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

Re: **Fee Disclosure RFI**

Ladies and Gentlemen:

The SPARK Institute, Inc. (“SPARK”)<sup>1</sup> appreciates this opportunity to respond to the Request For Information (“RFI”) regarding retirement plan fee disclosure that was issued by the Employee Benefits Security Administration (the “EBSA”) on April 25, 2007. The SPARK Institute members include the retirement plan service providers, such as record keepers and investment fund managers, whose fees are the subject of the RFI. Our members will also ultimately play a critical role regarding participant fee disclosure because plan sponsors will rely on such service providers to facilitate compliance with any rules issues by the EBSA.

At the outset, we commend the EBSA for taking deliberate and measured steps in attempting to resolve these extremely complex issues. Service providers and industry insiders have wrestled with these issues for years and recognize the complexity in developing a simple, useful and cost

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<sup>1</sup> SPARK represents the interests of a broad based cross section of retirement plan service providers, including members that are banks, mutual fund companies, third party administrators and benefits consultants. SPARK members include most of the largest service providers in the retirement plan industry and the combined membership services more than 95% of all defined contribution plan participants.

efficient means of disclosing fee information to participants. As the EBSA already knows, the complexities of these issues are driven by, among other things, the diversity of investment products and structures, the diversity of service provider business models and structures, the general passivity and disinterest among the vast majority of plan participants to receive and absorb complex financial information, and the costs associated with providing more information.

The SPARK Institute believes that the EBSA should consider the following guiding principles in developing its participant disclosure guidance:

1. Fee information is only one of many data points and arguably not the most important one that participants should consider in making investment decisions.
2. Over-emphasis on fees and expenses may lead to poor investment decisions, as well as lower employee participation and contributions to employer sponsored retirement plans.
3. Participant fee disclosure must be short and simple to have any chance of being effective.
4. Only information that is reasonably likely to be read and influence the investment decisions of otherwise passive participant investors in choosing among their plans' investment options should be included in any required disclosure.
5. Participants will ultimately bear the costs of any required disclosure and access to additional information.
6. Fee disclosure requirements should neither favor any one retirement plan or investment industry segment nor disrupt the current competitive balance among such service providers.

We developed these principles and our responses to the RFI based on information we gathered from our members. Our responses and positions reflect the collective views of the vast majority of our members, including record keepers, mutual fund companies, insurance companies, and banks. We also asked our members to identify those issues in the RFI that they considered to be the most important to them and for the EBSA to address. The five most important issues according to the vast majority of our members are questions 1, 2, 3B, 3D and 7A.

## **SECTION 1 - DISCLOSURE OF INFORMATION RELATING TO PLAN INVESTMENT OPTIONS**

### **Question 1**

**What basic information do participants need to evaluate investment options under their plans? If that information varies depending on the nature or type of investment option (options offered by a registered investment company, options offered under a group annuity contract, life cycle fund, stable value product, etc.), please include an explanation.**

**Answer** - Based on recommendations from a majority of our members, The SPARK Institute believes and recommends that the following basic information is what most employees and plan participants need in order to evaluate the investment options offered by their plans:

1. The identity of the type of investment security or vehicle (e.g., mutual fund, annuity contract, or individual stock).
2. A brief description of the investment style and objectives (e.g., small capitalization, large capitalization, or balanced fund) risk and return information (e.g., high risk, low risk, or above average risk), and the type of assets invested in (e.g., stocks or bonds).
3. The identity of the investment manager (or guarantor, in the case of guaranteed products).
4. The historical performance/returns of the investment.
5. The total “expense ratio” or total cost of owning the investment. As discussed more fully in our response to question two, The SPARK Institute believes the underlying information and detail on how a fund uses the fees it collects (12b-1 fees, sub-transfer agency fees, etc.) should not be required to be included in any participant disclosures.
6. Transaction-based fees e.g., sales charges, commissions, redemption fees or surrender charges.
7. The fund’s ticker symbol, if available.
8. For insurance type products, “nonperformance” characteristics such as guaranteed rates of return, survivor and death benefits should be disclosed.

The foregoing basic elements should serve as the framework for the EBSA’s plan investment option disclosure guidance but permit plan sponsors and service providers flexibility regarding how to present and provide such information. However, the substantial majority of The SPARK Institute members recommend that the information could be provided or made available to participants in a one or two page fund fact sheet that facilitates comparison among all of the investment options in the plan.<sup>2</sup> However, as discussed more fully below, we do not believe that a standardized form or format for such disclosure should be mandated by any regulator. We understand that the Securities and Exchange Commission (“SEC”) is currently developing a mutual fund disclosure form that is intended to help with disclosure to retirement plan participants. We are concerned that any requirements established by the EBSA and SEC will be different, and as a result, will create confusion and make compliance more costly. The SPARK Institute is unaware of what the SEC requirements might be and what the disclosure form may look like. Therefore, we note that our reference to the SEC’s efforts is not intended to endorse its approach.

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<sup>2</sup> These disclosure recommendations are not intended to apply to any investment purchased by a plan participant through a brokerage window feature in a plan. Brokerage windows allow participants to select from among thousands of securities including stocks and mutual funds. Providing the recommended information to participants would be extremely burdensome for plan sponsors and service providers. Most, if not all of the information in our recommendation, as well as much more, can be obtained relatively easily and for free by participants through web sites such as Morningstar.com. Participants who elect to use a brokerage window are generally “do-it-yourselfers,” who may be more investment savvy than the average plan participant, and may have a personal financial advisor. The participants’ source of investment information on investments made through a brokerage window should be their broker or financial advisor. Imposing additional disclosure burdens on plan sponsors or service providers with respect to investments chosen or available to these participants is unnecessary and would likely force brokerage windows out of retirement plans.

