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EXECUTIVE DIRECTOR

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure (RIN 1210-AB53)

Dear Sir or Madam:

The SPARK Institute, Inc.[1] appreciates this opportunity to comment on the Department of Labor's (the "Department") proposal to amend the disclosure regulation under section 408(b)(2) of ERISA to add a new requirement for service providers to create and provide a "guide" to the required fee disclosures ("the proposal").

As the 408(b)(2) regulation was being developed, the SPARK Institute, on behalf of our member firms, repeatedly stated our strong support for robust fee disclosure in the retirement plan industry. We believed then, and we continue to believe now, that effective fee transparency will ultimately benefit not only plan sponsors and plan participants, but that it will also benefit the retirement plan and investment management industries. Our goal, which we believe is shared by the Department, is to have a disclosure regime that provides useful and actionable information to plan fiduciaries and participants without imposing undue costs on them. Importantly, such a regime must be justified by robust data on any perceived gaps in disclosure, reflect the diversity of plans, services, and investments, and be workable. Unfortunately, the Department's guide proposal does not meet this test in its current form. As explained in more detail below:

- The Department's proposal is premature. The proposal should be withdrawn and put on hold until the results of the Department's focus group testing are made available. We also recommend that the Department release a Request for Information to collect adequate data on the need for, and costs of, any changes to the 408(b)(2) final rule.

[1] The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third party administrators, trade clearing firms and benefits consultants. Collectively, our members serve approximately 70 million participants in 401(k) plans, and a substantial majority of the participants in 403(b) plans.

- The Department is underestimating the cost of providing a guide because creating and updating the guide will be, in most cases, a manual process that must occur on a plan by plan (not product) basis. The documents the guide requires to be indexed through use of a specific locator are simply not uniform, either from provider to provider or from plan to plan. Adding further complexity, when documents are created by an unaffiliated entity, there is no legal requirement or operational mechanism for the unaffiliated entity to provide the covered service provider with updated locator information or even inform the covered service provider such information has been updated.

- The guide requirement would encourage service providers to create 408(b)(2) disclosure documents that are *less* helpful to plan fiduciaries than those now being provided because it would discourage the provision of summary information by service providers as an integral element of the disclosure. It further suggests to plan fiduciaries that they may not need to focus on information in documents that is not referenced in the "guide."

- The standards for compliance with the new guide requirement create uncertainties for service providers about how to properly implement the guide:

    - The "locator" requirement will be difficult to administer because it is not possible to know when a plan fiduciary can "quickly" and "easily" find the information.
    - The Department should not require a guide as a separate document.
    - The guide requirement should not be triggered based on the page length of the disclosure.
    - The guide should not be triggered solely because the 408(b)(2) disclosure is in a summarized format that references more detailed information in other documents.
    - The covered service provider should not be required to provide a locator for information contained in documents that were individually negotiated by the plan fiduciary or created by an unaffiliated entity.

- Requiring identification and contact information for an individual person or office that the plan fiduciary may contact regarding the disclosures is *all that is required* to address the Department's concerns.

- If the Department nonetheless moves forward with requiring a guide, the new requirement should not apply to contracts or arrangements entered into prior to the effective date of the amendment to the final rule; it should apply on a prospective basis only.

I. Background

The proposal

Under the Department's proposal, a service provider would be required to provide a "guide" if the information that constitutes the 408(b)(2) disclosure is either (a) not contained in a single document or (b) contained in a single document but the document exceeds a yet-to-be-specified number of pages. This guide must be a separate document from any other document intended to serve as a 408(b)(2) disclosure. The guide would need to provide the plan fiduciary with "the document and page or other sufficiently specific locator, such as a section" where the 408(b)(2) information can be found. If something other than a page number is used, the locator must be specific enough to allow a plan fiduciary to "quickly and easily" find the required 408(b)(2) information. Finally, the guide must identify a person or office, including contact information, whom the responsible plan fiduciary may contact regarding the disclosures.

SPARK Institute members' efforts to implement 408(b)(2) disclosures effectively

SPARK Institute members have invested significant time and money to comply with the 408(b)(2) regulation. For the largest recordkeepers, this effort involved millions of dollars and thousands of man hours. This effort consisted of programming technology solutions, testing, and distributing the 408(b)(2) disclosures. Covered service providers also proactively reached out to, and worked with, plan fiduciaries and their intermediary partners, as part of the original 408(b)(2) disclosure implementation, to answer any questions, educate them on the significance of documents, and to work with plan fiduciaries to enhance services and reduce costs. The highly competitive nature of the plan services marketplace and the focus on fees and fiduciary responsibility for oversight of fees, demands that service providers provide full transparency of their compensation and to provide disclosures that are succinct and usable.

