Submitted Electronically

February 2, 2011

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

Re: **Definition of Fiduciary Proposed Rule**

Ladies and Gentlemen:

The SPARK Institute, Inc.[1] appreciates this opportunity to comment on the Employee Benefits Security Administration's ("EBSA") definition of fiduciary proposed rule (the "Proposal").[2] The SPARK Institute supports EBSA's objective of clarifying the scope of the definition of fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA") to include certain plan service providers and to help plan sponsors understand whether or not their service providers are acting in a fiduciary capacity. However, we are concerned that the Proposal may have significant unintended consequences that will adversely affect the products and services that are available to retirement plans and may severely limit plan sponsors'[3] ability to cost effectively get the information and support they need with respect to their plan investment options. This letter includes a summary of our concerns regarding the Proposal and suggests certain modifications.

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1 The SPARK Institute represents the interests of a broad based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third party administrators, trade clearing firms and benefits consultants. Members include most of the largest firms that provide record keeping services to employer-sponsored retirement plans, ranging from one-participant programs to plans that cover tens of thousands of employees. The combined membership services approximately 70 million employer-sponsored plan participants.

2 75 Fed. Reg. 65263 (Oct. 22, 2010).

3 For purposes of simplicity, references herein to the plan sponsor include a plan committee acting on behalf of the plan, plan trustee or other plan fiduciary that is designated as being responsible for selecting a plan's investment options.

Additionally, EBSA requested comments regarding distribution counseling services. The SPARK Institute believes that non-fiduciary distribution counseling services are a valuable tool for plan sponsors and participants that should be preserved. Accordingly, this letter includes our views on that subject.

I. Executive Summary

The following is a summary of the various requests and recommendations made in this letter.

A. Definition of Fiduciary - General Concerns (Section II, A) – We urge EBSA to take a more measured and restrained approach in changing the definition of investment advice and fiduciary so that it and the entire retirement plan community can evaluate the implications for everyone affected. If EBSA decides to proceed with expanding the definition of a fiduciary, we urge it to consider the following recommendations that can form the basis for modifications to the Proposal or a safe harbor under the final rule.

1. Unless a service provider has or exercises discretion with respect to plan assets, the service provider and a plan, plan sponsor, plan participant or beneficiary should be permitted to agree upon and define, in writing, the service provider's role and whether a fiduciary relationship is intended or expected and, if so, the scope of that fiduciary relationship.

2. Any written agreement regarding a service provider's role as a fiduciary or non-fiduciary should include an express statement that the products and services are not investment advice or fiduciary service, except as specifically provided otherwise in the agreement.

3. The service provider should disclose in any such agreement and consistent with the regulations under Section 408(b)(2) of ERISA, the financial interests it may have regarding any decisions that the plan, plan sponsor, plan participant or beneficiary may make in connection with the plan and plan assets.

4. A service provider should be permitted to provide advice, recommendations, and information to a potential customer during the sales process if the selling party expressly discloses that the seller is providing such in a non-fiduciary capacity as a seller and that it has a financial interest regarding any decisions that the potential customer may make in connection with the plan and plan assets.

B. Definition of Fiduciary - Unintentional Fiduciary Status of Certain Investment Adviser Affiliates (Section II, B) – We urge EBSA to modify the language in the Proposal to clarify that merely being affiliated with an Investment Adviser will not cause a service provider to be treated as having rendered investment advice, and that such service provider will only be treated as having rendered investment advice if it meets one of the other requirements under Section (c)(1)(ii).

C. **Investment Platform Exception (Section II, C)** – We recommend that EBSA clarify or modify the Proposal in the following ways. Service providers should be permitted to make recommendations and provide information to a plan, plan sponsor, participant and beneficiary about plan investment options in a non-fiduciary capacity provided that any such assistance is based on "objective criteria" including criteria recommended by the service provider, and provided further that the service provider discloses that the assistance is not intended to be advice, that the service provider is not acting in a fiduciary capacity, that the service provider may have a financial interest regarding the decisions that are made (if applicable), and that the recipient is ultimately responsible for making the final decision.

Many of the services and the assistance described above are comparable to the non-fiduciary participant education services defined by EBSA in Interpretive Bulletin 96-1 ("IB 96-1") and, therefore, we urge EBSA to consider developing guidance that is comparable to IB 96-1 to address many of the concerns identified in this letter. Additionally, we urge EBSA not to finalize the Proposal or make it effective before issuing such guidance.

D. **Seller's Exception (Section II, D)** – We urge EBSA to modify certain language in the Proposal as follows:

> "the provision of advice or recommendations if … such person can demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, **has a financial interest in the decision that the recipient makes**, and that the person is not undertaking to provide impartial investment advice." (Recommended new language is in bold.)