The SPARK Institute believes that any investment information should be presented to participants in a simple format and in plain English. With respect to mutual funds, the participant disclosure information we recommend herein is generally included in the prospectus, and the profile prospectus. However, the fund prospectus is lengthy, technical and complex. Although profile prospectuses are generally less cumbersome and intimidating than full prospectuses, they tend to be several pages in length, do not always present relevant information in the concise manner that fund fact sheets do, and are not available for all funds. It is important to recognize that in this instance overwhelming participants with more information than they care to receive and requiring the preparers of such information to include cumbersome technical disclosures and notices will be counter productive. The substantial majority of plan participants will simply not read documents that appear technical and intimidating. For those plan participants who want additional fund information that is available with respect to an investment option such information should be available to them upon request.<sup>3</sup>

However, The SPARK Institute is concerned that plan sponsors, service providers, fund companies and distributors that develop simple fund fact sheets in order to encourage participants to read them and seek out additional information could be subject to claims and potential liability from plaintiffs' lawyers who, after the fact, wish to argue that the information provided or made available to participants was insufficient. These concerns can override the need for brevity and simplicity that average plan participants want. In order to minimize such concerns, the EBSA's guidance should create a safe harbor for plan sponsors, service providers, investment providers and distributors against claims under ERISA for inadequate disclosure about a plan's investment options if the information listed above is provided and such information is accompanied by a reasonable notice to participants about the limited nature of such information. For example, such notice might be:

“[t]he information provided in this fund fact sheet is only a limited summary of the information about this investment option in your plan. Detailed information about this investment option is available from (insert as applicable). We encourage you to request and read the detailed information or consult with your financial advisor before making your investment decisions.”

Additionally, as discussed more fully under our response to question two, we recommend that the EBSA's guidance also encourages the inclusion of a notice in the fund fact sheets that cautions participants that fees and expenses are only one component of the total information relevant to investment decisions.

For investment options that are not mutual funds (e.g., bank collective trusts), the summary information recommended herein may not currently be available from the investment provider.

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<sup>3</sup> Except for the basic information specifically identified herein that should be provided and made available for each investment option, investment and retirement plan service providers should not be required to provide participants with additional information that such entity is not otherwise legal required to provide to investors.

However, in order to facilitate comparison among a plan's investment options, substantially similar or equivalent information should be provided or made available by the investment provider.<sup>4</sup> We note that such information will have to be provided to plan sponsors and retirement plan service providers by the investment fund manager or distributor in order to provide it or make it available to participants. Plan sponsors and plan service providers should not be subject to liability for failing to provide information that it cannot reasonably obtain from the investment manager or investment provider.<sup>5</sup> However, the EBSA's guidance should encourage plan sponsors to consider the availability of information necessary to make participant disclosures when they select their investment options.

Although The SPARK Institute recommends that the basic information listed above should be provided or made available in a format that facilitates comparison, we do not believe that the EBSA, the SEC, the NASD, or any other regulatory authority should mandate a standardized form or format for such disclosure. Ultimately, plan sponsors working with the retirement plan service providers and the affected investment providers are in the best position to develop fund fact sheets that meet the needs of participants and comply with regulatory requirements. Because of the number and complexities of the various investment options available to plan participants, industry flexibility is crucial to accommodating all of the options and future innovations. Accordingly, the EBSA's guidance should be limited to specifying the type of information that should be provided to participants as summarized above.

Additionally, the EBSA's guidance should not require plan sponsors and retirement plan service providers to calculate and provide to plan participants the actual dollar amount such participants paid as a result of fees and expenses that are embedded in the expense ratios of the investment options. Such information is not readily available and would require significant initial and ongoing efforts and resources to provide. Providing the expense ratio or rate information as recommended herein should suffice. Participants who are interested in converting such rate information into a dollar estimate can do so with a simple arithmetic calculation. However, the costs associated with requiring service providers to calculate actual dollar amounts for millions of participants for multiple investment options would be more costly than could be reasonably justified.

The information that should be provided to participants needs to be clearly distinguished from information that should be provided to plan fiduciaries. Since plan fiduciaries are responsible for decisions about how expenses are paid under the plan, they need to be aware of the components

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<sup>4</sup> In the case of insurance company general account products, attempts to derive an expense ratio or similar expense indicator will likely be problematic and are more likely to confuse than to inform participants. Although too complex to resolve in the discussion provided herein, in such instances a reasonable alternative indicator of value such as net guaranteed rate information could be provided along with a brief explanation of the reasons why different information was provided. Such explanation should include a basic explanation of the fees and expenses associated with the investment option.

<sup>5</sup> Additionally, neither plan sponsors nor service providers should be subject to liability for providing information to plan participants that they receive from sources they believe to be reliable (e.g., the fund company or a reporting service such as Morningstar).

of compensation received by service providers to the plan. However, most participants are not in a position to influence the way in which expenses are paid under a plan so the information is not relevant to participants. Moreover, providing such information is likely to confuse the disclosure of fees and expenses since participants will have difficulty distinguishing between fees that actually affect investment returns and those that are simply part of the plan's arrangements for compensation of service providers. Instead, plan sponsors should be encouraged to take their role as plan fiduciaries seriously and to ensure that the fees and expenses charged for operating their plans are reasonable, particularly when such fees and expenses are paid by plan participants from their retirement savings.

