



714 HOPMEADOW STREET, SUITE 3  
SIMSBURY, CT 06070  
(860) 658-5058

ROBERT G. WUELFING, PRESIDENT  
LARRY H. GOLDBRUM, GENERAL COUNSEL

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Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attention: 408(b)(2) Amendments  
Room N-5655  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

Re: **408(b)(2) Regulations Amendment**

Ladies and Gentlemen:

The SPARK Institute, Inc.<sup>1</sup> appreciates this opportunity to comment on the proposed amendment to the regulations under Section 408(b)(2) (the “Proposed Regulations”) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) and the related prohibited transaction class exemption (the “Proposed Exemption”) issued by the Employee Benefits Security Administration (“EBSA”) on December 13, 2007.<sup>2</sup> The SPARK Institute members include the retirement plan service providers, such as record keepers and investment fund managers, who will be directly affected by any new fee disclosure rules.

At the outset, we commend EBSA for attempting to take a measured and flexible approach to address the extremely complex issues relating to fee disclosure in the retirement plan industry.

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<sup>1</sup> 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 95% of all defined contribution plan participants.

<sup>2</sup> 72 Fed. Reg. 70988 (December 13, 2007).

As EBSA knows, plan service providers and investment managers have wrestled with these issues for years and understand the difficulty in developing clear and meaningful ways of disclosing record keeping and investment management fees. Additionally, we reiterate our support for more robust fee disclosure in the retirement plan industry. We believe that fee transparency will ultimately not only benefit plan sponsors and plan participants, but also the retirement plan and investment management industries.

This comment letter summarizes The SPARK Institute's issues and concerns regarding the Proposed Regulations and Proposed Exemption. We respectfully request that EBSA address the following issues and consider our views and recommendations regarding our concerns.

**A. What are the disclosure responsibilities and contract requirements of the various parties when a plan service provider<sup>3</sup> (e.g., record keeper) maintains the records and facilitates investments in a non-proprietary investment product (i.e., an unaffiliated mutual fund<sup>4</sup>) for a plan?** - As a result of plan sponsor demand, it is now commonplace in the retirement plan industry for record keepers and third-party administrators ("TPAs") to make available to plan sponsors a menu of both mutual funds that it or an affiliate manages, as well as mutual funds that are managed and distributed by unaffiliated third parties (i.e., non-proprietary funds).<sup>5</sup> In addition to allowing plan sponsors to choose between proprietary and non-proprietary mutual fund options, generally referred to as "open architecture," the record keeper provides most or all of the record keeping and administrative services to the plan. Under these arrangements, which are sometimes referred to as "bundled arrangements,"<sup>6</sup> plan

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<sup>3</sup> Section (c)(1)(i) of the Proposed Regulations identifies various service providers who are subject to the regulations. Subparagraph B of Section (c)(1)(i) includes service providers that provide "insurance." Based on our understanding of the Proposed Regulations the reference to insurance service providers would include insurance brokers, agents and advisors that perform services for any plan. We request that EBSA confirm our understanding and clarify in the final regulations that brokers, agents and advisors are service providers.

<sup>4</sup> The discussion under Section A is limited to mutual funds as they are registered securities that provide prospectuses and make other disclosures available to investors. The prospectuses and other disclosure materials are prepared in accordance with Securities and Exchange Commission ("SEC") regulations. Certain other investment options are covered under Section B.

<sup>5</sup> The competitive forces in the retirement plan industry have dictated that plan service providers make non-proprietary investment products available as investment options to plans with at least \$5 million in assets. For small plans (i.e., those with less than \$5 million in assets), many plan record keepers may provide most or all of the administrative services but only offer their proprietary investment funds as investment options. The investment option limitation is a product design issue driven by the economic realities and costs associated with servicing smaller plans.

<sup>6</sup> The term "bundled arrangement" does not have a universally accepted definition in the retirement plan industry. A significant amount of confusion stems from the fact that there are several different types of bundled service providers and arrangements. Under one such arrangement, typically found in smaller plans (e.g., under \$5 million in assets), a plan record keeper provides all of the administrative services and only offers its proprietary investment funds as investment options. The investment option limitation is a product design issue driven by the economic realities and costs associated with servicing smaller plans. Such arrangements are "fully bundled." However, another type of bundled arrangement is available to most plans with at least \$5 million in assets. Under such arrangements a plan record keeper provides comprehensive administrative services together with proprietary and non-proprietary investment options (i.e., open architecture investment options). Such arrangements are frequently included in references to bundled arrangements which overlooks and creates potential confusion

