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Submitted Electronically

June 1, 2009

CC:PA:LPD:PR (Announcement 2009-34)
Room 5203
Internal Revenue Service
POB 7604, Ben Franklin Station
Washington, D.C. 20044

Re: **Comment on Revenue Procedure for 403(b) Plans; Announcement 2009-34**

Dear Sir or Madam:

The SPARK Institute appreciates this opportunity to comment regarding Internal Revenue Service (the "Service") Announcement 2009-34 relating to the proposed 403(b) plans opinion letter and prototype plan program. The SPARK Institute represents the interests of a broad based cross section of retirement plan service providers who will offer and provide services in connection with the prototype plan program. Our members include most of the largest service providers in the 403(b) plan industry. The combined membership services more than 80% of all 403(b) plan participants.

First, The SPARK Institute would like to commend the Service for proposing the creation of the opinion letter and prototype plan program and for proposing to allow plans to be amended retroactively under a remedial amendment period. The SPARK Institute believes that the program and the amendment period will promote compliance and be very helpful to plan sponsors trying to meet the requirements of the 2007 final regulations and subsequent guidance. We also commend the Service for retaining, rather than replacing, the model plan language in Revenue Procedure 2007-71 applicable to public schools, including public K-12, community colleges, colleges and universities.

In response to the final 403(b) regulations, The SPARK Institute created a dedicated 403(b) Plans Task Force and has taken a leadership role in developing practical solutions and best practices for complying with the new rules. Since many plans have expressed interest in being able to rely on prototype plan language, we respectfully request changes to: (1) expand employer eligibility to use the 403(b) prototype plan, (2) clarify the interaction between certain plan document provisions and the underlying funding vehicles, and (3) allow employers additional flexibility in the plan document and adoption agreement. We have also included suggested revisions to the draft language of the plan document and/or adoption agreement.

I. Expand Eligibility for Employers to Use the 403(b) Prototype Plan Program

A. Vesting - The SPARK Institute believes that the most significant revision that is necessary to expand the availability of the prototype program is to permit the use of a vesting schedule in the prototype plan. The Revenue Procedure emphasizes the Service's objective to make the prototype plan program available to as many plan sponsors as possible, and many 403(b) plans, especially ERISA-covered 403(b) plans, include employer contributions with vesting schedules. Some employers, especially in this time of economic downturn, may not be able to continue to make employer contributions if vesting is not available. Such employers include small tax-exempt organizations that can not afford a costly customized plan document and would benefit greatly by use of the prototype plan document.

Although The SPARK Institute recognizes that Section 403(b) does not expressly provide for vesting, the Service has long permitted vesting schedules in 403(b) plans and the final regulations specifically accommodate them. Certainly, to the extent the 403(b) program is covered by ERISA, the rules under ERISA Section 203 would apply to 403(b) vesting schedules. For governmental 403(b) plans, The SPARK Institute believes the prototype program could accommodate vesting schedules that satisfy the minimum vesting standards applicable to governmental employers. Such accommodation, The SPARK Institute believes, would actually encourage employers to implement and/or maintain 403(b) plans.

Recommended Approach: The SPARK Institute requests that Section 5.10 of the Rev. Proc. and the Listing of Required Modifications ("LRM") be revised to allow plans that use a vesting schedule for employer contributions to use the prototype plan document by recognizing the existence of one or more vesting schedules for employer contributions, provided that non-vested amounts are separately accounted for. We also request that the prototype plan allow for graded vesting schedules based upon age or service criteria.

B. Additional Contribution Methodologies - In qualified plan prototypes, which are subject to nondiscrimination rules that are equally or more restrictive than those applicable to 403(b) plans, the Service has accepted additional structures for contributions, including discretionary and nondiscretionary, basic and matching contributions, as well as employer contributions which match contributions to another plan. 403(b) plans may have waiting periods, or mandate employee contributions as a condition of employment which, in some instances, may be subject to a one time irrevocable election.

