Via Electronic Mail

June 15, 2010

Ms. Monika Templeman
Director, Employee Plans Examinations
Internal Revenue Service

Re: **401(k) Compliance Check Questionnaire Project**

Dear Ms. Templeman:

The SPARK Institute[1] is writing to bring certain issues and concerns regarding the 401(k) Compliance Check Questionnaire Project that have been raised by our members. Our members include record keepers who will be asked by plan sponsors to provide information, guidance and assistance in completing the questionnaires. Our issues and concerns are summarized below under two categories (1) Resources Demands and Timing and (2) Plan Compliance Implications and Consequences.

I. Resource Demands and Timing

We are concerned that it will take many plan sponsors a significant amount of time to gather and review the necessary data, and complete the questionnaire. Many plans, including those that changed service providers during the four year period covered by the questionnaire, will be required to work with multiple service providers in order to gather and consolidate the required information. Additionally, because of the potential legal implications and consequences that may result from the questionnaire many employers may find it necessary to have their completed forms reviewed by legal counsel prior to submitting.

We are also concerned about the timing of these requests and the deadline for responses. As the Internal Revenue Service (the "Service") knows, plan sponsors are currently in the process of preparing their 2009 Form 5500s, which have new and complicated requirements. Plan

[1] The SPARK Institute represents the interests of a broad based cross section of retirement plan service providers and investment managers, including record keepers, 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.

sponsors and service providers are devoting significant resources to figuring out how to complete the new forms and gather the information they need from their service providers in order to complete the form. For many plan sponsors the same people are needed to work on responding to the questionnaire.

As discussed more fully below, many of the questions and the available responses could have significant implications for plan sponsors and result in an audit or enforcement action. Plan sponsors should be allowed the time they need to ensure that a misunderstanding about the meaning of a question, incomplete information or any other inadvertent error in completing the form does not trigger a costly enforcement action.

Based on the forgoing we request that the Service allow all plan sponsors 180 days instead of 90 days to respond to the questionnaire. Alternatively, we request that the Service offer a 90 day extension to any plan sponsor who requests it. In either case we urge the Service to publicly announce its position so that plan sponsors and the service provider community know what to expect and can plan accordingly. We believe that this additional time will help plan sponsors provide more accurate responses and avoid potential additional costs.

II. Plan Compliance Implications and Consequences

We are concerned that many plan sponsors may not fully understand the implications of the questionnaire and the potential consequences of their responses. The letter to plan sponsors about the questionnaire states that its purpose is "to determine (1) potential compliance issues, (2) any plan operational issues, and (3) additional education and outreach guidance that may be helpful for the IRS to provide to plan sponsors to improve compliance." The FAQ provided by the Service also state that "**a compliance check is an enforcement action**." (Emphasis added.) Accordingly, it is critical that plan sponsors understand the questions completely, and provide complete and accurate responses.

However, we are concerned that many of the questions, particularly the multiple choice questions, include answers that are unacceptable under the law. While we recognize that the Service is trying to identify whether plans are following the correct rules and regulations, we are concerned that plan sponsors may be unintentionally confused or misled into believing that an unacceptable choice may be a proper response. In addition to this resulting in the selection of a potentially incorrect response, some employers may be led to believe that it may be permissible to follow an otherwise unacceptable way of operating their plan in the future.

We are also concerned that the terminology and technical terms used in certain questions varies and may confuse plan sponsors. Additionally, certain questions related to similar issues appear in different sections of the questionnaire. Some plan sponsors may not recognize the relationship between these questions and the importance of coordinating their responses. The following is a summary of many of the questions that we are concerned about.

Questions 1b and 3b – Both of these questions ask that the plan sponsor identify the type of plan they sponsor. Question 1b offers the option "profit-sharing plan" but does not specifically reference 401(k) plans. The glossary for the questionnaire does not mention 401(k) plans in the definition provided for profit-sharing plans. Question 3b however, specifically mentions 401(k) plans.

Question 23e – dealing with posting a safe harbor 401(k) plan notice includes the responses "posted on website" and "posted in workplace" either of which by itself will raise a compliance defect.

Question 25f – dealing with the number of loans outstanding and the amounts involved includes an option for loans of more than $50,000 which will raise compliance defect concerns.

Question 25g – dealing with the maximum period allowed to repay a primary residence loan includes a response of "no limit" which will raise a compliance defect.

Question 25k – dealing with the interest rate charged on participant loans includes multiple answers that may not be acceptable under the Department of Labor's "reasonable commercial rate" standard and could raise a compliance defect.

Question 28f – dealing with the suspension of contributions after a hardship instructs an employer to enter "0" if there is no restriction which will raise a compliance defect concern for plans that follow the safe harbor needs test for hardships.

Question 30b – dealing with cashing out terminated participants includes only one correct choice, i.e., $1,000 and any other answer will result in compliance defect concerns.

Question 48 – dealing with the adoption of an automatic contribution arrangement. If a plan was designated as a QACA, then the best answer under this question appears to be the fifth option, i.e., "only participants with no affirmative deferral election in place," because a QACA must apply to any participant as of the effective date of the arrangement who does not have an affirmative deferral election in effect as well as any future participant who fails to make an affirmative deferral election. In order to properly answer the question, a plan sponsor must fully understand the regulations and understand the meaning of an "affirmative election." Absent an affirmative election, the first two answers available under the question (i.e., "all employees who were participants on the effective date of the automatic contribution arrangement" and "only employees who become participants after the automatic contribution arrangement was effective") may appear to be correct responses. However, it is our understanding that they are not and that the fifth response is the best choice. We are concerned that plan sponsors will be confused by this question which may result in compliance defect concerns.

Question 49b – dealing with the automatic contribution arrangement notice includes the responses "posted on website" and "posted in workplace" either of which by itself will raise a compliance defect.

Certain Yes/No Questions – Several yes/no questions may raise significant compliance issues for plan sponsors. These include questions 18b (minimum contributions for top-heavy plans), 19g (corrective contributions for failed ADP tests), 20a (asking whether the plan is subject to ACP testing; Question 15a asks if the plan offers a match), 27 (1099-R for a defaulted loan), 28e (dealing with obtaining maximum amount of loans before a hardship), 31b (procedures

for 402(g) limit monitoring), 33 (1099-R for distributions), 41 (use of rollovers to purchase employer stock or a franchise) and 49d (automatic enrollment deferral rate changes).

In order to address these concerns, we believe that plan sponsors need additional information and should be alerted to the fact that many of the choices under certain questions are unacceptable ways to operate a plan and will require corrective measures. Plan sponsors should be reminded that they must provide complete and accurate responses but should also fully understand the nature of the questions, their responses and the implications of self disclosing a compliance defect in their plans. The SPARK Institute, working with our members, has developed a summary of these concerns that we will make available to our members and plan sponsors as a tool to help plan sponsors fully understand the questionnaire and to respond accurately.

* * * * *

The SPARK Institute appreciates your consideration of our views on this important matter. We are available to discuss our issues and concerns further at your request. Please do not hesitate to contact us at (704) 987-0533.

Respectfully,

Larry H. Goldbrum
General Counsel

cc: J. Mark Iwry, U.S. Department of the Treasury