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record keepers typically have a menu of non-proprietary funds for which they have trading agreements and arrangements in place in order to be able to make such funds available. While in most cases neither the plan nor the plan sponsor deals directly with the mutual fund company in selecting a non-proprietary fund as an investment option, the plan sponsor does, of course, review the fund information and determines whether it is appropriate for its plan.<sup>7</sup>

The preamble to the Proposed Regulations describes the intended application of the disclosure requirements, and the nature of the disclosures that must be provided concerning bundled arrangements, pursuant to such provisions. In this respect, the preamble states:

. . . paragraph (c)(1)(iii)(A)(3) requires the bundled provider to disclose separately the compensation or fees of any party providing services under the bundle that receives a separate fee charged directly against the plan's investment reflected in the net value of the investment, such as management fees paid by mutual funds to their investment advisers, float revenue, and other asset-based fees such as 12b-1 distribution fees, wrap fees, and shareholder servicing fees if charged in addition to the investment management fee. Also, paragraph (c)(1)(iii)(A)(3) requires the separate disclosure of compensation or fees of any service provider under the bundle that are set on a transaction basis, such as finder's fees, brokerage commissions, or soft dollars. See 72 Fed. Reg. 70991.

We are concerned that the Proposed Regulations are unclear regarding a bundled service provider's obligation to identify the fees and other compensation paid by non-proprietary funds to parties other than the bundled provider and/or its affiliates. Neither the Proposed Regulations nor the preamble makes any distinction between proprietary and non-proprietary funds for which the identified information is required, nor does it identify how the bundled provider would be expected to have access to such information or be authorized to receive such information from a non-proprietary fund.

As discussed above, the plan sponsor enters into a services agreement with its record keeper or plan provider with the expectation that such provider has the necessary trading agreements in place with the mutual fund companies whose funds are available on the record keeper's platform. The agreements do not grant the record keeper access to fee and compensation information beyond that which is set forth in the prospectuses. Record keepers do not have access to such information, and similarly the fund companies generally do not have access to the identity of the plans that invest in their funds through the plan record keepers.

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regarding the open architecture aspect of the arrangements. Under a third type of arrangement a record keeper provides comprehensive administrative services, together with open architecture investment options using only non-proprietary investment options. This type of bundled arrangement is available from service providers that do not manage proprietary investments and are not affiliated with a mutual fund company or an investment manager. However, such record keepers usually consider themselves to be bundled service providers.

<sup>7</sup> At a minimum, such a review generally includes an analysis of the information contained in the fund's prospectus, but often includes more detailed reviews of third-party data and relevant peer group comparisons (e.g., Morningstar and Lipper information).

Plan record keepers typically trade with their mutual fund trading partners through consolidated omnibus accounts that include the positions of multiple plans, the identity of which are not known to the fund companies. Additionally, a fund company would have no way of knowing that one of its funds was being considered as an investment option by a plan through a record keeper.<sup>8</sup> Record keepers consider the identity of their plan customers to be proprietary. As a result of open architecture investments and because many fund companies also provide record keeping services, bundled service providers, who are affiliated with investment managers, frequently compete with each other to be a plan's record keeper. Even though such companies are competing against each other, they frequently make the investment products of their competitors available to their plan prospects and customers.

We are concerned that the Proposed Regulations are either intended, or may be interpreted, to either: (1) require record keepers to make disclosures on behalf of unaffiliated parties and their investment products for which they do not have access or the necessary privity of contract to compel access, or (2) obligate mutual fund companies to enter into contracts directly with every plan that includes their funds as an available investment option.<sup>9</sup> The SPARK Institute believes that record keepers should not be obligated to make disclosures about non-proprietary mutual funds on behalf of unaffiliated parties and should not be exposed to potential liability in connection with such disclosures. Additionally, we believe that obligating mutual funds to enter into agreements with every plan that uses the fund will be extremely costly and disruptive to the retirement plan and mutual fund industries.

**Recommended Approach** - The SPARK Institute requests that EBSA provide in the final regulations that a record keeper may agree to provide a fund's then-current statutory prospectus to a plan sponsor (or such other plan fiduciary responsible for making investment decisions) on behalf of the fund in order to satisfy any disclosure requirements applicable to the fund. We also request that the final regulations allow the use of a statutory prospectus to satisfy the disclosure requirements with respect to a non-proprietary mutual fund that is an underlying investment in a separately managed account, such as an insurance company's separate account, or any other fund of funds maintained by a record keeper for a plan.<sup>10</sup> This

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<sup>8</sup> The fund company would have no way of knowing its funds are being considered by a plan that is changing record keepers or a plan that is merely considering changes to its investment options. As discussed more fully above, because of the competitive nature of the retirement plan industry, a plan record keeper would not want the fund company to know about the changes being considered by its plan prospect or customer.