Recommended Approach: The SPARK Institute proposes that the Service revise LRM Section 4(64) to permit additional employer contribution alternatives, waiting periods and employee contributions that are mandatory as a condition of employment or subject to a one time irrevocable election in prototype 403(b) plans

II. Interaction Between the Certain Prototype Plan Document Provisions and Underlying Funding Vehicles

The SPARK Institute seeks clarifications with respect to Sections 3.03, 5.04, 5.05, and 5.07 of the Rev. Proc. and Section 10(47)(4) of the LRM. The proposed requirement that a prototype plan preempt any conflicting provisions of the annuity contract or custodial account ("Funding Vehicles") significantly raises the likelihood of unnecessary operational defects in the event of conflicts between two otherwise compliant documents. Many 403(b) plans consist of multiple existing Funding Vehicles, the terms of which are already in existence and consistent with the requirements of Section 403(b). In some cases, those Funding Vehicles will include restrictions in excess of those imposed by the plan, which would not threaten the plan's compliance with the Code and the regulations. The sample plan language in Rev. Proc. 2007-71 acknowledges this fact with respect to loans, for example. The regulations acknowledge the role the terms of the Funding Vehicles may play, by allowing those terms to be incorporated into the plan by reference (Treas. Reg. Section 1.403(b)-3(b)(3)(ii)). Although the preamble to the final regulations refers to a high likelihood that the plan would control, the reality is that such control is only necessary to the extent that plan compliance is implicated.

LRM Section 10(47)(4) appears to be intended to impose the broad supersession requirement. Because it references only the Vendors and not the actual Funding Vehicles, however, there is some ambiguity. Moreover, the apparent intent of the provision would seem to be the unilateral rewriting of existing contracts onto which the new written plan requirement has been imposed, for reasons wholly unrelated to valid plan compliance concerns.

Funding Vehicles used in 403(b) plans are subject to federal securities laws and the laws of the various state insurance agencies. After a Funding Vehicle is issued it is difficult if not impossible to change. If the terms of the Funding Vehicle conflict with the terms of the prototype plan, an inadvertent operational or plan document failure could result. These potential problems can be even more difficult for employers that use multiple Funding Vehicles.

Recommended Approach: The SPARK Institute proposes to revise LRM Section 10(47)(4) to read as follows:

> "The Plan Administrator shall maintain a list of all Vendors under the Plan, including sufficient information to identify corresponding Funding Vehicles. Such a list and the identified Funding Vehicles are hereby incorporated as part of

> the Plan. In the event of a conflict between the Plan and a Funding Vehicle: (a) the terms of the Plan shall govern to the extent necessary to satisfy requirements of the Code and regulations; (b) the Plan may limit a Participant's rights under the Funding Vehicle but may not enlarge the duties or diminish the contractual protections of the Vendor without the consent of the Vendor."

An additional way to minimize the potential disconnect between the plan and the Funding Vehicles is to identify which tax compliance provisions should be included in full in the plan document, and which tax compliance provisions can be incorporated by reference from the plan into the Funding Vehicle or omitted altogether if the Funding Vehicle is used in conjunction with a plan document (e.g., it is not a Funding Vehicle for a grandfathered 90-24 contract).

Recommended Approach: The SPARK Institute proposes that the Service issue a list of the tax compliance provisions that must be included in all plans and Funding Vehicles, and a subset of provisions which can be incorporated by reference from the plan into the Funding Vehicle (or omitted altogether) if the Funding Vehicle is used in conjunction with a plan. To the extent that the prototype plan provision is necessary for the plan to meet the requirements of the law and regulations, the plan provision must control over a conflicting provision in the Funding Vehicle. But to the extent that there are conflicts between optional provisions, the plan should be permitted to allow the Funding Vehicle provision to override conflicting plan document language.

III. Additional Flexibility in the Plan Document and Adoption Agreement

A. Allocation of Duties - Definition of Plan Administrator - Although draft Rev. Proc. Section 5.10 only refers to allocations of administrative responsibilities in the Adoption Agreement, the sample adoption agreement language in Section 2(21) of the LRMs clarifies that the plan may incorporate a separate document which reflects the allocation. The SPARK Institute believes that employers would prefer that the allocation of duties be set out in a separate document, eliminating the need to execute a new adoption agreement with any change in administrative procedures. With respect to the sample adoption agreement language, use of the term "Memorandum of Understanding", although not defined in either the Revenue Procedure or the LRM, implies a pre-existing concept with particular legal significance, though it has no prior existence in the regulations. It also implies the existence of a single document where there may be multiple documents, including separate agreements with individual service providers.