We also urge EBSA to expand the seller's exception so that a fiduciary may also rely on it with respect to advice and recommendations provided outside the scope of the fiduciary's current engagement. We recommend that EBSA clarify that the seller's exception is intended to cover the advice and recommendations of the seller until the recipient makes a decision with respect to an unresolved matter, even if an agreement has been signed or decisions have been made by the recipient with respect to other matters. Additionally, we request that EBSA clarify that the seller's exception is intended to apply to a seller of products and services, including platform providers.

E. **Financial Information and Reporting Exception (Section II, E)** – We urge EBSA to withdraw Sections (c)(1)(i)(A)(1) (which defines valuation services as investment advice) and (c)(2)(iii) (which provides exceptions). Additionally, as explained in the detailed discussion, we request that EBSA study these issues and their potential impact on the retirement plan community before issuing a final rule.

Alternatively, if EBSA does not accept our preferred approach, we urge EBSA to modify the exception at issue by deleting the following language from paragraph (c)(2)(iii), "unless such report involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries." Additionally, we urge EBSA to modify the Proposal to provide that a service provider shall not be considered a fiduciary as a result of reporting, providing statements, using, relying on or taking any other necessary action for a plan based on, or in connection with, the value of any plan assets, including assets that do not have a generally accepted market value, unless such provider independently establishes or determines the value of such asset. We also urge EBSA to provide that a service provider will not become a fiduciary as a result of calculating the value for an investment option that does not itself have a recognized market value, where the value is otherwise determined based on the prices of the investment options' underlying publicly traded securities. We also request that the final rule provide that group annuity contracts and other insurance company investment products that must be valued by the insurance provider should not cause the insurance product provider to become a plan fiduciary.

F. **Pending Securities and Exchange Commission Standards of Care (Section II, F)** – We urge EBSA to take a measured and restrained approach in changing the definition of investment advice and fiduciary. This will provide additional time for the regulated community, EBSA and the SEC to evaluate any potential SEC and EBSA initiatives together.

G. **Compliance Deadline (Section II, G)** – We urge EBSA to allow 18 months from the date that any final rule is published in the Federal Register for the regulated community to comply.

H. **Distribution Counseling (Section III)** – The SPARK Institute urges EBSA to maintain its current position that distribution counseling services and recommendations that a person take a distribution are not investment advice under ERISA, even when combined with recommendations as to how to invest the distributed funds. Additionally, we urge EBSA to issue additional guidance that is comparable to IB 96-1 that clearly defines acceptable distribution counseling, assistance and education that can be provided by the plan sponsor and service providers to the plan, including plan fiduciaries. However, these issues are different from the in-plan or ongoing investment advice issues that are dealt with in the Proposal, and therefore, we urge EBSA to handle them separately in order to allow it and the regulated community adequate time to fully evaluate the alternatives and implications of any changes.

I. **Distribution Counseling - Other Applicable Laws (Section III, B)** – The Securities and Exchange Commission ("SEC") recently released a 208 page study that evaluates the effectiveness of existing legal or regulatory standards of care for brokers, dealers, investment advisers, and persons associated with them when providing personalized investment advice and recommendations about securities to retail investors. In light of the study and in order to avoid potentially conflicting rules and duplication of effort by

everyone that could be impacted, we urge EBSA to continue to evaluate these issues, including considering future action by the SEC or Congress, but to otherwise postpone any action that would reverse its current position under AO 2005-23A.

II. Definition of Fiduciary

A. General Concerns – The Proposal expands the definition of a fiduciary under ERISA by redefining when a service provider renders "investment advice" for a fee within the meaning of Section 3(21)(A)(ii) of ERISA. Under the Proposal, a service provider renders investment advice, and would be a plan fiduciary, when it "[m]akes recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property, or … [p]rovides advice or makes recommendations as to the management of securities or other property"[4] and meets certain other requirements. Under the Proposal, the service provider would be considered a fiduciary if it provides advice or recommendations regarding the matters described above

> "pursuant to an agreement, arrangement or understanding, written or otherwise, between such person and the plan, a plan fiduciary, or a plan participant or beneficiary that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary."[5]

As noted above, we support EBSA's efforts to clarify the definition of fiduciary to include certain additional plan service providers and to help plan sponsors understand whether or not their service providers are acting in a fiduciary capacity. However, we are concerned that the scope of the Proposal is very broad and the availability and scope of the exceptions are unclear. As a result, the threshold for when a service provider will be considered a fiduciary would be substantially lower, and in many instances, significantly unclear. In other instances, the Proposal treats some services as investment advice that in our view should not be treated as such. It is crucial that service providers be able to structure their products, services, and compensation arrangements with reasonable certainty about whether they are a fiduciary with respect to a plan and its participants. Service providers must have greater certainty than the Proposal provides so that they can reasonably avoid unintentionally and unwillingly becoming fiduciaries, and engaging in prohibited transactions. Much of the uncertainty relates to product and service design issues and long standing practices resulting from customer needs and demands. Unintentional fiduciary status is a realistic possibility, if not a likelihood, under the Proposal in connection with investment platform products and services, and in many other situations. We provide many examples of situations involving potential unintended consequences and

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4 2510.3-21(c)(1)(i)(A)(2) & (3).