<sup>9</sup> If EBSA's intent is to obligate mutual fund companies to enter into contracts directly with every plan that includes their funds as an investment alternative, we note that we are concerned about the scope of EBSA's jurisdiction with respect to such matters. We are also concerned about the extent to which the final regulations would attempt to compel disclosure with regard to matters not involving "plan assets" as such term is defined under ERISA (e.g., disclosure of information not otherwise included in a fund's prospectus). The SPARK Institute will continue to evaluate these concerns as additional information about the scope of the regulations becomes available. Absent such additional information, a detailed discussion of the jurisdictional issues is outside the scope of this comment letter.

<sup>10</sup> A plan record keeper may also agree to provide notice to the plan sponsor (or such other plan fiduciary responsible for making investment decisions) on behalf of the fund when the compensation or fees information in the prospectus changes. Under such arrangement the record keeper would provide a copy of the revised or amended prospectus to the plan sponsor on behalf of the fund. This approach is not intended to address changes in the  
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approach is not intended to relieve the record keeper from complying with the rules and regulations that require it to disclose the compensation (or estimated compensation) it will receive from the mutual fund. We further request that the regulations provide that if the plan record keeper provides the fund's statutory prospectus to the plan on behalf of the fund, such fund should not be obligated to enter into a contract directly with the plan.

In order to facilitate acceptance of such arrangements by record keepers and fund companies, the regulations should expressly provide that if the record keeper provides the prospectus for the fund, then the record keeper shall not be subject to any claims or potential liability due to the inadequacy of or errors in the fund's prospectus. Additionally, the regulations should expressly provide that if any inadequacy or error in the prospectus causes the disclosure made by the record keeper to the plan about the arrangement between them to be inadequate or erroneous, such inadequacy or error should not cause the arrangement between the plan and record keeper to be an unreasonable contract or arrangement, provided that the record keeper informs the plan about the problem and takes steps to cure it within a reasonable time after receipt of notice from the fund about it. As noted below in Section B, this recommended approach should also apply to a mutual fund that a plan provider does not make widely available to its plan customers but otherwise agrees to make available as an accommodation to a plan.

The SPARK Institute applauds EBSA for stating in the preamble to the Proposed Regulations that the required disclosures can be made electronically. 72 Fed. Reg. 70990. We encourage EBSA to specifically include this position in the final regulations relating to fee disclosure or in future regulations regarding electronic disclosures. Electronic delivery of prospectuses will help to facilitate cost effective compliance and may also facilitate electronic proof of delivery to the plan fiduciary.<sup>11</sup>

Unless our recommended approach under this Section A is included in the final regulations,

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compensation that the record keeper receives from the fund. Disclosure regarding changes to the record keeper's compensation is addressed separately under Section E of this letter.

<sup>11</sup> Based on an informal survey of our members, we estimate that the average cost for a plan record keeper to provide a hard copy of a fund prospectus to a plan sponsor is 78 cents per prospectus, excluding postage. The average number of investment options offered by a typical plan is 15.5. See [Boston Research Group 2006 DCP Plan Sponsor Study](#). Accordingly, a record keeper's average cost to deliver prospectuses for every investment option used by a typical plan is approximately \$12.09, plus postage. This cost estimate does not include the additional cost of printing the prospectuses and delivery of the prospectuses to the record keeper which are borne by the fund company. A record keeper that has 25,000 plan relationships (which is not uncommon among those that service smaller plans) could incur over \$300,000 in compliance expenses. In contrast, the average costs for electronic delivery are substantially lower. Based on the informal survey of our members, we estimate that the average cost for a record keeper to provide electronic copies of fund prospectuses to a plan sponsor is approximately 22 cents per prospectus. Electronic delivery eliminates postage costs and the fund companies' printing and delivery expenses. Accordingly, a record keeper's average cost to provide electronic prospectuses for every investment option used by a typical plan is approximately \$3.41. Electronic prospectuses will allow the retirement plan and mutual fund industries to save over 75% of the estimated compliance costs that would otherwise be incurred with paper based compliance, after factoring in postage and the mutual fund company expenses.

