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Mr. Robert Doyle
Director, Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Room N-5669
Washington, DC 20210

Re: **Transition Issues for 403(b) Plans under FAB 2009-02**

Dear Mr. Doyle:

The SPARK Institute, Inc.¹ would like to take this opportunity to express our appreciation for the guidance the Employee Benefits Security Administration (“EBSA”) provided in Field Assistance Bulletin (“FAB”) 2009-02. The guidance and clarifications provided in the FAB will assist employers who sponsor 403(b) plans, as well as SPARK Institute members who include the retirement plan service providers who will be directly affected in assisting employers with the completion of Form 5500 for the 2009 plan year.

We commend EBSA for the guidance provided with respect to the difficulties that confront 403(b) plan sponsors in establishing an opening balance for the new, expanded Form 5500 requirements for the 2009 plan year. The SPARK Institute does, however, urge EBSA to clarify one of the criteria set forth in the FAB for determining whether the assets held in certain pre-2009 contracts may be excluded for Form 5500 purposes.

¹ The SPARK Institute represents the interests of a broad based cross section of retirement plan service providers, including members that are banks, mutual fund companies, insurance companies, third party administrators and benefits consultants. Our members include most of the largest service providers in the retirement plan industry and the combined membership services more than 62 million participants in 401(k), 403(b) and other employer-sponsored retirement plans.

The SPARK Institute requests that EBSA clarify the condition that rights under the contract must be exercisable by the participant “without any involvement of the employer.” Under the FAB, contracts that were issued to an employee or a former employee prior to 2009 that received no contributions in 2009 (including elective deferrals), and that are fully vested, may be excluded for Form 5500 reporting and audit purposes, provided that all of the rights and benefits under the annuity contract or custodial account are legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer.

The SPARK Institute is aware of two conflicting interpretations of the condition that rights and benefits under the contract be enforceable by the participant without any involvement by the employer. Under what we believe is the most prevalent interpretation, the determinative factor is whether the terms of the annuity contract or custodial account specifically grant to the employer any rights to enforce the benefits under the contract. Under this interpretation, the contract or account could be excluded for reporting purposes even when the insurer or custodian is required to confirm certain plan information with the employer (e.g., whether the employee has experienced a financial hardship, and thus is entitled to a distribution under the terms of the contract).

Under the second interpretation, the fact that the insurer or custodian requests information from the employer, such as confirming the participant’s severance of employment for purposes of a distribution or his or her eligibility for a loan, would constitute “involvement of the employer” for purposes of the FAB. The SPARK Institute is concerned that such an interpretation would significantly narrow the scope of the relief.

Recommended Approach - The SPARK Institute requests that EBSA confirm that the first interpretation is correct and that the existence of contract rights which are directly enforceable by the participant against the insurer or custodian is the operative concern. Therefore, such contracts should be eligible for relief under the FAB.

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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

- cc: Mr. Joe Canary
- Mr. Ian Dingwall
- Ms. Lisa Alexander
- Ms. Elizabeth Goodman
- Ms. Susan Rees