THE SPARK Institute, Inc.

Filed Electronically

January 13, 2011

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

Re: **Proposed Regulation for Target Date Fund Disclosure**

Ladies and Gentlemen:

The SPARK Institute, Inc.[1] appreciates this opportunity to comment on the proposed regulation for target date fund disclosure (the "Proposed Regulation") published by the Employee Benefits Security Administration ("EBSA") on November 30, 2010.[2] The SPARK Institute members include the industry's leading retirement plan service providers, including record keepers and investment fund managers, who will be directly affected by the Proposed Regulation.

At the outset, we note that we support EBSA's efforts to educate plan participants about target date funds and to ensure that they have information about the funds available to them as plan investment options. After reviewing the Proposed Regulation with our members, we have identified several issues that we believe require clarifications or modifications. This comment letter summarizes our issues and concerns, and includes recommended changes.

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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, trade clearing firms 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 approximately 70 million employer-sponsored plan participants.

2 75 Fed. Reg. 73987 (Nov. 30, 2010).

A. "Glide Path" Illustration – The Proposed Regulation requires the plan administrator to provide an explanation of the fund's asset allocation, how the asset allocation will change over time, and the point in time that the fund will reach its most conservative asset allocation.[3] The Proposed Regulation also requires the plan administrator to include a chart, table or other graphical representation that illustrates the change in asset allocation over time and "**does not obscure or impede a participant's or beneficiary's understanding** of the information explained pursuant to the [applicable section]." (Emphasis added.)

Although it appears that EBSA's goal is for participants to receive simple and understandable information, we are very concerned that the disclosure requirement includes the subjective qualitative standard that the chart, table or illustration does not obscure or impede a participant's understanding of the other disclosures. We believe that the standard is too subjective, is vague and is subject to very different interpretations. We are also concerned that meeting or failing to meet the standard appears to be dependent on participants' subjective and potentially biased evaluation of the materials and their understanding of them. The materials may, in order to convey critical information and in order to mitigate risk of litigation, include complex concepts and disclosures. Service providers, including record keepers and investment managers, will likely be reluctant to assume responsibility for providing or for assuring plan administrators that any such materials comply with the proposed standard. Additionally, we are concerned that the standard lays the groundwork for potentially significant and frivolous litigation that will be based on factual disputes about the understandability and clarity of charts and illustrations that, as noted above, may have to include complex information. The threat of litigation is significant because the inherent factual nature of such claims and the cost to defend against them make them especially appealing to class action lawyers whose primary goal in bringing lawsuits is to obtain a financial settlement rather than to protect the interests of plans and participants.

Accordingly, in order to resolve this issue and address our concerns, we urge EBSA to modify the Proposed Regulation by replacing the following language "does not obscure or impede a participant's or beneficiary's understanding of the information explained pursuant to the [applicable section]" with "is presented in a manner calculated to be understood by the average participant." Our recommended language has been used by EBSA in regulations related to preparing summary plan descriptions. We believe the alternative language strikes a balance between EBSA's objectives and our concerns that are summarized above.

B. Risk of Loss Statement – The Proposed Regulation requires the plan administrator to include with target date fund disclosures a statement that the participant "may lose money by investing in the alternative, including losses near and following retirement, and that there is no guarantee that the alternative will provide adequate retirement income."[4] Although we understand EBSA's intentions in requiring this disclosure, we are concerned that it may have

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[3] 2550.404a-5(i)(4)(i), and 2550.404c-5(d)(vi)(A).

[4] 2550.404a-5(i)(4)(iii), and 2550.404c-5(d)(vi)(C).

the unintended consequence of creating a potentially negative perception of target date funds in comparison to other plan investment options. Target date funds, as well as any plan investment option that has a variable rate of return, involve the risk of loss to the investor near and after retirement, and do not provide a guarantee of adequate income in retirement. The risks vary in degree among the investment alternatives based on the asset class, investment style, and other factors. However, the Proposed Regulation singles out target date funds by requiring this special risk of loss notice. In addition to our concern that this special notice could create a negative perception of target date funds, it could also have the unintended consequence of suggesting to participants that the other funds offered as investment alternatives do not involve such risks. Additionally, the notice could cause some participants to avoid target date funds entirely, even though such funds may be a good choice.

Accordingly, in order to resolve our concerns, we urge EBSA to modify the Proposed Regulation by eliminating the risk of loss notice requirement. The SPARK Institute urges EBSA not to single out specific types of funds for disclosure about investment risks that generally apply to all plan investment options.