Providers did not simply "dump" additional documents on plan fiduciaries in connection with the 408(b)(2) rule implementation. Rather, they commonly created a specific 408(b)(2) disclosure document to summarize the provider's compensation and services and other information required by the regulation. Because a summary, by its nature, consists of summarized information, the disclosures often reference more detailed or additional information in other documents or the information contained in disclosures provided by the issuers of investment products available under the plan. For example, the disclosure might state that the service provider will perform "recordkeeping" services but refer the plan fiduciary to an administrative services agreement for more details on exactly which services the sponsor has contracted. Or it might point out that the service provider will receive income in the form of float, and refer the plan fiduciary to the provider's more detailed "float disclosure" provided pursuant to Field Assistance Bulletin 2002-3.

SPARK Institute members have carefully tracked the responses to the 408(b)(2) disclosures, including the kinds of questions that providers received by the plan fiduciaries with whom it works. It was the consistent experience of our members that plan fiduciaries' inquiries prompted a few plan specific discussions, but did not in any way suggest the need for a "guide." There

were virtually no questions on the format of the disclosure, where to find information, or about the ability to access information. In short, our members saw no evidence that the 408(b)(2) regulation is inadequate because it allows (by the Department's deliberate design) flexibility in how disclosures are formatted and provided. Because the SPARK Institute's members serve the vast majority of plans subject to the rule, we think this experience is representative of the industry.

The preamble to the proposal states that "anecdotal" evidence suggests that small plan fiduciaries often have difficulty obtaining required information in an understandable format because these plan fiduciaries lack the bargaining power and specialized expertise possessed by large plan fiduciaries. Even if this is correct, the Department's proposal would not solve this lack of specialized expertise or understanding, because all that the proposal requires is a reference to the location of where information can be found in other documents.

II. Comments on the Department's Process

The proposal is premature.

Executive Order 12866 requires an agency proposing a regulation to do so only where there is a compelling public need and where other regulatory approaches would not provide greater *net* benefits taking into account all the costs. We think this proposal is premature.

The Department acknowledges as much in the preamble to the proposal. Coincident with issuing the proposal, the Department announced its intention to conduct focus group testing to determine whether there is a need for a guide, summary, or similar tool in the first instance. The Department acknowledges that the focus group testing will not be publicly released until after the close of the comment period. For reasons that are unclear, the Department decided to both propose a rule *and* proceed with gathering information to determine the need for the rule, simultaneously. A better approach would be to determine whether any gaps exist in the regulation first, and then propose to close those gaps to the extent that any are identified. This approach would also allow interested parties to consider any recorded concerns of the focus group respondents and offer plausible solutions to address them, within their comments on a subsequent proposal, should that still be deemed necessary.

Accordingly, we recommend, as a first step, that the Department withdraw the proposal and complete the focus group study. We also believe that the Department would benefit from a Request for Information that collects data and comments on what gaps, if any, exist under the current 408(b)(2) regulation and what would be most effective in closing those gaps. After a complete record is developed, the Department could then reconsider if an amendment to the 408(b)(2) regulation is needed.

The Department is underestimating the costs of the guide.

It is absolutely crucial that the Department have firm and reliable data about the costs of this proposal before moving forward. We are concerned that the Department has proposed to amend the regulation despite the preamble's statement that "[t]he Department lacks information on the time required by covered service providers to create a guide" and "lacks complete data and empirical evidence to estimate the cost for covered service providers to create the guide."[2]

We believe that the Department is underestimating the costs of the proposal. Simply based on the structure of the proposal we know that the Department's estimate is much too low because the Department assumes that the guide will not require manual processing for each plan.

The Department estimates that the guide requirement will apply to between 49,140 and 81,900 "products and services." The Department assumes that for each product or service, a service provider will spend between 2-4 hours per year complying with the guide requirement. In other words, for any product or service, the estimate assumes that 2-4 hours of review and programming per year will be all that is needed to create a disclosure that would comply for all plans that use that product or service. Thus, the Department assumes that for each plan that uses a product or service, no customization of the guide will be necessary for that plan. This assumption must be reevaluated.