The SPARK Institute believes that the amount of time, cost and effort that will be involved in the contracting process among all service providers, fund companies and plans will be very significant and potentially disruptive to the retirement plan and mutual fund industries. The potential burden the Proposed Regulations could place on the retirement plan and mutual fund industries is illustrated by the industries' experience with SEC Rule 22c-2, which imposed, among other things, new contract requirements between mutual fund companies and plan record keepers. Although the contractual requirements under Rule 22c-2 were not as far reaching and involved fewer parties than the requirements under EBSA's Proposed Regulations, they would have significantly affected both industries. Eventually, the SEC recognized the significance of the burden that Rule 22c-2 would have imposed and amended the rule.

We note that the requirements under Rule 22c-2 generally affected fund companies and record keepers who already had agreements with each other that, for the most part, only had to be amended. In contrast, absent modification or clarification, the Proposed Regulations would require fund companies to enter into new agreements with tens of thousands of plans with which they currently have no direct relationship. We urge EBSA to consider our concerns and provide the much needed relief requested above.

As discussed further in Section I below, we are also concerned about the effective date and compliance deadline of the Proposed Regulations. As the Proposed Regulations currently stand, we are concerned that the retirement and mutual fund industries will be unable to comply with the contract requirements by the proposed deadline.

- B. What are the disclosure responsibilities and contract requirements of the various parties when a plan service provider (e.g., record keeper) maintains the records and facilitates investments in a non-proprietary special asset or plan specific investment product for a plan?** - Another common arrangement, which is similar to the arrangement described under Section A above, involves plan sponsors that request or require, as a condition to hiring a service provider, that such service provider maintains the records for, holds, and facilitates investments in a special asset or plan specific investment. Generally, such investment products are those that the service provider does not make widely available to the other plans it services. Rather, the plan's named fiduciaries, acting alone or together with their investment consultants, independently select the investment as an investment option for the plan. These types of investments include, but are not limited to, limited partnerships, real estate, separate accounts managed by third-party investment advisers, and insurance products.<sup>12</sup> These arrangements usually involve a direct relationship and agreement between the plan sponsor on behalf of the plan and the investment product provider. In many cases, the investment option is managed on the plan's behalf by an investment adviser or other professional who acknowledges its status as a fiduciary to the plan. Despite having no prior relationship with the sponsor of the product or its manager, plan service providers may agree to record keep the investment option as an accommodation

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<sup>12</sup> Where the special asset is or includes a mutual fund, our recommended approach under Section A should apply to the mutual fund that is part of the arrangement.

to the plan sponsor and in order to win or retain the business. However, absent clear regulations that limit the responsibilities of a record keeper that accommodates such investment options upon the insistence of a plan sponsor, plan service providers may not be willing to service such plans. Consequently, plan sponsors could potentially find that they have less investment option flexibility or fewer service providers from which to choose.

**Recommended Approach** - The SPARK Institute requests that EBSA clarify and expressly provide in the final regulations that if a plan record keeper makes an accommodation for a special asset or plan specific investment, the record keeper should have no fee disclosure or contract obligations with respect to such asset, except that the record keeper should have to disclose the compensation it or its affiliates will receive for the services it provides in connection with the special asset. In such cases, the plan sponsor or its investment adviser is in a much better position to request appropriate disclosures, which often would need to be obtained prior to the decision to enter into the relationship with the record keeper. Accordingly, the plan sponsor or the investment adviser or consultant acting on the plan's behalf should be responsible for obtaining all other disclosures directly from, and be obligated to enter into a contract directly with, the special asset investment provider.

- C. **What are the disclosure responsibilities and contract requirements of the various parties when a plan service provider (e.g., record keeper) offers a participant directed brokerage account or window?** - Brokerage windows allow participants to select from among thousands of securities including individual stocks and mutual funds. 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. Neither the plan sponsor nor the plan service provider can predict where each participant will invest their assets through such accounts. Therefore, it will be practically impossible for plan record keepers and investment product providers to comply with the Proposed Regulations with respect to the investments chosen by each participant that invests through a participant directed brokerage window.