C. Fund Design Disclosures – The Proposed Regulation requires the plan administrator to make certain additional disclosures about a target date fund that is named or described with reference to a date.[5] Specifically, the Proposed Regulation requires an explanation of the age group for whom the alternative is designed, the relevance of the date and any assumptions about a participant's.…contribution and withdrawal intentions on or after such date.[6] It appears that EBSA is attempting to clarify for participants whether a particular fund is designed for investment "to" a participant's retirement date or "through" the participant's retirement. We support EBSA's goal but are concerned that the language used in the proposal is subject to different interpretations by plan administrators, investment managers and other service providers. Plan administrators are likely to expect that their service providers and the fund companies will help them by providing information and explanations that are intended to meet the disclosure requirements. After discussing the language used in the proposal with our members who are fund managers and viewing it from their perspectives, it became evident that the disclosures that are developed by them in order to satisfy the regulations, as currently written, could be lengthy and complicated.

Many fund managers that we have discussed this with are concerned that the contribution and withdrawal explanation requirement, as written, could be interpreted as requiring an explanation of the quantitative analysis used by the fund manager in constructing the glide path for the fund. An explanation of that type would be lengthy and complicated, and is not likely to be readily understood by the average plan participant. We do not believe that EBSA intended to require such explanation to be included in the disclosures to participants. We believe that EBSA intended that the disclosure provide an explanation about whether a fund

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5 2550.404a-5(i)(4)(ii), and 2550.404c-5(d)(vi)(B).

6 Id.

is designed for investors who intend to withdraw their money upon reaching retirement age or for those who intend to keep their money in the fund beyond reaching retirement age. To ensure that EBSA's intent is carried out, and in order to help the regulated community understand the disclosure requirements, we have proposed clarifying language below.

We urge EBSA to modify the proposal by deleting the following language "and any assumptions about a participant's or beneficiary's contribution and withdrawal intentions on or after such date;" and replacing it with the following "and a statement identifying whether the fund is designed for investors who intend to withdraw their money upon reaching retirement age or for those who intend to keep their money in the fund, either inside the plan or outside of the plan, beyond reaching retirement age;"

D. Required Disclosures for All Qualified Default Investment Alternatives ("QDIAs") – The Proposed Regulation amends the disclosure rules for QDIAs by requiring the plan sponsor to provide participants with more detailed fee and performance information. We are concerned that some of the newly required information does not directly apply to, or may not be available from, a QDIA that is an investment management service (e.g., managed account") as described under the existing QDIA regulations.[7] Specifically, the Proposed Regulation requires disclosure of the "investment's issuer",[8] the investment's historical performance data,[9] and the investment's attendant fees and expenses including, among other things, any annual operating expenses (e.g., expense ratio).[10]

Managed accounts do not have an "investment issuer" because, by definition, they are products and services that involve managing or allocating a participant's account based on particular investment principles. Additionally, managed account products and services may not have historical performance data because the performance history is generally based on the results within individual participant accounts, which will vary based on a number of factors such as age and risk tolerance. Similarly, managed accounts will not have an expense ratio that can be disclosed because of the variation in the investment of participant accounts. For example, when the underlying investments in such accounts are mutual funds, the fees attendant to the account will vary based on the participant's asset allocation and the expense ratios of the underlying funds.

Accordingly, we request that EBSA modify or clarify the disclosure requirements with respect to a QDIA that is an investment management service as follows. The identity of the investment manager for the managed account product or service should be required to be disclosed, instead of the investment issuer. The historical performance data disclosure requirement for such services should be eliminated. The fee disclosure requirement should be modified to require disclosure of the fees charged by the investment manager of the

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[7] 2550. 404c-5(e)(4)(iii).

[8] 2550.404c-5(d)(3)(i).

[9] 2550.404c-5(d)(3)(iv).

[10] 2550.404c-5(d)(3)(v)(B).

accounts, and an estimated range of the annual operating expense for the underlying investments in which the participant's account may be invested under the service.