## Question 2

**What specific information do participants need to evaluate the fees and expenses (such as investment management and 12b-1 fees, surrender charges, market value adjustments, etc.) attendant to investment options under their plans? If that information varies depending on the nature or type of option, or the particular fee arrangement relating to options (e.g., bundled service arrangements), please include an explanation.**

**Answer** - For the substantial majority of retirement plan participants, the most relevant and only investment fees and expenses information they need are (1) the fund's total expense ratio or cost of owning the investment, and (2) any transaction based fees including the triggering events for such fees. Any additional investment fund fees and expenses information, while possibly of interest or helpful to some, is of no use or interest to the vast majority of plan participants. Moreover, such information is more likely to confuse the average plan participant or make what should be a simple disclosure more complex than is needed.

As the EBSA knows, fees and expenses are only one factor among many that participants should take into account in making an investment choice. Putting too much focus on investment fees and expenses (as opposed to other investment information) may mislead participants into believing that the expenses associated with a particular investment option are the sole relevant criteria for making an investment choice. Over-emphasis on fees and expenses could unintentionally cause participants to select the investment option with the lowest expense ratio, which in many instances is likely to be a short-term investment vehicle that is inappropriate for long-term investing. Participants should instead place more emphasis on the net performance history of the fund, which generally takes most of the investment related fees into account.

Those responsible for preparing the fund fact sheets may elect, but should not be required to, provide additional education and information about fees to participants. Such information might include: (1) an explanation of why expense ratios vary based among investment vehicles, (2) an explanation of the relationship between fees, expenses and returns, or (3) an example of the cost of a \$1,000 investment over certain time periods.

As the EBSA knows, fees and expenses may be charged against or deducted directly from participant accounts at the election and direction of the plan sponsor. By definition, such fees and expenses are not otherwise embedded in the expense ratios of the underlying investment options. Such fees and expenses may be associated with a single investment option (e.g., an

additional wrap charge), or none of the investments in particular but still allocated to participants on the basis of the value of their plan accounts, e.g., trustee and record keeping fees. As discussed more fully under our answers to questions nine and ten (relating to plan administrative fees and expenses), such expenses should also be disclosed by plan sponsors.

### **Question 3**

#### **A. To what extent is the information participants need to evaluate investment options and the attendant fees and expenses not currently being furnished or made available to them?**

**Answer** - Most of the information that participants need with respect to most of the investment products that are used by participant directed plans is already provided or made available to them. Some or all of the information is included in various forms including mutual fund prospectuses, profile prospectuses, fact sheets and on participant statements. Generally, the information is provided or available to the participants through multiple delivery channels including online through the plan service provider or the fund company, upon request by phone or online from the plan sponsor, the plan provider, or the fund company. Investment rating services such as Morningstar provide summaries and detailed information about most mutual funds for free over the internet. Additionally, such information is generally provided or made available to participants when they become eligible to participate in the plan, during enrollment meetings and other retirement saving education meetings. The fact is that the information participants need to make fully informed investment decisions is already widely available.

Unfortunately, as evidenced by the need for automatic plan features in retirement plans, and the passage of the Pension Protection Act to make it easier to include such provisions, most employees are passive about saving and investing for retirement. Despite the general availability of such information, most plan participants do not seek out and read the information. Ultimately, in disclosing fees “less is more” given typical participant behavior. Mandatory detailed participant disclosure requirements are not likely to change individuals’ behavior or improve decisions. Instead, overwhelming disclosures could lead to analysis paralysis where participants elect to do nothing because of information overload.

However, The SPARK Institute believes that there is room for improvement regarding the availability of equivalent summary information among investment options in formats that facilitate comparisons. Our recommendations to improve disclosures are discussed in our response to question one.

#### **B. Should such information be required to be furnished or made available by regulation or otherwise?**

**Answer** - The SPARK Institute recommends that the information should be required to be provided or made available by regulations, provided that:

1. Such regulations take a practical and flexible approach to the issues as summarized herein (i.e., allow the use of brief understandable disclosures that are limited to what the average plan participant should know).
2. Such regulations should not impose general fiduciary obligations on plan service providers or be established as a condition to fees constituting reasonable compensation to the service provider or investment provider.<sup>6</sup>
3. Any disclosure requirements that apply to retirement plan participants are coordinated among the multiple regulators (e.g., DOL, SEC, NASD) in order to avoid creating duplicative and potentially conflicting disclosure requirements that overwhelm and confuse rather than inform average plan participants.
4. The EBSA coordinates such disclosure requirements with other participant notice and disclosure requirements in order to minimize what has become to many plan sponsors and participants a confusing and overwhelming amount of material that must be provided.
5. Such regulations allow cost effective electronic notice, access and delivery of the information.

As noted earlier, The SPARK Institute is concerned about the creation of a set of regulations that create opportunities for plaintiffs' lawyers to bring claims against plan sponsors, plan service providers, investment providers and distributors based on after the fact allegations that the simple summaries that are provided to otherwise disinterested participant investors were insufficient. We urge the EBSA to create a safe-harbor for good faith compliance with any disclosure requirements that are developed.