**Recommended Approach** - The SPARK Institute requests that EBSA provide that when a plan sponsor makes a participant directed brokerage window available, the plan sponsor and the service provider that provides such brokerage feature should not have any fee disclosure or contract obligations with respect to the investments purchased and held through such accounts. The foregoing exception is not intended to relieve the plan service provider from disclosing the compensation that such service provider or its affiliates receive for the brokerage window services it provides. Absent the requested relief, the disclosure requirements would be unreasonably burdensome and would likely force brokerage windows out of retirement plans.<sup>13</sup>

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<sup>13</sup> The SPARK Institute raised similar concerns with respect to participant directed brokerage features in our response to EBSA's participant fee disclosure request for information (“RFI”). See The SPARK Institute DOL RFI Response, footnote 2 (July 23, 2007). As we noted in our prior letter, the plan participant should be responsible for obtaining specific information about the investments he or she makes through the brokerage window. The participants' source of investment information on investments made through a brokerage window should be their broker or financial advisor.

**D. What are the disclosure responsibilities and contract requirements of the various parties when a plan service provider (e.g., record keeper), at the direction of a plan sponsor, makes payments to a third party (e.g., a broker or TPA) that is not considered to be part of the service provider's bundled arrangement?** - It is commonplace for a plan sponsor to work with a broker or TPA, in addition to a bundled service provider that is not affiliated with the broker or the TPA. Although the service provider and the unaffiliated broker or TPA may provide services to the plan at the same time, the service provider may not consider the broker or TPA to be part of its bundle of services. In these situations it is common for the plan sponsor to direct the service provider to make payments out of plan assets or from revenue sharing (e.g., 12b-1 or sub-transfer agency fees) to the broker or TPA in order to compensate the broker or TPA for the services it provides to the plan. Frequently the bundled service provider merely acts as paying agent for the plan at the direction of the plan sponsor. The service provider generally does not have any control over the amount of compensation paid to, or the services provided by the third parties. The SPARK Institute is concerned that bundled service providers will be required to make disclosures on behalf of unaffiliated parties that they do not consider to be part of their bundled arrangements merely because they are directed by plan sponsors to make payments to the third parties.

**Recommended Approach:** The SPARK Institute requests that EBSA clarify and provide in the final regulations that when a bundled service provider, at the direction of a plan sponsor, makes payments to a third party that the service provider does not consider to be part of its bundled arrangement, the third party is responsible for satisfying any applicable disclosure and contractual obligations under the final regulations. Under our approach the service provider would be acting pursuant to directions from the plan sponsor, which should make it unnecessary for the bundled service provider to have to disclose the payment arrangement to the plan sponsor. A service provider that makes payments to a third party on behalf of a plan at the plan sponsor's direction should not be required to treat the third party as part of its bundle of services and should not be obligated to satisfy the regulations on behalf of, or with respect to, the third party. We request that EBSA expressly state that when a service provider accommodates these payment arrangements the service provider shall not be subject to any claims or potential liability due to the third party's failure to comply with the regulations, provided that, the payments are made pursuant to directions from the plan sponsor and the service provider discloses to the plan sponsor that it does not consider the third party to be part of its bundled arrangement.

**E. Service providers should be obligated to notify plans about a change in their compensation from a fund company or investment provider within 90 days of the later of actual knowledge of the change, the effective date of the change, or the date on which the agreement or amendment to the agreement with the fund company is executed.** - In certain instances, a service provider (e.g., record keeper) may learn about a possible or planned unilateral change to its compensation that is the result of events beyond its reasonable control (e.g., unilateral changes to compensation arrangements made by proprietary and non-proprietary mutual funds). Under Proposed Regulation Section 2550.408b-2(c)(1)(iv), service providers must disclose changes to their compensation within 30 days of obtaining knowledge of the change. The SPARK Institute is concerned that if a service provider's compensation changes because of circumstances the service provider does not initiate or that are beyond its control, the 30 day disclosure requirement may cause



premature and inaccurate disclosure. Additionally, we are concerned that the beginning date for such 30 day compliance period is too subjective and ripe for disputes over when the notice period starts and ends. Many service providers are large institutions with complex organizational structures. “Knowledge” of a possible or impending change by one employee of an organization does not necessarily mean that the part of the organization that is responsible for these matters has received formal notice and has the information necessary to disclose the change to its plan customers. In addition, these large organizations may have thousands of customers who must be separately identified and communicated with regarding the change.

**Recommended Approach** - The SPARK Institute requests that EBSA provide that service providers must notify plans about a change in the compensation paid to them by an investment provider or manager including, but not limited to, proprietary and non-proprietary mutual funds, within 90 days of the later of actual knowledge of the change, the effective date of the change, or the date on which the agreement or amendment to the agreement with the fund company is executed.<sup>14</sup> Our members have advised us that this additional relief is necessary with respect to proprietary mutual funds because the rules that apply to all mutual funds and the service provider’s corporate structures will not necessarily enable compliance by such service provider with respect to proprietary funds within a shorter time frame (e.g., 30 days). Our recommended approach is intended to provide sufficient time for the service provider to learn about the change, identify its affected plan customers, obtain the required disclosure materials from the fund company and then distribute such materials to its affected plan customers. Our members have advised us that this process will take more than 30 days, and that 90 days should be adequate.