E. **<u>Content and Timing of Notices</u>** – The QDIA regulations[11] require that participants be furnished with a notice generally when they become eligible to participate in the plan and annually thereafter.[12] In the time since the QDIA regulations were issued, EBSA has finalized the participant disclosure regulations[13] that require plan administrators to furnish all participants, including eligible non-participating employees, with substantial information about a plan's investment alternatives.[14] Under the participant disclosure regulations, participants must be furnished with information about the plan investments generally when they become eligible to direct their investments and annually thereafter.[15] We are concerned that the combined effect of the disclosures that must be provided under both regulations will likely be to overwhelm and potentially confuse participants unless they are modified and coordinated so that plan administrators can satisfy both disclosure requirements in one or more documents that can be furnished to participants at the same time. We urge EBSA to modify the Proposed Rule to allow plan administrators to coordinate and combine the content of the required notices and to coordinate their timing so that they can be made together.

There is significant overlap in the information that must be provided about the investment alternatives under both regulations. However, the investment alternative information that is required under the participant disclosure regulations is more robust and likely to be just as, if not more, useful to all participants than the information required under the QDIA regulations. Plan administrators should not be required to provide more or unique information about the plan investments to passive participants whose plan contributions are defaulted into the QDIA. Defaulted participants, by definition, are less likely than participants who actively manage their accounts to read the materials. If and when passive or defaulted participants begin to read the materials they receive and actively manage their accounts, the materials they would receive pursuant to the participant disclosure regulations put them in the same position as all other participants in the plan. Accordingly, we urge EBSA to modify the Proposed Regulation to provide that a plan administrator can satisfy the notice requirements under Section (d)(3) of the QDIA regulations by providing the investment alternative disclosures required under Section 2550.404a-5(d).

We recognize that the QDIA notice must also include additional information about the circumstances related to the use of the default fund, and that such information is not otherwise required under the participant disclosure regulations. For example, the QDIA

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11 See <u>Default Under Investment Alternatives Participant Directed Individual Account Plans; Final Rule</u>, 72 Fed. Reg. 60452 (Oct. 24, 2007).

12 2550.404c-5(c)(3).

13 See <u>Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans; Final Rule</u>, 75 Fed. Reg. 64910 (Oct. 20, 2010).

14 2550.404a-5(b)(1). See also Id. at 64912, Supplementary Information Section B, 1.

15 2550.404a-5(d)(1).

notice must include a description of the circumstance of when the participant's account will be invested in the QDIA, a description of the participant's right to transfer his funds to another investment alternative, and certain other disclosures.[16] However, providing this information separate and apart from the investment related information that must be furnished to participants is duplicative, costly and will likely confuse participants. The SPARK Institute believes that the entire QDIA notice process can be simplified and combined with the participant disclosure requirements, which will make it less likely that participants will be overwhelmed with duplicative and potentially confusing separate notices and will also make complying with both regulations more cost effective. Accordingly, and consistent with the request in the preceding paragraph, we urge EBSA to clarify and modify the QDIA notice requirement, as needed, to allow plan administrators to combine and include the information required under Sections 2550.404c-5(d)(1), (2), (4) & (5) in the annual disclosures that must otherwise be furnished to all participants under the participant disclosure regulations.

Additionally, we urge EBSA to modify the QDIA regulations to conform the timing of when a QDIA notice must be provided to the timing requirements under the participant disclosure regulations. This would allow participants to receive all of the required information generally when they become eligible to direct their investments and annually thereafter. Existing differences in the timing requirements will perpetuate the duplication of effort, add to the cost of compliance and will likely confuse participants. The SPARK Institute believes that conforming the timing requirements will provide significant advantages with little or no negative impact to plan participants.

F. **Effective Date** – The Proposed Regulation will be effective 90 days after it is finalized and published in the *Federal Register*. Although the plan administrator is designated as being responsible for making the required disclosures, as a practical matter, they will be largely dependent on investment providers and other providers to help them gather, prepare and distribute the required information. As EBSA knows, an extraordinary number of broad and significant new rules were issued in 2010, including the 408(b)(2) regulations and participant disclosure regulations. Additionally, EBSA's proposed regulation that would change the definition of fiduciary is still pending and being evaluated by the retirement plan community. The combined impact of these three initiatives on the entire retirement plan community and the time and resources needed to evaluate and comply with them is substantial. We urge EBSA to consider the combined impact of all of its rulemaking initiatives in setting any effective dates and compliance deadlines so that plan sponsors and service providers can comply with new rules in an orderly and cost-effective manner. Providing more time will not only improve the quality of compliance but will also help plan sponsors and service providers to manage the cost of doing so. Accordingly, we request that EBSA modify the effective date of the proposal to one year after it is finalized and published.

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[16] 2550.404c-5(d)(1), (2), (4) & (5).

The SPARK Institute appreciates the opportunity to provide these comments to EBSA. 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