The reason the Department's cost assumption is not correct is that creating a guide that references specific page numbers, or section headings, will require manual checking and intervention by individuals. The proposal requires that the service provider identify a page number or other locator where the required fee disclosure information can be found. In the vast majority of cases, providers do not use the same identical service agreement for each plan they service—they vary by market and are often heavily negotiated by plan fiduciaries. Additionally, mutual fund prospectuses and disclosures for other investments are not identical, and plans routinely include investments from unaffiliated providers. Each plan has its own mix of services and investments that have been selected. Some very standard service and investments packages may be the same for every plan, but this is the exception, not the rule.

In other words, a more accurate estimate would involve multiplying the expected hours at a labor rate by the number of *covered arrangements* (2.2 million), not the number of estimated products and services. This would result in a much more accurate estimate of the cost of the proposal.[3]

Unfortunately, the Department's proposal presents challenges that will limit the ability of covered service providers to leverage technology to overcome the substantial manual effort

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[2] 79 Fed. Reg. 13949, 13958 (Mar. 12, 2014).

[3] The Department assumes that every single plan fiduciary – numbering 684,000 – would save on average half an hour if a guide were provided. The assumption that every single ERISA fiduciary would spend less time after the guide is provided is somewhat hard to believe, but if the Department is going to make that assumption, it must also assume that every single covered arrangement will involve the creation of a guide.

necessary to develop a guide. There is no external data source available to providers to create the "roadmap" of references to specific locations within documents, as there is no current *need* for this information. There is no uniform place where the required information can be located in publicly available documents for all mutual funds,[4] with additional complexity for all other investment products. Other documents that might contain the required information – like service agreements, investment management agreements, and miscellaneous disclosures – are not in a uniform format or indexed.

Put another way, the locator information that the proposal would require to be indexed by the guide is what is known as "unstructured" data, meaning the data is not organized in a pre-defined manner that is readily searchable. This is the reason that search engines require massive algorithms to crawl the unstructured nature of the Web and return search results of unstructured data – still with less than perfect accuracy - and why different search engines produce different search results.

As a result of the unstructured nature of the data, a service provider would have to manually build and maintain a database to support production of a guide. The amount of manual effort required to maintain accurate "roadmap" references to specific pages would introduce a level of inaccuracy to the process that technology cannot overcome.

In some cases, complying with the guide requirement may not even be possible. For example, assume a 401(k) plan recordkeeper makes available an investment from an unaffiliated issuer, and in that investment provider's disclosure document, there is on page six a section entitled "Investment Fees." The 401(k) plan recordkeeper is required by the 408(b)(2) regulation to disclose the operating expense of the investment. It might comply with the new guide requirement by referencing the document and either referencing page six (unlikely) or referencing the section entitled "Investment Fees." Now assume the investment provider modifies the document so that the expense ratio is now on page eight under a section now entitled "Management Fees." There is no legal obligation on the investment provider to alert the 401(k) plan recordkeeper of this change or to provide updated information, nor is there any systematic way the 401(k) plan recordkeeper could track these changes for the thousands of investments it might make available on its platform.[5]

The Department should hold a public hearing.

Given the complexities of how different service providers may need to implement the guide requirement, and because the Department is proposing this regulation while simultaneously collecting information on the need for it, the Department would benefit from a public hearing on the proposal to be held after the Department makes public the results of the focus group testing and any other data it gathers in this process. This would give Department officials an opportunity to learn more about the costs of this proposal, engage with interested parties on what

[4] In addition, even assuming the covered service provider could provide a plan fiduciary with a URL for the fee section of a prospectus available on the Web, that information would quickly become outdated, as a URL could be changed for reasons unrelated to the substance of the information found at that location.
[5] Mutual funds and other investments update their documents throughout the year.

gaps they see in the Department's disclosure regime, and lead to a better understanding of what arrangements, if any, are most likely to result in disclosure problems that could be addressed by a guide. As such, the hearing should not just focus on the guide but also on whether the 408(b)(2) regulation is meeting its goals and whether it contains any gaps.

III. Comments on the Content of the Regulation

The "locator" standard is unclear and not possible to administer with certainty.

The Department's 408(b)(2) regulation, in essence, sets out the minimum requirements for a service contract to avoid resulting in a prohibited transaction, under the theory that only when the proper disclosures are provided is the arrangement reasonable. A prohibited transaction is a fiduciary breach and subjects the "disqualified person," in tax code parlance, to a self-assessing excise tax. Thus, the requirements to satisfy the regulation must be clear – there cannot be any gray area as to whether a prohibited transaction has occurred.