The definition of "Plan Administrator" does not seem appropriate in certain common circumstances, in which either: (a) the plan is not subject to ERISA, and the use of the term might imply maintenance of a plan as described under Title I of ERISA; or (b) a service provider has assumed responsibilities for non-discretionary determinations which may fall within the scope of the term Plan Administrator for purposes of the plan but not for purposes of Title I of ERISA. Providing that the employer is, by default, the plan administrator, this creates a problem for non-ERISA tax exempt plans intending to satisfy the ERISA safe harbor under DOL Section 29 C.F.R. 2510.3-2(f).

Recommended Approach: The SPARK Institute proposes revising LRM Section 2(21)(2b) to read as follows:

> "Allocation of Duties: Administrative duties are allocated among two or more parties according to one or more service provider agreements. All such agreements are incorporated herein by reference into the Plan. Any administrative duties not allocated under such agreements are reserved to the Employer.

The SPARK Institute also proposes the following clarification to the term "Plan Administrator" in the LRM Sample Adoption Agreement language or in the LRM language itself: "The term Plan Administrator, as used for purposes of the written plan document or the adoption agreement may not correspond with use of the term for purposes of Title I of ERISA." This would give those plan sponsors that utilize the external service provider agreement(s) to memorialize their allocation of administrative duties an opportunity to clarify their intent in such agreement(s).

B. <u>Confusion Between Use of Terms "Funding Vehicle" and "Individual Agreement"</u> - The differences, if any, between the terms "Funding Vehicle" and "Individual Agreement" should be clarified. LRM Section 1(11) defines the term "Funding Vehicle as the Annuity Contracts and/or Custodial Accounts as selected in the Adoption Agreement issued for funding amounts held under the Plan and specifically approved by the Employer for use under the Plan." LRM Section 1(12) defines the term "Individual Agreement" as the agreement between a Vendor and the Employer or Participant that constitutes or governs an Annuity Contract or a 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. Additionally, the term "Individual Agreement" is confusing since many of the annuity contracts and custodial account agreements are group contracts.

Recommended Approach: The SPARK Institute requests that the term "Individual Agreement" be deleted in its entirety such that the term "Funding Vehicle" will always apply.

C. <u>Additional Clarifying Guidance</u> - As the Service knows, use of the prototype plan language will provide greater comfort to plan sponsors that they are in compliance and meeting their obligations under the new rules. The following requested guidance and proposed changes with respect to the prototype plan language will help facilitate compliance and minimize potential conflicts among plan documents.

1. <u>Prototype Sponsor Obligations</u> - It is unclear from the wording in Section 8.03 of the Rev. Proc. whether a prototype plan sponsor is obligated to provide notice to an employer who obtained a copy of the prototype sponsor's documents but has neither provided an executed copy of the adoption agreement to the prototype sponsor, nor notified the prototype sponsor of its intent to adopt the plan.

Recommended Approach: The SPARK Institute proposes that the language in Section 8.03 of the Rev. Proc. be revised to clearly indicate that a prototype plan sponsor is not obligated to provide notice to any plan sponsor who has not provided an executed copy of the prototype document's adoption agreement to the sponsor. Furthermore, the prototype sponsor shall not be responsible for determining whether an employer who has not responded intends to execute the sponsor's prototype document.

2. **<u>Definition of "Account Balance"</u>** - The current draft language in LRM Section 1(2) creates potential ambiguity as to whether the plan is required to create a separate aggregate record reflecting the sum of the individual accounts. However, because many of the Funding Vehicles in these plans consist of either individual accounts or group allocated accounts, many plan sponsors will prefer to recognize this term as a mathematical sum of the participant's assets in the Funding Vehicles under the plan.

<u>Recommended Approach</u>: The SPARK Institute proposes to clarify the definition of Account Balance in LRM Section 1(2) as follows:

> "Account Balance" means the bookkeeping account (whether in the form of a separate plan-level record or a sum of separate records for each Account) for each Participant, which reflects the aggregate amount credited to the Participant's Account under all Accounts…"

3. **<u>Definition of Annuity Contract</u>** - The SPARK Institute proposes that the definition of "Annuity Contract" in LRM Section 1(4) be modified to specifically include both group and individual contracts.

4. **<u>Definition of Beneficiary</u>** - The current draft language seems to require each beneficiary to have a separate "account" which is defined to mean a separate Funding Vehicle. Since multiple beneficiaries are typically permitted and quite common, this provision should reflect the need to separately account for each beneficiary, not imply that each beneficiary will have a separate contract. Additionally, the current draft language implies that a beneficiary may be designated only at the plan level with the Plan Administrator. It is common practice, however, particularly under individual annuities and accounts, for participants to designate one or more beneficiaries directly with the issuer of each Funding Vehicle.

