the how the timing and content of target date fund related notices and the participant disclosure rules impacted each other and their potential impact on participants.¹⁰

Although plan sponsors/plan administrators will ultimately be responsible for making the required target date fund disclosures, they will be largely dependent on investment providers and record keepers to help them gather, prepare and distribute the required information and disclosures. The uncertainty related to these matters and the possibility that the Department may publish final target date fund disclosure rules in the near future create additional complexities for the plan sponsors and service providers, and further justify the need for the additional extensions requested in Section IV.

⁷ 76 Fed. Reg. 19285 (April 7, 2011).

⁸ See 76 Fed. Reg. 31544, fn. 1 (June 1, 2011).

⁹ 75 Fed. Reg. 73987 (Nov. 30, 2010).

¹⁰ See The SPARK Institute Letter to the Employee Benefits Security Administration Re: Proposed Regulation for Target Date Fund Disclosure, Sections E and F at pp. 5-6 (January 13, 2011).

IV. Recommendations

We request that the Department extend and align the compliance dates as follows:

- A. Extend the compliance date for the new 408(b)(2) rules for at least 180 days following the date of publication of the final rules in the *Federal Register*. If major changes are made to the final rules, such as including a mandate to provide a summary disclosure form, a longer period will be required to avoid unnecessary implementation costs and burdens.
- B. Extend the compliance date for the participant disclosure rules to at least 120 days following the compliance date for the new 408(b)(2) rules.
- C. Provide a one year good faith compliance exception for plan sponsors under the participant disclosure rules with respect to the disclosure of investment information for all non-registered investment products.
- D. Extend the transitional guidance for benefit statements under the Field Assistance Bulletin No. 2006-03 to the participant disclosure rules until such time as a new electronic communications safe harbor and other rules are issued.

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We thank you for the opportunity to comment on this very important effort and for your consideration of our views. The SPARK Institute is available to provide additional information and clarification regarding these matters. Please do not hesitate to contact us at (704) 987-0533.

Respectfully,



Larry H. Goldbrum
General Counsel