Under our approach, a service provider must continue to comply with existing rules and regulations that relate to changes in fees and compensation initiated by the service provider itself. We believe that our recommended approach provides adequate compliance time and a more definitive compliance date tied to specific facts and circumstances and, therefore, will facilitate better compliance.

- F. **The regulations should allow generic disclosure for certain non-cash amounts (e.g., gifts, awards and trips) received by a service provider that are not intended as compensation for plan services.** - Third parties (e.g., subcontractors and fund companies) may give non-cash items (e.g., business promotions, holiday gifts, due diligence trips, and business meals) to plan service providers in the normal course of business in order to maintain goodwill and promote product and brand awareness. Plan service providers will most likely not have specific information regarding such non-cash amounts that they may receive from the third party at the time that they enter into a services agreement with their plan customers. Additionally, such items are generally not provided to a plan service provider as compensation related to, or attributable to, any particular plan customer, but instead relate to the overall relationship between the service provider and the third party.

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<sup>14</sup> Our recommended approach assumes that service providers will receive notice from the fund companies and investment managers that initiate such changes, in accordance with existing SEC regulations.

Proposed Regulation Section 2550.408b-2(c)(iii)(A)(1) states that “compensation or fees” includes “money or any other thing of monetary value (for example, gifts, awards, and trips) ....” We are concerned that specific disclosure of non-cash items is excessive, and will be onerous and costly. Service providers will have to develop new tracking and reporting policies and procedures with respect to such items, the cost of which will likely outweigh the value of the non-cash items they receive.

**Recommended Approach** - The SPARK Institute requests that the final regulations permit a service provider to disclose non-cash amounts that they may receive from third parties to a plan sponsor through a generic disclosure that informs the plan sponsor generally about the possibility of receiving such items, regardless of their value; provided that the items are not given to the service provider as either (1) the direct result of the exercise of any discretionary authority by such service provider with respect to the plan, or (2) remuneration directly and specifically resulting from the services provided to the plan by the service provider or specifically and exclusively attributable to the investments of the plan. This approach gives service providers the ability to inform plan customers about the possibility of receiving non-cash amounts from third parties without the burden of allocating and making after the fact dollar amount disclosures of amounts that are not specific to particular plans.

**G. What are the responsibilities and alternatives available to a service provider that is unable to get a plan sponsor to execute a new or amend an existing services agreement that is required under the Proposed Regulations?** - Plan service providers generally have little, if any leverage, to compel an existing plan sponsor customer to amend or execute a new plan services agreement. Although the Proposed Exemption provides relief to plan sponsors who make a good faith effort to comply with the regulations, but who fail to do so through no fault of their own, no comparable relief is available for service providers.

Most plan sponsors cooperate in matters concerning plan agreements. However, The SPARK Institute is concerned that a plan service provider could be subject to penalties and liability if a plan sponsor ignores the service provider’s requests to execute compliance amendments, refuses to sign anything that the service provider sends to them, makes unreasonable demands in connection with the agreement or amendment that prevent execution, or delays the process beyond the compliance deadline.

**Recommended Approach** - The SPARK Institute requests that EBSA expressly provide protection from penalties and liability for service providers in the final regulations and a prohibited transaction class exemption. Such relief should provide that service providers shall not be considered to have violated the final regulations with respect to amending existing service arrangements when a plan sponsor fails to take the necessary and requested affirmative action to amend the agreement after reasonable advance notice regarding such required action. In such instances, the service provider should be protected from any adverse consequences associated with servicing the plan and receiving compensation for such services, provided that it had otherwise attempted to comply with the regulations but was unable to obtain affirmative consent from the plan sponsor. Absent such relief, plan service providers will be put in the untenable position of having to either refuse compensation while continuing to perform services, or terminate its services arrangement and discontinue

providing services to the plan. Neither of those options serves the best interests of any of the parties involved, including plan participants.