<u>Recommended Approach</u>: The SPARK Institute proposes the following clarifications in LRM Section 1(5):

> "'Beneficiary' means the designated person or persons entitled to receive benefits under the Plan after the death of a Participant, as identified under each Account or Funding Vehicle or in other records maintained for the Plan. In the case of multiple Beneficiaries, each Beneficiary's assets shall be separately accounted for."

5. <u>Definition of "Disability"</u> - The current draft language limits the determination of the permanence and degree of the impairment to the support of medical evidence.

<u>Recommended Approach</u>: The SPARK Institute proposes that the Social Security Administration definition of Disability, as used by many qualified plan prototypes, be added as an alternative. In this regard, we propose the addition of the following sentence to the end of the current definition in LRM Section 1(7):

> "However, if the condition constitutes total disability under the federal Social Security Acts, the Administrator may rely on such determination that the participant is considered disabled for purposes of this Plan."

6. <u>Compensation Reduction Election</u> - The language in LRM Section 3(23) imposes requirements unrelated to 403(b) plan compliance. The inclusion of this language in the plan document may result in significant numbers of inadvertent operational defects.

<u>Recommended Approach</u>: The SPARK Institute proposes that LRM Section 3(23) be revised to read as follows:

> "1. An Employee elects to participate by executing an election to reduce his or her Compensation (and have that amount contributed as an Elective Deferral on his or her behalf) to one or more designated Accounts. The Employee's elections with respect to allocations among Accounts shall be contained in this election or in another record maintained under the Plan. Allocations (and reallocations) within such Accounts shall be subject to the terms and administrative procedures, and shall be made on such forms, as required under the Funding Vehicles. The Compensation Reduction Election shall be made on the agreement provided by the Plan Administrator under which the Employee agrees to be bound by all terms and conditions of the Plan. The Plan Administrator may establish an annual minimum deferral amount no higher than $200 as specified in the Adoption Agreement, and may change such minimum to a lower amount from time to time. The participation election may also include a designation of Beneficiary. Any compensation reduction election shall remain in effect until a new election is filed…"

7. <u>Timing of Contribution Remittances</u> - The example in the final regulations regarding the timing of a contribution remittance provides for such remittance within fifteen business days following the end of the respective month. The language in LRM Section 3(27) designates the period merely as fifteen days, which could either be considered ambiguous or imposing a fifteen calendar day requirement.

<u>Recommended Approach</u>: The SPARK Institute proposes that LRM Section 3(27) be clarified to reflect a period of fifteen business days following the end of the respective month.

8. <u>Limitations on Considered Compensation</u> - The provisions of draft Rev. Proc. Section 5.05(3) and LRM Section 5(31)(2.2)(a) impose the Code Section 401(a)(17) limit without any regard to existing grandfathering for certain governmental employers.

<u>Recommended Approach</u>: The SPARK Institute proposes that the last sentence of LRM Section 5(31)(2.2)(a) be revised to read as follows. "Except to the extent otherwise permitted with respect to certain eligible governmental plan participants, the amount of Includible Compensation of each Participant taken into account…"

9. <u>Available Correction Methods under Code Section 415(c)</u> - The final regulations did not alter the correction provisions of the regulations under Code Section 415(c), which permit certain excess contributions to be distributed to the Participant.

<u>Recommended Approach</u>: The SPARK Institute proposes that draft Rev. Proc. Section 5.09 and LRM Section 5(31) be clarified such that a corrective distribution of excess contributions under Code Section 415(c) may be made consistent with the regulations under that Section.

10. <u>Account Aggregation</u> - LRM Section 5(31) dealing with annual additions makes a broader statement regarding account aggregation than would be imposed by Code Section 403(b)(5) and 415(c).

<u>Recommended Approach</u>: The SPARK Institute proposes that the first sentence of LRM Section 5(31)(1.2) be revised to read as follows. "For purposes of these limitations, and as otherwise required under Code Section 403(b)(5), all Section 403(b) Annuity Contracts…"

11. <u>Limitation Year</u> – LRM Section 5(31)(2.3) states that the Limitation Year means the Calendar Year. For plans with just employee contributions, the calendar year works well. The plan year and the limitation year may need to match the fiscal year if there are employer contributions, however, to avoid unnecessary expense in administrative costs.