Under the proposal, the guide would need to include either a page number or another locator that "enables the responsible plan fiduciary to quickly and easily find" the information in another document. "Quickly" and "easily" are extremely unclear standards. For example: Is there a time limit intended? What if a plan fiduciary still has trouble? Does this standard vary by the complexity of the underlying document?

The Department's position has been that, when a prohibited transaction exemption is relied upon, the burden is on the party seeking the use of the exemption to prove all its elements are met. It is hard to see how a service provider could assure itself that this standard has been met with respect to every guide it creates and every unique customer it services.

In addition, the locator requirement assumes that all disclosures are furnished either in paper or in an electronic format that mimics paper. Many documents simply do not have page numbers, particularly those delivered via the layered and dynamic nature of the Web. Thus, the proposal does not distinguish between e-delivery (*e.g.*, emailing a PDF), and e-disclosure (*e.g.*, providing information in a Web-friendly format).

The Department should not require a guide as a separate document.

Under the proposal, if a guide requirement is triggered, the guide must be in a "separate" document. The need for a separate document is not clear. For example, if the service provider creates a 408(b)(2) disclosure summary that happens to reference a few additional documents, a separate guide would be necessary under the proposal. This guide would have to include a locator for *all of the 408(b)(2)* information, even where that information has already been summarized in a useful form.

Similarly, if the service provider's 408(b)(2) information is contained in a single document, but that document just happens to exceed the Department's page limit, a separate guide is required. In many cases, providers have formatted the disclosure so that each fund option is on its own

page. Even though this can result in a document with more pages, it is done both for purposes of clarity and to enable semi-automated assembly of the packages. A much more appropriate and useful tool would be a table of contents or index included as part of that single document, if one is not already provided.

The triggering of the separate document requirement also creates odd effects when a service provider sends a "change" notice. Under the current 408(b)(2) regulation, if information provided to the plan fiduciary changes, the service provider generally must disclose the new information no later than 60 days after the service provider is informed of the change. Typically these "change" notices do not repeat the entire 408(b)(2) disclosure but simply inform the plan fiduciary of the changed information. But the sending of this change notice would, itself, appear to trigger the requirement for the provision of a guide because the 408(b)(2) information would now be in multiple documents.

The guide should not be triggered based on the page length of the 408(b)(2) disclosure.

Under the proposal, the guide requirement is triggered if the 408(b)(2) disclosure is in a single document but that single document exceeds a yet-to-be-specified page limit. Besides seeking comments on what that page limit should be, the Department asks whether standards like font size and margins should be included to "prevent formatting or other manipulation of the page number requirement."

As an initial matter, it is very difficult to provide meaningful comment on this proposal not knowing the precise circumstances under which the guide requirement might be triggered. This is true both on the costs of the proposal but also the circumstances under which we believe service providers will tailor their disclosure to fit within the page limit.

We also believe that a page limit, enforced through font size and other formatting rules, might be appropriate for plan participants or similar consumer-like disclosures but is not appropriate in this context. Plan fiduciaries are not ordinary consumers. They are required by ERISA to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use."[6] A plan fiduciary must have the requisite expertise to meet that standard or, in the Department's view, should "hire someone with that professional knowledge to carry out the investment and other functions."[7]

The number of pages in a document is not a proxy for its complexity. Some service arrangements can be described in a few pages while others will require more pages, but requiring more pages does not mean that the disclosure is not straightforward and easy to digest. In some cases, a page limitation may prevent providers from including information intended to assist users' understanding, like a glossary of terms. Similarly, if the disclosure references the fees of the plan's investments, the length of the document will be determined by the number of

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[6] ERISA § 404(a)(1)(B).
[7] http://www.dol.gov/ebsa/publications/fiduciaryresponsibility.html.

investments the plan fiduciary selects. The 408(b)(2) disclosure for a plan with five investments might be ten pages shorter than one for a plan with 50 investments, even if both disclose those fees in exactly the same way. Similarly, since the 408(b)(2) disclosure requires a description of the service provider's services, some services can be very concisely described, while others simply require more explanation. In fact, the guide requirement might be triggered simply because the plan fiduciary wishes to obtain multiple services from a single vendor. In sum, we do not believe that a maximum page number rule could properly separate those 408(b)(2) disclosures that are "too lengthy" from those that are not.

The guide requirement could discourage disclosures that are more helpful.

Under the proposal, if the information required by the 408(b)(2) regulation is not "contained in a single document" under the page limit, the guide requirement is triggered. It is unclear what it means to have the information "contained in a single document." This is important because, as stated above, service providers have routinely provided 408(b)(2) summaries that reference other, longer documents.