- H. The final regulations should expressly state that IRAs are not subject to the 408(b)(2) regulations.** - The Proposed Regulations do not specifically state whether they apply to IRAs and other arrangements that are not subject to ERISA but that are subject to Section 4975 of the Internal Revenue Code (the “Code”). The preamble to the Proposed Regulations refers only to plans that are subject to ERISA and to fiduciaries that are subject to the fiduciary rules under Section 404 of ERISA. The preamble does not specifically mention arrangements that are subject only to the Code's prohibited transaction rules. Additionally, the Proposed Regulations do not amend the Code Section 4975 regulations relating to whether a contract is considered reasonable. However, the preamble states that a violation of the Proposed Regulations is also a violation of Code Section 4975, which is applicable to IRAs. See 72 Fed. Reg. 70993.

**Recommended Approach** - Based upon our understanding of the Proposed Regulations, it appears that EBSA did not intend to subject IRAs to the regulations. The SPARK Institute requests that EBSA expressly state that IRAs and other plans that are not subject to ERISA will not be required to comply with the final regulations. If our understanding is incorrect, we request that EBSA reconsider its position and consider the following. IRAs do not, in most cases, have an employer as a plan sponsor and they are administered and operated differently from employer sponsored plans. If service providers are obligated to comply with the 408(b)(2) regulations for the vast number of IRAs they hold, such providers will likely be overwhelmed by the cost and effort necessary to comply. If EBSA is concerned that the disclosure rules applicable to IRAs and other plans that are not subject to ERISA need to be modified, we urge EBSA to address its issues and concerns in separate regulations that can be tailored to how such plans are used by individuals and how they are operated.

- I. The effective date in the Proposed Regulations should be modified and should include a longer transition and compliance period for existing arrangements between plan sponsors and service providers.** - As noted above under Section A, the retirement plan and investment management industries and the SEC learned in connection with SEC Rule 22c-2 that compliance rules that impose new contract requirements involve significant time, cost and effort. We believe that the time, cost and effort that it will take for plan sponsors and service providers to comply with the Proposed Regulations’ contracting requirements are substantially greater than EBSA estimated when setting the proposed compliance deadline. Our members have advised us that there are several potentially time consuming tasks that must be accomplished before they will be in a position to amend or restate their customer agreements. The tasks include, for example, revising customer agreement forms for every affected product and service model, preparing form amendments for use with existing customers for every product and service model, developing the detailed disclosures that comply with the final regulations, and identifying and preparing amendments for every affected plan customer. Record keepers and third party administrators will also have to amend some or all of their agreements with their subcontractors and mutual fund company trading partners in order to prepare for the new disclosure requirements. These tasks, and others that may ultimately be required, will take a significant amount of time to complete.

Based on an informal survey of our members that are record keepers, we estimate that the time associated with various compliance efforts will be as follows. The time required to understand the new rules will likely be approximately 130 hours per record keeper rather than 24 hours as estimated by EBSA. This estimate is for all service providers, including those that do not consider their fee arrangements to be overly complex.

The time required to update forms and agreements, which does not include preparing amendments, restating agreements and providing new disclosures for each existing plan customer will likely be approximately 100 hours per record keeper rather than 80 hours as estimated by EBSA. Although it may appear that EBSA's estimate regarding the foregoing item is reasonably close to our estimate, the time required to complete the tasks that we excluded from our estimate and that we show separately (i.e., preparing amendments, restated agreements and disclosures for each plan customer) is significant. Among the costs associated with initial compliance with the new rules will be those related to amending or restating plan agreements and making disclosures according to the new requirements. We estimate that it will take an average of approximately one hour and forty five minutes per plan to comply with the new disclosure requirements for the first time. Our members each have thousands to tens of thousands of plan relationships. Accordingly, the time required by our members to complete these tasks will be significant.

Several members have advised us that system changes will be required in order to facilitate automated compliance with different aspects of the regulations. The estimates for that additional time range from approximately one thousand to several thousand hours. This estimate includes the time of employees responsible for different functions within each organization to fully understand the new rules, come to agreement on interpretations, and then collaborate with each other to take the agreed upon actions.

Additionally, EBSA's estimate does not include time for record keepers and mutual fund companies to amend their agreements with each other in order to comply with the new rules. Based on information from our members that have experience with these matters as a result of having gone through a similar process in connection with SEC Rule 22c-2 we estimate that it will take a record keeper an average of approximately four hours per fund family to accomplish this task. The number of trading relationships that each record keeper may have can range from twenty five to several hundred.

We also note that EBSA's estimates do not include an estimate for the use of outside legal counsel at current hourly rates. Some of our members have advised us that they anticipate as much as 100 hours of outside ERISA counsel time at \$350 to \$600 per hour.