### **C. Who should be responsible for furnishing or making available such information?**

**Answer** - The "plan administrator", which is usually the plan sponsor, should be responsible for complying with the disclosure requirements. The plan sponsor/plan administrator has a direct relationship with the plan participants as their employer or former employer. In contrast, plan service providers do not have a direct relationship with the plan participants and should not be put in an awkward position of having to dictate what an employer provides to its employees. Additionally, plan sponsors/plan administrators are already responsible for making required disclosures to plan participants. The plan investment option disclosure requirements should originate from the plan sponsor's/administrator's general prudence requirements under ERISA. Investment providers will be motivated to provide the required

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<sup>6</sup> The SPARK Institute recommends that the participant investment options disclosure requirements should be included among the general prudence requirements of the plan sponsor or plan administrator. For example, as part of its duties to make prudent decisions with respect to the selection of the investment funds to be included under its plan, a plan sponsor should consider whether the necessary disclosure information is available from the investment provider.



information so that plan sponsors can continue to make such investments available as an investment option and by industry wide competitive pressures. As noted above, participant disclosure requirements should not be established as a condition to fees constituting reasonable compensation to the service provider or investment provider.

We recognize that most plan sponsors will expect their retirement plan service providers or investment providers to supply the necessary information, prepare the disclosures, and deliver or make such disclosures available to participants on the sponsors' behalf. However, because of the multiple parties that can be involved in servicing a plan and the different service structures, assigning this responsibility to any entity other than the plan sponsor/administrator will likely cause confusion as to who is actually responsible for making the disclosure and could result in multiple and potentially conflicting disclosures.

**D. What, if any, additional burdens and/or costs would be imposed on plan sponsors or plans (plan participants) for such disclosures?**

Answer - The extent of the burdens and costs associated with the recommended disclosures will depend upon whether such disclosures are required to be made through paper based or electronic means, the complexity of information required to be provided, and the level of standardization required among differing investment products. Paper based disclosures will be more costly, require frequent updating and result in more waste.

Flexible disclosure requirements that follow the recommendations proposed by The SPARK Institute herein that can be satisfied through internet availability and electronic mail are practical and cost effective. Plan sponsors will likely expect plan service providers to make disclosures available and furnish them through the multiple channels that are currently available to plan participants (e.g., call centers, automated voice response systems, web sites, e-mail and print media). However, rigid and inflexible disclosure requirements will ripple through all of these channels and be far more costly to accommodate than necessary.

Ultimately, the costs associated with any disclosure requirements will be borne by the end-user of such disclosure, which is the plan participant. Such costs may be included in the overall expenses of the investment funds which are ultimately paid by the participants who invest in the funds. Additionally, expenses of the retirement plan service provider can be added to plan fees and expenses which the plan sponsor can charge against participant balances.

**Question 4**

- A. Should there be a requirement that information relating to investment options under a plan (including the attendant fees and expenses) be provided to participants in a summary and/or uniform fashion? Such a requirement might provide that: i) all investment options available under a participant-directed individual account plan must disclose information to participants in a form similar to the profile prospectus utilized by registered investment companies; or ii) plan fiduciaries must prepare a summary of**

**all fees paid out of plan assets directly or indirectly by participants and/or prepare annually a single document setting forth the expense ratios of all investment options under the plan.**

**Answer** - As noted elsewhere herein, The SPARK Institute recommends against the creation of a standardized or uniform disclosure form. However, The SPARK Institute supports a conceptual regulatory framework that will make it easier for plan participants to understand their investment options. We are concerned that creating a “one size fits all” solution may not be feasible or practical. The diversity and complexity of retirement plan investment products, and the differences among service providers in the retirement plan and mutual fund industries cannot be addressed in a single industry wide disclosure form that will be user-friendly for plan participants, will be cost effective to produce and will avoid disrupting the competitive balance in the marketplace among service providers.

**B. Who should be responsible for preparing such documents?**

**Answer** - As we noted above in our answer to question 3C, most plan sponsors will expect their retirement plan service providers or investment providers to supply the information and prepare the disclosures. Market forces should be allowed to sort out the details regarding the preparation of such disclosures with the plan sponsor/plan administrator as the primary driver of the process.

**C. Who should bear the cost of preparing such documents?**

**Answer** - As noted above in our answer to 3D, ultimately the costs associated with any disclosure requirements will be borne by the end-user of such disclosure, which is the plan participant.

**D. What are the burden/cost implications for plans of making any recommended changes?**

**Answer** - Please see our response under question 3D.

**Question 5**

**A. How is information concerning investment options, including information relating to investment fees and expenses, communicated to plan participants, and how often?**

**Answer** - Investment option information is generally widely available through multiple sources including from the plan sponsor, plan service providers, plan investment providers and the internet (e.g., Morningstar). Plan sponsors generally provide investment options information in enrollment materials and at enrollment meetings. Additional information may also be provided quarterly together with participant statements. Such information may include quarterly fund fact sheets. Generally, all of the information that is provided to participants on paper, plus much more information, including a mutual fund prospectus is available at any time electronically through plan service provider websites, investment provider websites, and other websites like Morningstar. Electronic information is generally

more robust, more current than paper disclosures, and can be printed on demand. Information is also available during normal business hours from plan and investment service provider phone representatives. Hard copies of investment information are also generally available at no charge upon request over the phone from the plan service provider, the investment service provider, and the plan sponsor.

