Submitted Electronically

May 31, 2012

The Honorable Phyllis C. Borzi
Assistant Secretary, Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: **Request for Transition Relief in Connection with Anticipated 408(b)(2) FAQs and Certain Issues Raised in Field Assistance Bulletin 2012-02**

Dear Ms. Borzi:

The purpose of this letter is to express the concerns of retirement plan service providers about their ability to comply with the final 408(b)(2) regulations[1] consistent with anticipated Frequently Asked Questions guidance ("FAQs") that the Department of Labor ("Department") representatives have indicated will be released in the near future. We urge the Department to provide broad transition relief so that service providers who have acted in good faith to comply with the final 408(b)(2) disclosure regulations will not be subject to increased risk of private party litigation and claims, and enforcement actions brought by the Department. We also request that the Department consider modifying the 404a-5 participant disclosure transition relief in Field Assistance Bulletin ("FAB") 2012-02.[2]

408(b)(2) Concerns - Although The SPARK Institute had not previously requested additional guidance regarding the final 408(b)(2) regulations, our members who provide services to a substantial majority of retirement plans will be significantly impacted. As we noted in earlier letters and discussions with the Department, because the regulations are effective July 1, 2012, if the Department interprets the disclosure regulations in a manner that is inconsistent with service providers' interpretations and already programmed disclosure solutions, service providers will be unable to adjust their compliance approaches before the

[1] Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure, 77 Fed. Reg. 5632 (Feb. 3, 2012).

[2] Field Assistance Bulletin 2012-02 (May 7, 2012).

deadline. We acknowledge the Department's efforts and appreciation of similar concerns we expressed before the Department issued FAB 2012-02. However, FAB 2012-02 only provided relief from enforcement actions that may be brought by the Department.[3] We are concerned that such limited relief in connection with the anticipated 408(b)(2) FAQs will unduly expose service providers who have acted in good faith to substantially greater risk of private party claims and litigation. In several earlier letters and communications, we described the difficulties that service providers will face when they must comply with new rules and interpretations on short notice, especially after having devoted a substantial amount of time, effort and resources on compliance solutions based on their reasonable and good faith interpretations of the rules.[4] If the anticipated FAQs interpret the regulations in a manner that is inconsistent with how they have been reasonably interpreted by a service provider, the service provider will not be able to change its compliance approach before the July 1, 2012 deadline. The stakes for service providers are substantial because of the potential that their agreements with every plan they service could be affected. The costs and adverse consequences for a service provider that may have engaged in inadvertent prohibited transactions due to unexpected guidance from the Department in the anticipated FAQs could be substantial.

We are also concerned about certain issues addressed in FAB 2012-02 that impact service providers' 408(b)(2) disclosure obligations. FAB 2012-02 Questions and Answers 29 and 30 raise the possibility that certain investments on a brokerage platform and investments selected by participants though brokerage windows may have to be treated as designated investment alternatives of a plan in order for the responsible plan fiduciary to satisfy its fiduciary obligations under Section 404 of the Employee Retirement Income Security Act.[5] Section 408b-2(c)(iv)(F) requires certain record keepers and brokerage service providers to furnish disclosures for each of a plan's designated investment alternatives to the responsible plan fiduciary. The Department's policy and position in Answers 29 and 30 could not have been anticipated by service providers.[6] It is unclear how plan fiduciaries will address these issues. Moreover, service providers have not had adequate time to evaluate their impact and how to comply under 408(b)(2) with respect to investments that become, or are deemed to be, designated investment alternatives because of significant participant usage. It is also unclear

[3] Id. Q&A 37.

[4] See e.g., Letter dated March 30, 2012 to Michael L. Davis from Larry H. Goldbrum regarding Request for Transition Relief in Connection with Anticipated Fee Disclosure FAQs, Letter dated January 6, 2012 to Michael L. Davis from Larry H. Goldbrum regarding Delayed Release of Final 408(b)(2) Regulations, and Letter dated December 14, 2011 to Michael L. Davis from Larry H. Goldbrum regarding Impact of the Delayed Release and Potential Changes to the 408(b)(2) Regulations.

[5] Our concern with respect to Answer 29 that deals with brokerage windows relates to the last sentence which states "[s]ee also question 30 concerning fiduciary obligations with respect to non-designated investment alternatives selected by significant numbers of participants and beneficiaries" because it seems to extend the concepts in Answer 30 to brokerage windows.

[6] The concept of a "designated investment alternative" has been around for almost 20 years. During that time, including the extended 408(b)(2) and 404(a) regulatory process, the Department provided no indication to the regulated community of the interpretive position set forth in Answers 29 and 30. Additionally, 29 CFR § 2550.404c-1(e)(4), as adopted in October 1992, defines a "designated investment alternative" as a "specific investment identified by a plan fiduciary as an available investment under the plan."

when a service provider would be obligated to make the required 408(b)(2) disclosures to the plan fiduciary because the investments at issue would be treated as designated investment alternatives as a result of prior usage. A service provider should not be treated as failing to meet its disclosure obligations under 408(b)(2) with respect to brokerage window and brokerage platform investments until the regulated community can identify all of the potential issues that exist, and the Department can provide additional guidance.