**Recommended Approach** - The SPARK Institute requests that EBSA clarify and provide for different compliance deadlines for arrangements between a plan service provider and new customers, and for arrangements between a service provider and existing customers. For new customer arrangements (i.e., those where the service provider is not currently providing the services at issue for the plan), the final regulations should not be effective until at least six months after they are published. More specifically, the disclosure and contract requirements in the final regulations should apply to new service agreements and contracts that have an effective date that is at least six months after the final regulations are published.

For existing customer arrangements, the compliance deadline to either amend the existing service agreement or sign a new service agreement should be at least 18 months following the date the final regulations are published. Under this approach, during the first six months following the publication date of the final regulations the affected parties will be able to take the necessary steps and prepare to comply with the new regulations. Assuming that plan service providers are prepared to comply with the new regulations six months following the publication date of the final regulations (as would otherwise be necessary for new customers), they will be able to amend and restate their exiting agreements over the remaining 12 months of our proposed 18 months compliance period. Our proposed compliance deadline is intended to provide all of the affected parties a reasonable amount of time to develop new agreements and amendments, and facilitate an orderly transition.<sup>15</sup>

The SPARK Institute requests that EBSA coordinate the 408(b)(2) regulations, participant fee disclosure and Form 5500 disclosure initiatives. These fee disclosure initiatives will involve significant organization-wide reeducation by each affected service provider, product design and structure changes, record keeping systems modifications, new business practices, and changes to business relationships. For example, we request that EBSA coordinate these initiatives by using similar terms, definitions and standards. We urge EBSA not to underestimate the combined time and resource drain that these initiatives will have on the affected institutions. Many of the same people that will be responsible for facilitating compliance with these new rules are also responsible for facilitating compliance with other new rules and regulations including the Pension Protection Act changes and new 403(b) plan compliance requirements. Service providers should not be put in the position of having to drastically increase staff and costs in order to meet compliance deadlines that are too aggressive because of the combined effect of multiple initiatives that impose simultaneous demands on the same staff and resources. Increased compliance costs will ultimately be passed on to and absorbed by plan sponsors and plan participants. Accordingly, every effort should be made to facilitate cost effective compliance within reasonable timeframes. We urge EBSA to take a flexible approach with respect to the compliance deadlines and to be prepared to make adjustments as needed by the plan sponsor community and the retirement plan and investment provider industries.

- J. The provisions under the Proposed Regulations regarding requests for information in connection with plan reporting and disclosure requirements should be limited to reasonable requests made by plan sponsors.** - Proposed Regulations Section 2550.408b-2(c)(v) provides that a “service provider must disclose all information related to the contract or arrangement and any compensation or fees received hereunder that is requested by the responsible plan fiduciary or plan administrator in order to comply with the reporting and disclosure requirements of Title I ...” The preamble to the Proposed Regulations specifically states that this requirement is intended to facilitate completion of the annual report on Form 5500. We are concerned that the requirement under the Proposed Regulations could

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<sup>15</sup> We note that we cannot estimate the exact amount of time our members will need to comply with the new rules without knowing what the final regulations will require. The SPARK Institute can provide additional information to EBSA, if requested, in order to help estimate the amount of time that will be reasonably necessary to comply with the final regulations.

potentially require service providers to respond to unreasonable and excessive requests for information. Additionally, we are concerned that the Proposed Regulations could provide a basis for plan sponsors to demand that service providers provide them the information in a specific or customized format.

Our members have advised us that their record keeping systems already produce reports that are provided to plan sponsors for 5500 reporting purposes. However, accommodating unreasonable and excessive requests, and requests for information in specific or customized formats, can be labor intensive and costly. We are concerned that the Proposed Regulations could obligate plan service providers to respond to every request at its own expense, even if the request is unreasonable.

**Recommended Approach** - The SPARK Institute requests that EBSA clarify and provide that service providers shall only be obligated to respond to reasonable requests for information from a plan sponsor or other plan representative in connection with 5500 reporting. Service providers should not be obligated to respond to excessive or unreasonable requests (e.g., extraordinary detail beyond what is typically provided to and required by most plans). Additionally, we request that EBSA expressly state that these disclosure requirements neither obligate a service provider to provide the information in a customized format, nor entitle the plan sponsor to demand that such information be provided in a specific format. However, service providers that are able and willing to accommodate a plan sponsor's extraordinary or special requests should not be precluded from charging a fee for doing so. The SPARK Institute believes that the requested changes will help keep compliance costs down and facilitate better compliance.

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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: Tom Schendt (Alston & Bird)