**B. Does the information or the frequency with which the information is furnished depend on whether the plan is intended to be a section 404(c) plan?**

**Answer** - No. Generally, the information and frequency of delivery is the same for participant directed plans regardless of whether or not they are intended to comply with 404(c).

**Question 6**

**How does the availability of information on the internet pertaining to specific plan investment options, including information relating to investment fees and expenses, affect the need to furnish information to participants in paper form or electronically?**

**Answer** - As noted earlier herein, investment option information is available over the internet from multiple sources. The delivery costs associated with any disclosure requirements proposed by the EBSA can be kept to a reasonable minimum if such requirements allow a mechanism of “notice and access” to such information by participants using the internet. The use of the internet will substantially reduce printing and mailing costs. Additionally, internet based information is easier to maintain and update so it is generally more timely and accurate. Participants can also be notified about new information and updates regarding a fund through electronic mail. Conversely, requiring paper based disclosure is expensive due to printing, handling and postage costs.

The SPARK Institute recommends that the EBSA allows plan sponsors to make greater use of the internet by allowing them to satisfy any ongoing investment option disclosure requirements by making the basic investment option information described under our answer to question one available through a combined approach of notice and access. In order to avoid the perception that internet and electronic disclosures are less valid than paper disclosure, The SPARK Institute requests that any guidance provided by the EBSA encourages electronic compliance so that plan sponsors/plan administrators will be more willing to adopt this approach. For participants who prefer paper based information or who are interested in more details than the typical plan participant, such information should be available upon request.<sup>7</sup>

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<sup>7</sup> Based on information provided to us by our members, it is our understanding that nearly all retirement plan transactions (i.e., fund trades) are done via the internet or through a voice response systems (VRS). Additionally, SEC Chairman Cox is reported to have stated that giving fund investors a choice between paper and internet disclosure makes sense in light of recent Nielson/Net Ratings reports that two-thirds of Americans use the internet at home (BNA Pension & Benefits Reporter, Vol. 34, No. 20, May 15, 2007).

### Question 7

- A. What changes, if any, should be made to the section 404(c) regulation, to improve the information required to be furnished or made available to plan participants and beneficiaries, and/or to improve likelihood of compliance with the disclosure or other requirements of the section 404(c) regulation?**

**Answer** - As noted earlier herein, the information that is generally provided or made available to participants in participant directed plans is the same regardless of whether the plan is intended to be a 404(c) plan or not. The basic information recommended under question one herein should be provided or made available to participants in every participant directed plan. There should be no difference in the disclosure requirements for participant directed plans that intend to meet the requirements of 404(c) and those that do not.

Additionally, The SPARK Institute urges the EBSA to eliminate the prospectus delivery requirements under ERISA section 404(c). Plan sponsors should be permitted to satisfy the investment option disclosure requirements under 404(c) by providing the information described under our response to question one at the time of enrollment, and thereafter through the notice and access approach described under question six, and upon request.

- B. What are the burden/cost implications for plans of making any recommended changes?**

**Answer** - The approach recommended by The SPARK Institute herein will make it easier to comply with 404(c), and will likely increase plan sponsor reliance on the safe harbor. Additionally, the costs of, and burdens associated with, compliance will be substantially reduced. As the EBSA knows, the primary impediment to cost effective compliance and reliance upon the 404(c) safe harbor is the prospectus delivery requirements.

### Question 8

**To what extent should participant directed individual account plans be required to provide or promote investment education for participants? For example, should plans be required or encouraged to provide a primer or glossary of investment-related terms relevant to a plan's investment options (e.g., basis point, expense ratio, benchmark, redemption fee, deferred sales charge); a copy of the Department's booklet entitled "A Look at 401(k) Fees" or similar publication; or investment research services? Should such a publication include an explanation of other investment concepts such as risk and return characteristics of available investment options? Please explain views, addressing costs and other issues relevant to adopting such a requirement.**

**Answer** - The SPARK Institute recommends against establishing additional participant education requirements. As we have already noted throughout our response, participants want less information not more. The need for automatic plan features and demand for participant investment advice despite the significant resources spent by plan sponsors, service providers and investment providers over the last 10-15 years on retirement and investment education for plan

participants is evidence of the fact that additional mandates will have little benefit. Participant inertia continues to play a significant role in participant behavior regardless of whether education is provided.

Additionally, the education needs of participants will vary greatly depending on personal characteristics such as their age, education level, and familiarity with investing; as well as with plan characteristics such as the availability of managed accounts, asset allocation funds, QDIAs, or employer stock as an investment option. There are no one size fits all solutions to providing investment education that would justify the increased costs that would result from mandating such education. According to a Hewitt survey, "Trends and Experience in 401(k) Plans – 2005," while written materials are used by 98% of plan sponsors to provide investment education, only 17% find that medium to be "very effective" in communicating investment concepts. Additionally, we are concerned that any such mandate will likely create another opportunity for plaintiffs' lawyers to bring claims for investment losses after the fact on the basis that such education was insufficient.

We recognize that there will always be some participants who will want more than the basic investment information, but the average plan participant will likely prefer advice more than education. More materials pushed to participants will not necessarily equate to better decisions made by participants, unless they have specific guidance and advice on "where to put my money."