404a-5 Concerns[7] – Some service providers have reported to us that the limited transition relief for plan administrators under FAB 2012-02 is creating practical problems, causing concerns for plan administrators, and in some instances, creating tension between plan administrators and their service providers. The 404a-5 participant disclosures are a plan administrator obligation. However, as the Department knows, most plan administrators are depending on their service providers for substantial compliance assistance. Plan administrators are concerned about potential private party litigation and claims, as well as DOL enforcement actions. The transition relief does not protect plan administrators from litigation risk. Consequently, many plan administrators are unwilling to accept a good faith reasonable interpretation compliance approach that does not follow the requirements and examples under FAB 2012-02 (including the suggested, but not required, approaches that are provided in certain answers). Examples include Answer 13 that describes the information that must be disclosed to participants about brokerage windows in advance, and Answer 5 that provides an example for disclosing an estimate of administrative expenses that are not known at the time of disclosure, even though there is no requirement to provide an estimate.

Some plan administrators are insisting that their service providers furnish compliance support that is consistent with the FAQs by the August 30, 2012 deadline. As the Department, knows, service providers need substantially more time to adjust their compliance approaches in order to be able to help plan administrators meet their 404a-5 disclosure obligations based on the FAB. Although plan administrators bear the risk of non-compliance, they do not control the systems that must be changed, and they are generally not the ones developing the materials that must be provided to participants. Service providers are currently devoting substantial resources to preparing for compliance with the 408(b)(2) regulations, and are unable to devote the substantial resources that would be needed to accelerate compliance with FAB 2012-02. In summary, plan administrators are potentially exposed to litigation risk and are unable to follow the FAB without substantial assistance from their service providers, who need more time to make modifications to their compliance approaches.

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[7] This letter focuses on the need for broader transition relief based on the 404a-5 disclosure guidance that has already been released by the Department. This letter does not address the specific procedural, policy and substantive concerns that our member companies have regarding Answers 29 and 30. Those matters will be addressed by us separately after service providers and plan sponsors have had adequate time to fully evaluate the implications of the FAB. However, we believe that Answers 29 and 30 raise sufficiently significant cost, policy and procedural issues to justify the Department withdrawing them and, to the extent the Department continues to believe the position represents good policy, pursue adoption of its position through a formal notice and comment process. This would provide the regulated community an opportunity to assess the Department's rationale and the accompanying regulatory impact analysis, and offer information and comments for consideration prior to the Department's adoption. Although we prefer that the Department withdraw or modify Answers 29 and 30, broader transition relief is needed while the Department is considering and discussing the procedural and substantive issues and concerns of the regulated community.

<u>Request for Transition Relief</u> - The SPARK Institute urges the Department to provide broad transition relief for service providers in connection with the anticipated 408(b)(2) FAQs and with respect to 408(b)(2) disclosures that were impacted by FAB 2012-02. More specifically, we request that the Department expressly state in the anticipated 408(b)(2) FAQs that a service provider will be viewed as meeting the requirements of the 408(b)(2) regulations (which will mitigate the risk of private party claims and litigation), and will not be subject to enforcement actions brought by the Department if, for the transition period, the service provider relied (a) on a reasonable and good faith interpretation of the disclosure regulations or (b) on the regulations as interpreted in the FAQs. We request that the transition period begins on the date that the FAQs are issued and ends 12 months thereafter.

Additionally, we urge the Department to modify the transition relief provided to plan administrators in FAB 2012-02 to provide that a plan administrator will be viewed as meeting the requirements of the 404a-5 regulations (which will mitigate the risk of private party claims and litigation), and will not be subject to enforcement actions brought by the Department if, for the transition period, the plan administrator relied (a) on a reasonable and good faith interpretation of the disclosure regulations or (b) on the regulations as interpreted in the FAB.

We also request that the Department consider modifying the <u>transition period</u> set forth in FAB 2012-02 as it relates to Answers 29 and 30. We anticipate that the regulated community will need additional guidance from the Department related to those answers to the extent that they are not withdrawn. As noted above, The SPARK Institute and others in the regulated community are evaluating those answers and their implications. Service providers will be hesitant to devote time and resources to modifying their compliance approaches without more certainty about the Department's expectations. Consequently, plan administrators will be limited in their ability to meet their obligations to plan participants until their service providers' systems and compliance materials are ready. Assuming that the Department will issue additional guidance in the future, as needed, we request that the transition period begins on the date that final additional guidance is issued and ends 12 months thereafter. Additionally, we request that the Department provide a corresponding extension of the 408(b)(2) transition period for service providers, as needed, based on the impact any additional guidance with respect to brokerage account investments has on service providers' disclosure obligations.

The SPARK Institute believes that our requested transition relief strikes a reasonable balance between the Department's objective of having the 408(b)(2) and 404a-5 disclosure rules take effect without further delay and the regulated community's need for adequate time to accommodate the new guidance without being subject to, or subjecting plan fiduciaries to, increased risk of liability for inadvertent violations. If the Department grants the proposed transition relief, the vast majority of the new 408(b)(2) and 404a-5 disclosure rules will still become effective as planned on July 1, 2012 and August 30, 2012. Service providers are prepared to comply with the new rules on the effective dates, and some have already started complying. Granting the requested relief will allow plan fiduciaries and participants to benefit from the new disclosure rules as planned while mitigating the risks to service providers and plan administrators with respect to recently released and anticipated guidance.

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Thank you for considering our views and recommendations on this very important topic. The SPARK Institute is available to provide additional information and clarification regarding this request. Please do not hesitate to contact us at (704) 987-0533.

Respectfully,

Larry H. Goldbrum
General Counsel