Filed Electronically

April 29, 2010

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: **2010 Investment Advice Proposed Rules**

Ladies and Gentlemen:

The SPARK Institute, Inc.[1] appreciates this opportunity to comment on the participant and beneficiary investment advice rules proposed (the "Proposed Rules") by the Employee Benefits Security Administration ("EBSA") on March 2, 2010. We commend EBSA for expressly stating that neither the Proposed Rules nor the Pension Protection Act of 2006 ("PPA") exemption relating to investment advice affects the prior guidance issued by EBSA pertaining to the provision of investment advice.[2] Additionally, we commend EBSA for reiterating its prior position that the fee leveling requirements apply only to fees received by the fiduciary adviser, and not to the fees received by the adviser's affiliates.[3]

The SPARK Institute has not previously commented on either the prior version of EBSA's investment advice rules or the PPA investment advice exemption. We have neither supported nor opposed such prior laws and regulations because our members have generally relied on the pre-existing guidance issued by EBSA to develop investment advice (e.g., "SunAmerica"

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[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 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 more than 62 million employer-sponsored plan participants.

[2] 29 CFR § 2550.408g-1(a)(3).

[3] 75 Fed, Reg. 9361, Section D (2010).

Advisory Opinion[4]) and education (e.g., EBSA Interpretive Bulletin 96-1) products and services that are currently used by millions of American workers. Accordingly, our position has been that as long as any new laws and regulations do not adversely affect our members' ability to continue to provide the advice products and services as they have done for years, then we would neither support nor oppose new laws and regulations.

Overall, we maintain our neutral position with respect to the Proposed Rules, except for one significant exception related to certain new concepts that were included. As discussed more fully below, The SPARK Institute is concerned about additions to the Proposed Rules that dictate what criteria an investment adviser and plan fiduciary can consider in connection with making investment recommendations.

Discussion

The preamble to the Proposed Rules states that:

> "in connection with investment advice arrangements that use computer models, that a computer model shall be designed and operated to avoid investment recommendations that inappropriately distinguish among investment options within a single asset class on the basis of a factor that cannot confidently be expected to persist in the future (paragraph (b)(4)(i)(E)(3)). While some differences between investment options within a single asset class, such as differences in fees and expenses or management style, are likely to persist in the future and therefore to constitute appropriate criteria for asset allocation, other differences, such as differences in historical performance, are less likely to persist and therefore less likely to constitute appropriate criteria for asset allocation." (Emphasis added.)

Additionally, EBSA requested public comments on a number of questions regarding investment theory, including which theories are generally accepted and which ones are not, whether the regulations should specify certain investment theories and require their application or preclude the application of others, whether the regulations should dictate the bases for model parameters, and whether historical data should be taken into account in determining a model's expectation for future performance of asset classes and specific investment alternatives.[5]

The SPARK Institute is very concerned that EBSA's statements regarding the appropriateness of computer models considering historical performance data to distinguish between funds in the same asset class:

1. Will limit investment experts' ability to use their professional expertise and judgment in providing advice and building computer models,

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[4] EBSA Advisory Opinion 2001-09 (December 14, 2001).

[5] 75 Fed, Reg. 9362, Section F (2010).

2. Intrude on a plan fiduciary's discretionary authority and ability to rely on an independent investment adviser's professional judgment and recommendations regarding what criteria are appropriate and important for making decisions that are best for the plan and its participants,

3. Will likely reduce the availability of computer based investment advice for plan participants,

4. Will confuse participants who receive advice with potentially mixed messages resulting in the advice not being followed or used at all, and

5. Will create circumstances that are ripe for litigation by class action lawyers who will see this as an opportunity to bring claims against service providers and plan sponsors who have otherwise acted in good faith in providing and making advice available to participants.

We are very concerned that the limitation in the Proposed Rules suggests a governmental bias in favor of passively managed or index investment funds over actively managed funds. Such a bias can be viewed as a governmental endorsement or "seal of approval" of index funds. Additionally, a bias of this type could potentially influence plan fiduciaries beyond the application of the rule to computer models.

When a plan offers an actively managed fund and an index fund in the same asset class, under the Proposed Rules the index fund would always have to be selected because historical performance could not be considered. Instead, only fees can be considered and, presumably, the index fund fees will be lower. Consequently, an actively managed fund with better historical performance than an index fund could not be recommended as an investment option to a participant.

Participants will question the credibility of the advice they received when the fund that is recommended to them has inferior historical performance. The advice will be inherently suspect when the adviser is required to recommend a lower performing fund because it can only consider fees. As a result, participants may ignore the advice with respect to those funds or ignore the advice entirely and possibly discontinue the service. Plan sponsors and service providers will find themselves having to explain why they provide participants with historical fund performance information that the investment adviser must ignore when making investment recommendations. Participants may be further confused, as performance is one of the data points likely to be included in required participant disclosures that are intended to provide relevant information for participants to consider when evaluating the plan's investment options.

Moreover, the Proposed Rules will likely have a negative spillover effect on third party advice programs and services that have been developed based on EBSA's SunAmerica Advisory Opinion. Many, if not all, of those programs rely on historical performance in determining the advice that is generated. Advice providers will be hard pressed to ignore the views of EBSA regarding historical performance and, consequently, forced to make significant changes to their advice models. Advice providers could potentially decide to shut down their services temporarily or permanently making advice services less available to participants.

Additionally, the concepts in the Proposed Rules could have negative implications for educational and asset allocation tools that plan sponsors and service providers make available to participants in a non-fiduciary capacity in accordance with Interpretive Bulletin 96-1. The creators of those tools and materials will likely not be able to rely on their professional expertise and judgment, and would have to consider the risks and implications of deviating from EBSA's determination of acceptable and unacceptable investment theories.

The SPARK Institute urges EBSA not to undertake defining concepts of "generally accepted investment theory." Investment professionals have the appropriate knowledge and expertise to determine what theories and data should and should not be considered in connection with computer models or any other type of investment advice. Any such regulations and limitations will almost certainly have unintended negative consequences that will have lasting and costly effects. Although such conceptual ideas, limitations and requirements regarding investment theory may seem appropriate or helpful to EBSA now they can easily become outdated as the retirement plan and investment services industries evolve and adapt to the needs of plan sponsors, participants and changing financial markets and conditions. It is impossible to predict and anticipate the changes that will occur, but what is certain is that changing the rules in the future to adapt to changes in the marketplace will be difficult, and could potentially impede the development of needed and useful products and services.

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The SPARK Institute appreciates the opportunity to comment on these matters and EBSA's consideration of our views. We are available to discuss these matters further at EBSA's request. Please do not hesitate to contact us at (704) 987-0533.

Respectfully,

Larry H. Goldbrum
General Counsel