<u>Recommended Approach</u>: The SPARK Institute proposes that LRM Section 5(31)(2.3) be revised to provide flexibility with respect to the definition of Limitation Year.

12. <u>Small Account Balances</u> - Although it is permissible for a plan to establish a lower limit on mandatory cash-outs, the proposed LRM language in Section 6(33) only contemplates a $5,000 threshold generally.

<u>Recommended Approach</u>: The SPARK Institute proposes that the LRM Section 6(33) be modified to replace the fixed cash-out threshold with a cash-out limit elected in the adoption agreement, and that the adoption agreement be modified accordingly to permit such an election (subject to the $5,000 overall limit and the $1,000 automatic rollover limit as applicable).

13. **<u>Required Minimum Distributions</u>** - Section 6(38) of the LRMs seems to suggest that a participant must take distributions from all amounts in the plan, including grandfathered amounts maintained in a plan on December 31, 1986, and may not rely on the permissive aggregation with other 403(b) Funding Vehicles. In addition, in referencing the determination of "entire interest", this LRM section fails to take into account the provisions of the regulations which exclude certain contract features from that determination. The plan language should not require the plan to ensure that distributions are made from the plan's Funding Vehicles, especially where the plan may not have the right to force out distributions without the consent of the participant. Additionally, the reference to the 5% owner rule is not applicable to eligible 403(b) employers.

Additionally, there are certain grandfather rules which apply to section 403(b) plans that are not reflected in the LRMs. Many 403(b) plans, including plans subject to Title I of ERISA, utilize these grandfather rules. If such a plan adopts the prototype plan language that does not include these grandfathering provisions it may cause the plan to violate the anti-cutback provisions of Section 204(g) of ERISA.

LRM Section 6 provides for the required beginning date for minimum distributions from 403(b) plans that are not governmental or church plans. There is, however, a special minimum distribution rule for 403(b) benefits accruing before December 31, 1987 (Treas. Reg. Section 1.403(b)-6(e)(6). The required minimum distribution rules in 401(a)(9) do not apply to any accumulations held in a 403(b) Funding Vehicle before January 1, 1987 (the pre-'87 account balance). The pre-'87 account balance must be distributed in accordance with the incidental benefit requirement of Treas. Reg. section 1.401-1(b)(1)(i).

<u>Recommended Approach</u>: The SPARK Institute proposes that the prototype plan language be revised to include language for the different treatment of pre-'87 account balances pursuant to Treas. Reg. section 1.401-1(b)(1)(i). We also propose the following addition to LRM Section 6(38):

> "The requirements of this section shall not apply to amounts to which the requirements of Code Section 401(a)(9) are inapplicable. To the extent permitted under the Code and regulations thereunder, these requirements may be considered satisfied by one or more distributions from one more 403(b) accounts outside of the plan."

In addition, Section 38(3) should be revised to add at the end thereof, "to the full extent required under applicable regulations."

All reference to 5% owners should be deleted for clarification.

14. Hardship Withdrawals - The language in LRM Section 7(41) only includes the safe harbor rules for hardship withdrawals.

Recommended Approach: Plans should be given the opportunity to adopt any of the rules permitted under the 401(k) regulations, including the rules that allow for a facts and circumstances test. In addition, the plan should clearly indicate that a service provider designated by the plan sponsor is permitted the same reliance on limited participant representations that is granted to employers. Hardship withdrawals should be subject to administrative limits under the plan and subject to administrative limitations contemplated under the applicable Funding Vehicles. Finally, the plan language should incorporate exceptions in the 401(k) regulations which do not require a participant to take an action which would be adverse to the participant's ability to satisfy the immediate and heavy financial need requirement ("Employee need not take counterproductive actions.) For purposes of this section, a need cannot reasonably be relieved by one of the actions described in this section if the effect would be to increase the amount of the need.".

15. Loans - With the exception of new loans to participants with outstanding defaulted loans, no provision in the Internal Revenue Code or final 403(b) regulations imposes a particular method of loan repayment (billing, coupon, salary deduction, etc…), nor is there any requirement that the repayment method be the same for all Funding Vehicles under the plan. The proposed sample adoption agreement language includes a selection of a single repayment method for the entire plan. The LRM language itself defaults to payroll deduction repayment unless an alternate method is elected in the adoption agreement. While a plan sponsor may decide to impose a repayment method requirement, there is no requirement that they do so.