## **SECTION 2 - DISCLOSURE OF INFORMATION RELATING TO PLAN AND INDIVIDUAL ACCOUNT ADMINISTRATIVE FEES AND EXPENSES**

### **Question 9**

**What information is currently furnished to participants about the plan and/or individual administrative expenses charged to their individual account? Such expenses may include, for example: audit fees, legal fees, trustee fees, recordkeeping expenses, individual participant transaction fees, participant loan fees or expenses.**

**Answer** - The information that is provided and how it is delivered varies depending on the type of information, the service provider's system functionality and decisions made by the plan sponsor as to how and what to disclose to participants. Our understanding of common industry practices with respect to certain categories of fees and expenses, which is based on information provided to us by our members, is summarized below.

**Participant transaction fees** - This category includes, for example, participant loan fees, distribution charges, and in some instances participant account based record keeping charges. Individual participant transaction fees and expenses are generally disclosed in participant enrollment materials. Additionally, information regarding specific types of transactions (e.g., plan loans or distributions) is included in the plan materials that are specific to those types of transactions (e.g., distribution request forms). This information may also be included on fee schedules, posted on service providers' and plan sponsors' websites, available through an automated voice response system or from a telephone representative. The Summary Plan

Description (“SPD”) for the plan may include information about fees charged based on the participant’s use of certain services. Generally, the information provided through these channels are the rates or fee schedule information rather than the actual amount incurred by the participant. Most plan service providers have the ability to show the actual amounts charged to a participant’s account for such items on their quarterly statement in a separate column for expenses. This information can also be provided electronically on the service provider’s website and viewed by participants by logging into their plan account. However, the statements and online information may only show the gross amount of the actual charge rather than the underlying detail. More specifically, the statement information may not state that the charge was for a loan fee. However, the detail can generally be obtained by calling the service provider telephone support center.<sup>8</sup> Certain plan sponsors may request and direct that the plan service provider not specifically show the amount charged to the participant account on the statements or online but instead direct them to net such amounts against the participant’s earnings for the period at issue. This does not change the participant’s net ending account balance for the period.

Plan level administrative fees and expenses - This category includes, for example, audit and legal fees, certain record keeping fees, annual plan fees, and trustee fees. Plan sponsors have the ultimate decision making authority and responsibility to determine whether some or all of these charges are paid by participants or the plan sponsor, and how they are to be disclosed. Disclosure may be included in the participant enrollment material, the SPD, participant statements and online. As is the case with participant transaction fees described above, some plan sponsors elect to show the gross amount charged against participants’ accounts as a separate charge on their statements<sup>9</sup> and others elect to net such amounts against the participants’ earnings for the period.

Asset-based investment wrap fees - These charges are generally asset-based fees that are added to the fees associated with a specific investment option or a unitized fund of funds that is available under a plan. Such fees may be embedded within a unitized account maintained by the plan service providers for the plan or plans that utilize such investment vehicle.<sup>10</sup> In such cases, the asset-based fee is generally accrued daily and netted from the daily unit price calculated each day by the plan service provider much the same way that mutual fund fees are charged and share prices are determined. The charges may be for record keeping and administrative services, investment management fees, an investment fee leveling mechanism to eliminate fiduciary conflicts of interest, or for other purposes approved by the plan sponsor. These fees and expenses are generally disclosed to participants through one or more of the following means: enrollment materials, fund fact sheets, fee schedules, service provider and plan sponsor websites, automated voice response systems, service provider telephone representatives, and the SPD.

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<sup>8</sup> Requiring plan sponsors and service providers to provide the underlying detail associated with the gross amount of the charge that is disclosed on participant statements would not be helpful or important to most participants. Such detail should not be required provided that it is available upon request.

<sup>9</sup> See footnote 8, supra.

<sup>10</sup> These fees are not embedded in the expense ratio of the underlying investment fund and are not reflected in the net returns of the underlying fund.

Generally, the information provided through these channels are the rates rather than the specific amounts charged to the participants' accounts. As we noted in our response to question one with respect to asset-based fees and expenses that are embedded inside an investment fund such as a mutual fund, the EBSA's guidance should not require plan sponsors and retirement plan service providers to calculate and provide to plan participants the actual dollar amount of such asset-based fees that are embedded within a unitized fund as described herein. Such information is not readily available and would require significant initial and ongoing efforts and resources to provide. Providing the applicable asset-based fee rate information should suffice. Participants who are interested in converting such rate information into a dollar estimate can do so with a simple arithmetic calculation. However, the costs associated with requiring service providers to calculate actual dollar amounts for millions of participants for multiple investment options would be more costly than could be reasonably justified.

When any of the expenses discussed in our response to this question are paid directly by the plan sponsor or are not charged against participant accounts (e.g., paid out of forfeitures held in suspense), such fees are generally not disclosed to participants. The SPARK Institute recommends that any guidance issued by the EBSA not require plan sponsors or service providers to disclose information to participants regarding fees and expenses paid by the plan sponsor or paid out of plan assets that are not allocated to participants' accounts.

We also note that material administrative fees paid out of the plan are reported on the Schedule C of the Form 5500. These typically are identified primarily by the service provider rather than category of service.

