



Submitted Electronically

June 10, 2013

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

Re: **Request for Guidance About Timing of Participant Disclosures**

Dear Ms. Borzi:

The SPARK Institute¹ requests that the Employee Benefits Security Administration of the U.S. Department of Labor ("EBSA") issue guidance that will simplify and facilitate efficient compliance with the 404a-5 participant disclosure regulations. Plan sponsors² are currently working with their service providers to comply with their first on-going annual disclosures since having made the initial disclosures by August 30, 2012. Out of an abundance of caution, the rule is generally being interpreted as requiring this and future years' materials to be furnished within 12 months of the prior year's disclosures (generally by August 30th). According to our member companies, the deadline is hindering many plan sponsors from synchronizing the delivery of the 404a-5 disclosure materials with other plan materials. Therefore, we request that EBSA issue guidance that specifies that good faith compliance with the "at least annually" requirement under the disclosure regulations³ shall mean furnishing the materials within each calendar year, without regard to the plan year, provided that the materials are furnished no more than 18 months from the date on which the materials were provided during the preceding calendar year. Following is a more detailed explanation about the need for guidance and its intended operation.

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 administrators, trade clearing firms and benefits consultants. Collectively, our members serve approximately 70 million participants in 401(k) and other defined contribution plans.

² References herein to "plan sponsor" are intended to include the "plan administrator."

³ 29 C.F.R § 2550.404a-5(h)(1).

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I. Discussion

The 404a-5 disclosure regulations require a plan sponsor to furnish certain materials to participants at least annually.⁴ The regulations define the term as "at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis."⁵ Some information can be included as part of the participant statements, but not all (e.g., the investment option comparative chart and general plan information.)

Plan sponsors are requesting that their service providers combine the 404a-5 disclosures with other plan materials, such as year-end disclosures (e.g., qualified default investment alternative and safe harbor 401(k) plan notices), or send the 404a-5 disclosures after the start of a new calendar year when year-end investment alternative performance and benchmark information is available. According to our member companies that distribute the materials, plan sponsors are split regarding their preferences, so any guidance should permit both approaches. In both instances, however, if the requested guidance is provided, then plan sponsors will be able to reduce plan costs by eliminating one or more separate mailings of the investment option comparative chart and other required materials.

Under our recommended relief, plan sponsors that choose to deliver the materials at year-end will be able to synchronize their disclosures instead of sending materials by August 30, 2013 (depending on when the requested guidance is issued).⁶ Those who elect to furnish the materials after the beginning of the calendar year will also benefit starting in 2014 because the requested guidance will help solve certain other practical timing concerns.⁷ Many service providers and plan sponsors strive to furnish the plan materials, such as the comparative chart and statements, as soon as practicable after the information they need from third parties becomes available. However, the early delivery of materials in one year accelerates the compliance deadline for subsequent years because of the manner in which the current definition of "at least annually" appears to operate. EBSA recognized and solved a similar problem with respect to participant statements in Field Assistance Bulletin 2006-03 (the "FAB") by providing that furnishing a benefit statement not later than 45 days following the end of a calendar quarter or calendar year constitutes good faith compliance with the timing requirements. Under the FAB, the date when statements are furnished in one quarter does not establish the compliance deadline for the next quarter.

The relief requested herein varies from the FAB for several reasons. First, the FAB relief does not cover the investment option comparative chart and other information because the

⁴ For example, general plan related information (29 C.F.R. § 2550.404a-5(c)(1)), information about administrative expenses (29 C.F.R. § 2550.404a-5(c)(2)), and investment related information (29 C.F.R. § 2550.404a-5(d)(1)).

⁵ 29 C.F.R. § 2550.404a-5(h)(1).

⁶ We understand that most service providers are already prepared or are preparing to help plan sponsors meet the August 30, 2013 compliance deadline.

⁷ Please note that we are not requesting that plan sponsor be permitted to skip furnishing materials during the 2013 calendar year, or during any year in the future.

disclosure regulation does not specifically state that such information can be included as part of the pension benefits statement.⁸ Second, the relief needs to be flexible enough to accommodate the different delivery preferences among plan sponsors as described above (i.e., with year-end materials and after the start of a new calendar year). Another reason for the difference is that the 404a-5 disclosure regulations require all investment return and benchmark information provided on the chart be "as-of" the same date. Plan sponsors and their service providers cannot complete the charts until they receive the necessary information from the fund managers. We understand from our member companies that some non-registered and alternative investment fund managers require more time to furnish the necessary information. For example, we understand that some investment options may only be valued quarterly (e.g., hedge funds and real estate). Additionally, we understand that certain non-registered funds may be permitted, and thus have a practice, to provide audited financial statements to their investors up to 90 days after the fund's fiscal year end. Consequently, record keepers have reported having to wait as much as 90 days for calendar year-end information. Therefore, relief that is limited to 45 days or 75 days after the end of a calendar year is likely to be inadequate for many plan sponsors. Service providers are also concerned that the information may not be provided to them on a predictable schedule year after year. As a result of the potential delays, a plan sponsor may not be able to comply with the at least annually requirement using year-end return information if it is not available for every investment option.

Our requested relief will also assist multi-vendor ERISA-covered 403(b) plan sponsors in complying with the 404a-5 rule. Sponsors of these plans must collect separate investment charts from each investment vendor and furnish all of the charts to participants at the same time. These plan sponsors must wait until they receive all of the charts and information from every vendor in order to furnish participants with compliant materials. As noted above, this could cause a plan sponsor to miss the current "at least annually" deadline.

II. Requested Guidance

The SPARK Institute requests that EBSA issue guidance that specifies that good faith compliance with the "at least annually" requirement under the disclosure regulations shall mean furnishing the materials within each calendar year, without regard to the plan year, provided that the materials are furnished no more than 18 months from the date on which the materials were provided during the preceding calendar year.

Under our proposed relief, plan sponsors will remain obligated to furnish participants with 404a-5 disclosure materials in 2013, and every calendar year thereafter. Although the proposed relief creates an 18-month range, it does not permit a plan sponsor to skip delivering materials in any calendar year. If the guidance is issued sufficiently prior to August 30, 2013, certain plan sponsors that have not already furnished the materials would be permitted to do so by December 31, 2013, but no later. Plans that comply for 2013 by August 30th would have until December 31, 2014 to furnish their 2014 materials, and could synchronize delivery at the beginning or end of 2014.

⁸ See 29 C.F.R § 2550.404a-5(e)(2).

The requested relief will help plan sponsors synchronize delivery of the materials with other plan disclosures and notices, and eliminate additional plan costs. Plan participants will benefit because plan sponsors who choose to do so will be able to furnish the comparative charts with year-end fund information instead of prior year third-quarter information when year-end information for one or more funds is unavailable before the compliance deadline.

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Thank you for considering our request on this very important issue. 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

cc: Mr. Alan Lebowitz, Deputy Asst. Secretary for Program Operations, US Department of Labor
Mr. Joe Canary, Director, Office of Regulations and Interpretations, US Department of Labor