Take a simple example. Assume a plan fiduciary and covered service provider enter into an administrative services agreement that is of typical length for such a legal contract. The basic services are recordkeeping, nondiscrimination testing, quarterly participant statements, and Form 5500 services. The service provider creates a single summary document (but not a "guide") intending to capture all the 408(b)(2) information that describes these services in summary form, but reminding the plan fiduciary that more detail is in the administrative services agreement. Is that information "contained in a single document"?

If the guide is triggered in that case because the 408(b)(2) information is in multiple documents, then the service provider must create *two* documents on top of the administrative services agreement: the summary, which is intended to be helpful, and the guide. Of course, the service provider might, instead, eliminate the summary and simply create the guide that gives page numbers for where the information can be found.[8] But this is clearly less helpful to the plan fiduciary, who no longer has a summary of the administrative services agreement. Thus, the guide requirement encourages service providers to create 408(b)(2) disclosures that are *less* helpful to plan fiduciaries than what is being provided now because it discourages the use of summary information.

The guide requirement also implicitly suggests to a plan fiduciary that the only information that is important in a referenced document is the 408(b)(2) information. For example, if the guide references page 3, 6, 7-9, 12, 22, and 26 of the administrative services agreement (because those are the pages on which 408(b)(2) information is contained), the plan fiduciary may conclude that reading and understanding the information contained on the other pages of the administrative services agreement is not necessary or is less important. And there may be very important information elsewhere in the document. The administrative services agreement may contain an

[8] Even though the proposal does not specify the page limit, we think it likely an administrative services agreement will exceed the limit.

indemnification provision, or a description of what services are *not* being provided. In addition, the "guide" suggests that a disclosure or other document that does not contain 408(b)(2) information does not need to be reviewed.

Similarly, in the context of prospectuses, insurance contracts, and other documents created pursuant to another regulator's rules, the Department's proposal suggests that information required by such other regulators is not relevant or important. With a mutual fund prospectus, the proposed guide would point a plan fiduciary to a fund's expense ratio but not to its historical performance, investment strategies, or investment risks. For a Form ADV, it would point a fiduciary to the adviser's fees and soft dollar disclosure, but not to the adviser's disciplinary information or trading practices. All of the information in a prospectus or ADV is potentially important to an investor – otherwise the SEC would not require it.

The guide should not be triggered solely because the 408(b)(2) disclosure is in a summarized format that references more detailed information in other documents.

As stated earlier, it is common for covered service providers to furnish a specific 408(b)(2) disclosure document that summarizes the provider's compensation and the services being provided, often referencing more detailed or additional information in other documents or the information contained in disclosures provided by the investments available under the plan. The foregoing discussion explains why this sort of disclosure is *more useful* than a guide.

Therefore, we recommend that the Department make clear that simply referencing another document that contains more information does not mean that the 408(b)(2) information is in "multiple" documents.

The covered service provider should not be required to provide a locator for information contained in documents that were individually negotiated by the plan fiduciary or created by an unaffiliated entity.

Many plans require that the service provider use the plan's contract as a starting point – a practice particularly common with plans that hire investment managers. In this case, the Department's proposal would require the service provider to tell the plan fiduciary where in the fiduciary's own document the 408(b)(2) information is contained. In other cases, the plan fiduciary heavily negotiates the service contract, resulting in a custom document. Thus, the document will no longer be in a standard format, and the covered service provider is not in a better position than the fiduciary to know where relevant information is contained.

A similar issue exists for documents created by an unaffiliated entity. This is not a new concern for the Department. In the interim final 408(b)(2) regulation, the Department recognized that "recordkeepers and brokers, unlike fiduciaries to investment vehicles holding plan assets, are not directly involved in the day-to-day management of the investment vehicles they represent, but rather, merely serve as intermediaries between plans and the issuers of these investment vehicles

for purposes of furnishing such information."[9] As a result, the Department limited the responsibility of recordkeepers and brokers with respect to designated investment alternatives of unaffiliated entities. The interim final and final rules provided that the recordkeeper or broker can furnish the current disclosure materials of the unaffiliated issuer as long as the covered service provider does not know the materials are inaccurate or incomplete. The same concern that led the Department to this conclusion – which we heartily support and believe has proven to be the right balance – leads to the similar conclusion that the covered service provider should not be required to furnish a page number or other locator for documents created by an unaffiliated entity.