### **Question 10**

**What information about administrative expenses would help plan participants, but is not currently disclosed? Please explain the nature and usefulness of such information.**

**Answer** - Our response to this question is organized according to the categories identified in our response to question nine, namely participant transaction fees, plan level administrative fees and expenses, and asset-based investment wrap fees. At the outset we note that disclosure to participants of participant transaction fees and plan level administrative fees has no bearing on participants' ability to evaluate plan investment options but instead enhances the overall transparency regarding fees and expenses paid by plan participants in connection with their plan. The SPARK Institute recommends that with respect to participant transaction fees and plan level administrative fees that are charged to participants accounts, the rate information should be provided to plan participants by the plan sponsor through currently available plan materials and delivery methods (e.g., enrollment kits, plan forms and online). Additionally, the gross amount of such fees and expenses charged against a participant's account should be disclosed to participants on their statements as described under our response to question nine instead of being netted against the participant's earnings for the period. However, as we noted in our response to

question nine, plan sponsors and service providers should not be required to provide a breakdown of the underlying detail associated with the gross amounts that are disclosed on the participant statements,<sup>11</sup> provided that such underlying detail is available upon request.

With respect to asset-based investment wrap fees that are embedded within a unitized fund as described in our response to question ten, plan sponsors should only be required to provide participants with the rate information through currently available plan materials (e.g., enrollment materials and fund fact sheets, where possible) and delivery methods (e.g., online). However, if such fees and expenses are not embedded with the unitized fund but instead are charged directly against participant accounts on a transaction basis similar to loan fees, for example, then plan sponsors should be required to include the gross amount of such charges on participant quarterly statements just the same as loan fees as recommended above.

### **Question 11**

**How are charges against an individual account for administrative expenses typically communicated to participants? Is such information included as part of a participant's individual account statement or furnished separately? If separately, is the information communicated via paper statements, electronically, or via website access?**

**Answer** - See our responses to questions nine and ten.

### **Question 12**

**How frequently is information concerning administrative expenses charged to a participant's account communicated?**

**Answer** - Such information may be provided with enrollment materials, with quarterly statements, annually after enrollment, available on demand through plan sponsor and service provider websites, and available during normal business hours by phone from the plan sponsor or service provider support center. Additional information regarding this question is included in our responses to questions nine and ten.

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<sup>11</sup> The breakdown of the underlying detail (e.g., legal fees, loan charges, etc.) would be of little value to most participants and extremely expensive for most service providers to provide. In order to provide such detail on participant statements, service providers would be required to reprogram their record keeping and report generating systems, which will be unjustifiably expensive and time consuming.



### **Question 13**

**What, if any, requirements should the Department impose to improve the disclosure of administrative expenses to plan participants? Please be specific as to any recommendation and include estimates of any new compliance costs that may be imposed on plans or plan sponsors.**

**Answer** - Our recommendations regarding the disclosure requirements with respect to these fees and expenses are included in our response to questions nine and ten.

### **Question 14**

**Should charges for administrative expenses be disclosed as part of the periodic benefit statement required under ERISA section 105?**

**Answer** - As we explained in our responses to questions nine and ten, certain information about particular fees and expenses should be provided to participants as part of their quarterly benefit statements.

## **SECTION 3 - GENERAL QUESTIONS**

### **Question 15**

**What, if any, distinctions should be considered in assessing the informational needs of participants in plans that intend to meet the requirements of section 404(c) as contrasted with those of participants in plans that do not intend to meet the requirements of section 404(c)?**

**Answer** - None. All participant directed plans should be required to provide the same investment option information to plan participants. Different sets of requirements should be avoided in order to prevent duplication of efforts and potentially inconsistent and confusing disclosures. Additional information regarding our recommendations with respect to section 404(c) is provided in our response to question 7A.

### **Question 16**

**What (and what portion of) plan administrative and investment-related fees and expenses typically are paid by sponsors of participant-directed individual account plans? How and when is such information typically communicated to participants?**

**Answer** - Based on the information provided to us by our members, this question is virtually impossible to answer reliably on an industry wide basis. Any answer would require segmentation of the marketplace along with significant caveats about the individual servicing needs of plans and the sponsors' preferences for paying for those services. The information we

received from our members suggests that the percentage of plan fees and expenses that a plan sponsor may typically pay ranges from 20 to 50 percent. Some plan sponsors may pay for all invoiced charges and others may elect to have some or all of those charges deducted from participant accounts. Some plan sponsors may not pay any of the administrative expenses either because they charge all expenses (except for settlor expenses) back to participant accounts or because they are able to negotiate away the charges that would have otherwise been invoiced. For example, a large plan sponsor may negotiate an arrangement for their plan where the plan provider's only fees come from revenue sharing amounts paid to it from the investment funds and individual participant transaction charges. In such cases, the charges that may otherwise be invoiced to the plan sponsor are virtually eliminated.<sup>12</sup>

Investment related asset-based fees are generally paid by participants. Participant loan fees are generally borne by the participant requesting the loan. Distributions fees may be paid by the sponsor or borne by the participant.

Information regarding the amounts paid by the plan sponsor may be included in enrollment materials, the SPD or other plan materials depending on the preferences of the plan sponsor. Some plan sponsors may want to share this information with participants in order to demonstrate the value of the retirement benefits they are providing. Others may prefer not to share such information.