Recommended Approach: The SPARK Institute proposes that the prototype plan language explicitly allow the loan terms contained in Funding Vehicles or other documents to be incorporated into the plan. We also propose that the language in LRM Section 8(42) be revised to read as follows:

> "Loan repayment method (select only one; if no selection is made, plan will default to the first option below):
>
> ( ) Any legally permitted method prescribed in the Funding Vehicle
> ( ) Payroll deduction only
> ( ) Direct repayment (not payroll deduction)"

16. Direct Rollovers - The LRM language in LRM Section 6(40) does not permit a plan to vary or waive the $200 floor on eligible rollover distributions and does not allow a partial direct rollover if the amount of the distribution is less than $500. Since many plan sponsors allow direct rollovers of smaller amounts, the inclusion of this prohibition is likely to result in inadvertent operational errors.

Recommended Approach: The SPARK Institute proposes that the language be modified to permit plan sponsor elections with respect to the minimum amount, if any, which may be directly rolled out of the plan. In addition, notwithstanding any provision of the Plan to the contrary that might otherwise limit a Distributee's election, plan language should provide that a Distributee may elect, at the time and the manner prescribed by the Plan Administrator, to have any portion of an Eligible Rollover Distribution paid directly to an Eligible Retirement Plan or Roth IRA specified by the Distributee in a direct rollover. Direct rollovers by nonspousal beneficiaries to inherited IRAs should be made mandatory and not elective pursuant to technical corrections to the Pension Protection Act.

17. **Qualifying Rollovers** - Under the services agreements between Funding Vehicles and plans, a deselected Funding Vehicle or a prior employer's plan is permitted to provide cost basis data within a specified period after completing the rollover. Plans are also required to separately account for rollover amounts received.

Recommended Approach: The SPARK Institute proposes that a plan be permitted under LRM Section 9(43) to accept a rollover received with cost basis information and treat all such amounts as pre-tax dollars unless cost basis data is received in a timely manner. Additionally, a plan should be permitted, as indicated in Section 9(39) of the LRMs, to either maintain a separate rollover account or treat the rollover amount as subject to the distribution restrictions under the plan, and disclose this default to a participant electing such a rollover.

IV. Recommended Revisions to Plan Document and/or Adoption Agreement

The SPARK Institute proposes the following changes to the draft plan document and/or Adoption Agreement language.

A. **Part I, Section 1, Item 11 (Definition of Funding Vehicle)** - The SPARK Institute proposes that the Adoption Agreement language should be eliminated because the list of Vendors can be maintained outside of the plan. We are also concerned that including this provision may require an amendment to the plan whenever there is a change of vendors.

B. **Part I, Section 1, Item 15 (Definition of Plan Year)** - The SPARK Institute proposes that additional options be provided in the Adoption Agreement. Plan Year means the calendar year unless one of the following is selected:

[ ] the 12-consecutive month period commencing on ________ and each anniversary thereof.

[ ] the 12-consecutive month period ending on ________ and each anniversary thereof.

[ ] other (e.g., for first plan year) ___________.

C. **Part I, Section 1, Item 19 (Definition of Vendor)** - The SPARK Institute believes that the terms Vendor, Funding Vehicle, Individual Agreement and Account should be clarified, with consistent usage throughout the plan document. We recommend that only three terms need to be defined:

1. The entity(ies) responsible for performing recordkeeping and processing transactions under the plan, typically pursuant to a separate written agreement with the employer. Suggested Term: "Recordkeeper/TPA."

2. The entity(ies) custodying the account(s) under the plan and/or the insurance company(ies) issuing the contract(s) under the plan. Suggested Term: "Custodian/Insurer."

3. The agreements that establish the custodial accounts and/or insurance contracts with the individual and/or the employer, include the required IRS language (e.g., nontransferability, 402(g) limits, 401(a)(9) requirements, and the direct rollover provisions of 401(a)(31)) and disclosure of the mutual funds available through the custodial accounts and/or the insurance contracts available for deposits. Suggested Term: "Funding Vehicle."

D. **Part I, Section 2, Item 21 (Plan Administration and Allocation of Duties)** - The SPARK Institute recommends removing items 1 and 2a of the Sample Adoption Agreement Language in LRM Section 2(21) because this information is not required to be in the prototype plan document if contained in other documents.