The Department's assumption is that a service provider is in a better position to locate information than the plan fiduciary. We caution that, although we agree this may be true in some cases, it is true in far fewer cases than the Department assumes. After all, a plan fiduciary should be intimately familiar with the plan and its services and investments. In any event, where a document is individually negotiated or created by an unaffiliated entity, the assumption is simply not true.

IV. Recommendation for a More Straightforward Solution to the Department's Goal

We appreciate the Department's concern that 408(b)(2) disclosures may be difficult for fiduciaries, particularly those for small plans, to understand and process. Even experts find the service arrangements designed to meet all ERISA and tax code regulations, and the investments available in plans, complex. Our members worked hard to create 408(b)(2) disclosures that were as straightforward as possible and actively reached out to and worked with plan fiduciaries that did have questions.

In addition to the guide requirement, the proposal would require that a covered service provider identify a person or office, including contact information, that the responsibly plan fiduciary may contact regarding the disclosures. We agree with the Department's proposal in this regard, but would point out that as a matter of basic business practice this would typically be included even though it is not presently required.

Simply amending the regulation to add this requirement would sufficiently address the Department's concerns. In addition, it would meet the Department's goal of having the covered service provider a plan fiduciary that has any difficulty locating any information referenced in the guide or has questions about the 408(b)(2) disclosure.

This solution is also flexible because it would be more appropriate to the range of ways that a service provider's documents might meet the 408(b)(2) disclosure requirements. If a service provider created a specific 408(b)(2) disclosure that summarized the provider's compensation and services but referenced other documents for more detail, the contact person could help the fiduciary locate and understand the referenced documents. If the service provider's disclosure is contained in a single document that is somewhat lengthy, the contact person could help the

[9] 75 Fed. Reg. 41600, 41612 (July 16, 2010).

fiduciary locate any part of the 408(b)(2) information that is not immediately apparent. Finally, this contact information is already contained in many 408(b)(2) disclosures and could be added at little cost (or sent to existing clients in short letter or email) in the case of disclosures that do not currently provide such contact information.

This solution is also more beneficial to small plan fiduciaries because it encourages those fiduciaries that are committed to reading and understanding the disclosure to speak with a contact person who can help explain the information. This human interaction with a contact person at the service provider is far more valuable than a page or section number. This requirement also aligns with providers' goals of ensuring their client understand the specific scenarios and fees in place for their plans.

This solution can easily be implemented in addition to another fairly straightforward solution the Department has already put in place. The Department has announced that its Office of Enforcement has been collecting 408(b)(2) disclosures and reviewing them in a working group within the Department. To the extent the Department finds a particular service provider's disclosure difficult to understand or formatted in a way that obscures or hides information, the Department can address such concerns informally with the service provider.

V. Effective Date

The Department proposes to make the new guide requirement effective 12 months after publication of a final amendment in the Federal Register. Although the regulation itself is not clear, it appears based on the economic analysis that the Department intends for *existing* contracts and arrangements to be subject to the rule.[10]

As discussed above, there are so many unanswered questions and issues raised by the Department's proposed amendment that it is impossible to comment on what period of time would be required for reasonable implementation without resolution of those questions and issues. Because of the manual nature of implementation in many instances, 12 months may not be sufficient.

We strongly recommend that, if the Department moves forward with the proposal in its current form, the **final regulation does not apply to contracts or arrangements entered into prior to the effective date**. The systems were not designed to deliver the cross-references the proposal would require, and would need to be completely redesigned.

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[10] Because of the way the proposal is drafted, it is not entirely clear that, where a guide might be required, the covered service provider would not need to provide every other 408(b)(2) document again. We doubt the Department intended for providers to furnish all 408(b)(2) disclosures again, but it may be appropriate to clarify this point.

While we have expressed significant concerns with this proposal, we reiterate that we believe in effective disclosure. Like the Department, we want to eliminate unnecessary costs that will be borne by plans and participants. We also support a measured approach to filling any gaps in the Department's fee disclosure regulations. For example, we applauded the Department for addressing, in Field Assistance Bulletin 2013-02, timing issues with annual disclosures under the participant disclosure regulation, and we provided suggestions for an amendment to the regulation that ensures participants receive disclosures in a timely manner.[11]

The SPARK Institute appreciates the opportunity to provide these comments to the Department. If you have any questions or need additional information regarding this submission, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com, 202-347-2210).

Sincerely,

Robert G. Wuelfing

Robert G. Wuelfing
Executive Director
The SPARK Institute, Inc.

[11] *See* SPARK Institute letter to John J. Canary (Jan. 27, 2014).