### **Question 17**

**How would providing additional fee and expense information to participants affect the choices or conduct of plan sponsors and administrators, and/or that of vendors of plan products and services? Please explain any such effects.**

**Answer** - Information regarding plan fees and expenses that are paid by plan participants is already provided and available to plan sponsors. As noted previously herein, plan sponsors ultimately decide and direct service providers how to charge the plan fees and expenses. Moreover, plan sponsors decide what, how and when information about plan fees and expenses should be provided to plan participants.

Requiring plan sponsors to provide more or better information to participants might prompt some employees to ask questions and discuss the plan fees and expenses with their employer. In theory, such questions and communications could encourage plan sponsors to (1) pay a greater portion of the costs associated with operating their plans or (2) look for ways to reduce the fees and expenses paid for operating their plans. In reality however, employer sponsored retirement plans are voluntary and plan sponsors generally have a limited amount of resources for employee

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<sup>12</sup> We note that these arrangements are generally only available to larger plans because of, among other things, the buying power and the economies of scale their participants and assets enable. These arrangements are generally also financially beneficial to participants because such plans typically have access to institutionally priced classes of shares of investment funds which are generally lower priced than other share classes.

compensation and benefits. If plan sponsors absorb more of the plan operating costs such amounts will likely reduce other benefits provided by the employer, e.g., matching contributions, bonuses, or health insurance benefits. Additionally, the retirement plan and investment product markets have already matured and are extremely competitive. Therefore, substantial cost reductions from service providers are generally not likely to occur.

In reality, additional disclosure regarding fees and expenses is likely to either be ignored, or worse, confuse participants. Moreover, the extreme emphasis currently being put on fees, if not properly tempered, puts plans and participants at risk of sacrificing needed services and potentially valuable investment choices in the interests of having a "low cost" program. For example, a low cost plan with extremely low participation rates because it does not pay for participant enrollment and educational services is not necessarily a better arrangement than a moderate cost plan with robust participation. Additionally, undue cost pressures on plan sponsors could potentially limit their ability to hire appropriate service providers to provide necessary services to help the plan sponsors satisfy their fiduciary responsibilities.

Additionally, because financial advisors play an important role in the sale and distribution of retirement and investment products, there needs to be adequate sources of payment for such financial advisors. If financial advisors are unable to be adequately compensated by certain plans (e.g., small plans and start-up plans) they will stop selling to and servicing those plans. This would run counter to the goal of encouraging employer sponsored retirement plans.

### **Question 18**

**How would providing additional fee and expense information to participants affect their plan investment choices, plan savings conduct or other plan related behavior? Please explain any such effects and provide specific examples, if available.**

**Answer** - For most plan participants their behavior will probably not change at all as they would not take the time to read and understand the fees and expense information regardless of how and when it was provided. However, a greater concern is that some plan participants will place too much emphasis on fees and may reduce their savings rates, or shy away from more expensive equity funds and opt for the cheaper funds which tend to be money markets that are inappropriate for long-term investing. Even worse, when participants are overwhelmed with too many choices and too much information, they become paralyzed and take no action, i.e., do not participate in the plan, do not increase their deferrals, or do not diversify their account among the equity options.

For financially savvy or engaged participants who take the time to understand the information provided, including the more critical other investment related information recommended by The SPARK Institute, the fee and expense information will become secondary to performance history and investment objectives. Financially savvy investors would generally be willing to pay higher expenses for better performing funds. Another potential benefit for financially savvy or engaged participants who take the time to understand plan and investment expenses is that they may experience less sticker-shock when they terminate employment and are faced with IRA rollover decisions. Such terminated employees will be better able to evaluate the relative costs associated

with their employer sponsored plan and retail IRA products. Employer sponsored plans may have access to lower cost share classes of investment funds instead of retail classes of shares which are more expensive. This may help guide them to keep their funds in their former employers' plans rather than rollover their account balances to potentially more expensive IRA options.

### **Question 19**

**Please identify any particularly cost-efficient (high-value but inexpensive) fee and expense disclosures to participants, and to the contrary any particularly cost-inefficient ones. Please provide any available estimates of the dollar costs or benefits of such disclosures.**

**Answer** - As we have noted previously herein, the most cost effective, robust and accurate means of providing investment information, including information about plan fees and expenses, is through the internet and electronic mail using a combined notice and access approach. In contrast, paper based forms that must be mailed are inefficient, expensive and have a short shelf life.

The SPARK Institute urges the DOL to coordinate its efforts with those of other regulatory agencies in order to minimize duplicative and potentially inconsistent and confusing disclosure requirements. Additionally, competing regulatory requirements will compound the overall costs of compliance which, as already noted, are ultimately borne by participants. The incremental value derived from any disclosure requirements must be weighed against the costs of compliance.

With respect to mutual funds, the expense ratios provide a cost-effective means of providing disclosure to participants and such information is readily available. As noted previously herein, expense ratio information may not be readily available for all investment products. However, each investment provider should be required to provide comparable or equivalent information about the investment fees and expenses. In order to minimize the costs of compliance such investment providers should have the flexibility to determine how to present such information.

### **Conclusion**

Many of the issues raised by the questions and covered in our responses are too complicated to be resolved herein. However, The SPARK Institute is available to provide additional information and clarification to the EBSA regarding these issues upon request. We thank you for this opportunity to comment on this very important effort. Please do not hesitate to contact us at (704) 987-0533.

Respectfully,

/s/

Larry H. Goldbrum  
General Counsel

cc: Andrew J. Donohue, SEC Division of Investment Management