We suggest revising item 2b of the Sample Adoption Agreement Language in LRM Section 2(21) as follows to provide for flexibility, including use of an "Information Sharing Agreement." "[ ] 2b Allocation of Duties. Administrative duties are allocated among the parties as specified in a separate written agreement or agreements. Such document(s) are incorporated herein by reference into the Plan."

E. **Part I, Section 3, Item 24 (Automatic Enrollment) [RESERVED]** - We note that automatic enrollment cannot be accomplished if the default funding arrangement is an individual custodial account or individual annuity contract because the employee's signature is required to open up the account or issue a contract. This fact will need to be taken into account in drafting the LRM language for automatic enrollment.

F. **Part I, Section 6, Item 33 (Small Account Balances)** - The SPARK Institute proposes changing the text to reflect that lump sum payments may not be made out of certain individual contracts without the consent of the contract owner, as follows:

> 33. Small Account Balances.
>
> Sample Plan Language:
>
> If elected in the Adoption Agreement and permitted under the terms of the custodial account or annuity contract, distributions may be made in the form of a lump-sum payment without the consent of the Participant or Beneficiary, but not without the consent of the Participant or Beneficiary if the Account Balance exceeds $5,000 (determined without regard to any separate account that holds rollover contributions). Any such distribution must also comply

with the requirements of section 401(a)(31)(B) of the Internal Revenue Code (relating to automatic distribution as a direct rollover to an individual retirement plan for distributions in excess of $1,000).

Adoption Agreement Language:

[ ] The Plan permits distribution of small Account Balances, to the extent permitted under the terms of the custodial account or annuity contract.

G. **Part I, Section 6, Item 34 (Minimum Distribution Requirements)** - The SPARK Institute proposes that all required RMD language be included in the 403(b) plan document at some future date, thus eliminating the requirement to include that language in the Funding Vehicles. This would eliminate potential inconsistencies between the terms of the plan and the terms of the Funding Vehicles. So long as the underlying annuity contracts and custodial accounts are required to include the specific RMD provisions as a qualification requirement, however, plans should incorporate the terms of the Funding Vehicles by reference. We also propose that the first paragraph of Item 34 be modified to include the following phase "Unless otherwise permitted by law" in order to accommodate any transitional relief that Congress may offer without amending the prototype (e.g., 2009 RMD waiver).

H. **Part I, Section 10, Item 47 (Investment of Contributions)** - The SPARK Institute recommends the following clarification between Vendors and Funding Vehicles.

"4. The Plan Administrator shall maintain a list of all investments available under the plan for future and past contributions, and the custodians/insurers through which such investments are available (Funding Vehicles). The Funding Vehicles through which such investments are available are hereby incorporated as part of the Plan, excluding those terms which are inconsistent with the Plan."

I. **Part I, Section 11, Item 48 (Plan Termination and Amendment)** - The SPARK Institute requests that the following language be added to enable currently frozen plans to use the document and to avoid misunderstandings about partial termination.

"1. Termination of Contributions. The Employer has no obligation or liability whatsoever to maintain the Plan for any length of time and may discontinue contributions under the Plan at any time without any liability hereunder for any such discontinuance, either prior to or effective as of the adoption date of this Plan document. Termination of contributions to one or more custodians or insurers under the Plan (but not all) shall not be deemed to be a partial termination of the Plan."

Adoption Agreement Language:

[ ] Contributions to the Plan were discontinued by the Employer as of [date].

J. Part I, Section 12, Item 51 (Domestic Relations Orders and Qualified Domestic Relations Orders) - The SPARK Institute requests the following additional clarification.

> "If a judgment, decree, or order (including approval of a property settlement agreement) that relates to the provision of child support, alimony payments, or the marital property rights of a spouse or former spouse, child, or other dependent of a Participant is made pursuant to the domestic relations law of any State ("domestic relations order"), then the amount of the Participant's Account Balance awarded to an Alternate Payee shall be paid only if such domestic relations order is determined by, or on behalf of, the Plan Administrator to be a qualified domestic relations order as defined in section 414(p) of the Internal Revenue Code, or any domestic relations order entered before January 1, 1985."

* * * * *

The SPARK Institute appreciates the opportunity to commend the Service providing this guidance with respect to the new 403(b) prototype plan program and to provide these comments. If you have any questions or need additional information regarding this submission, please feel free to contact us at (704) 987-0533.

Respectfully,

Larry H. Goldbrum
General Counsel

cc: Mr. James E. Holland (Internal Revenue Service)
Ms. Marilyn Collister (Great-West Retirement Services)