5 2510.3-21(c)(1)(ii)(D).

unintended fiduciary status throughout this letter. We emphasize that the stakes for service providers are significant because the adverse consequences we discuss herein could impact all of their customer relationships.

Plan service providers and their customers should have reasonable certainty, flexibility and discretion in determining and agreeing on a service provider's role and whether a fiduciary relationship is expected. This will allow plan sponsors and participants to get the non-fiduciary products and services they need at a reasonable fee. Service providers should not be subject to significant risk that an agreement with a plan or plan participants to provide non-fiduciary products and services will be treated, after the fact, as a fiduciary services arrangement. As EBSA knows, class action attorneys have discovered retirement plans as potentially fertile grounds for large settlements from perceived deep pocket defendants, typically large plan sponsors and service providers. Although these class action lawyers have had limited success on the merits of their cases, an increased threat of litigation, and the costs associated with defending against them, will have a significant chilling and negative effect on the retirement plan community. The greater risk of this hindsight recharacterization of relationships will likely cause service providers to discontinue providing many services that plan sponsors and participants demand or to charge substantially higher fees in order to account for the higher risk and responsibility that comes with being a fiduciary. As EBSA knows, plan participants will ultimately pay any such higher fees. We believe that this does not advance EBSA's and other policy makers' goals of providing lower cost ways for American workers to save for retirement.

We urge EBSA to take a more measured and restrained approach in changing the definition of investment advice and fiduciary so that it and the entire retirement plan community can evaluate the implications for everyone affected. As discussed more fully below, the impact on existing provider and plan relationships, and the products and services that are widely used will be dramatic and potentially harmful to many.

If EBSA decides to proceed with expanding the definition of a fiduciary, we urge it to consider the following recommendations that can form the basis for modifications to the Proposal or a safe harbor under the final rule.

1. Unless a service provider has or exercises discretion with respect to plan assets, the service provider and a plan, plan sponsor, plan participant or beneficiary should be permitted to agree upon and define, in writing, the service provider's role and whether a fiduciary relationship is intended or expected and, if so, the scope of that fiduciary relationship. Serving in a fiduciary capacity with respect to one aspect of plan investment management or services should not automatically result in fiduciary status with respect to other matters for which the service provider and the plan or plan sponsor have not specifically agreed that a fiduciary relationship exists..

2. Any written agreement regarding a service provider's role as a fiduciary or non-fiduciary should include an express statement that the products and services are not

investment advice or fiduciary service, except as specifically provided otherwise in the agreement.

3. The service provider should disclose in any such agreement and consistent with the regulations under Section 408(b)(2) of ERISA, the financial interests it may have regarding any decisions that the plan, plan sponsor, plan participant or beneficiary may make in connection with the plan and plan assets.

4. A service provider should be permitted to provide advice, recommendations, and information to a potential customer during the sales process if the selling party expressly discloses that the seller is providing such in a non-fiduciary capacity as a seller and that it has a financial interest regarding any decisions that the potential customer may make in connection with the plan and plan assets. Even if a service provider is a fiduciary with respect to one aspect of a plan's investments, that status should not bar the fiduciary from relying on the selling exception to provide advice and recommendations with respect to matters outside the scope of the service provider's fiduciary responsibilities (e.g., a plan's fixed-income manager should not be barred from cross-selling its equity management capabilities on a non-fiduciary basis).

The SPARK Institute believes that modification to the Proposal or safe harbor that is based on the above concepts will accomplish EBSA's goals, continue to protect plans, plan sponsors, plan participants and beneficiaries and address service providers' concerns. Alternatively, if EBSA does not accept our preferred approach as described above, our concerns and additional recommendations regarding specific aspects of the Proposal are summarized below.

B. <u>Unintentional Fiduciary Status of Certain Investment Adviser Affiliates</u> – The Proposal provides that a person renders investment advice if such person makes recommendations as to the advisability of investing in, purchasing, holding or selling plan investments, and such person meets at least one other requirement.[6] As relevant to this discussion, such person would also have to either (1) directly or <u>indirectly</u>, <u>including</u> through or <u>together with affiliates</u>, be an investment adviser under the Investment Advisers Act ("Investment Adviser"),[7] or (2) provide advice or make recommendations regarding plan investments pursuant to an agreement, arrangement or understanding, written or otherwise, with the plan, a plan fiduciary, or a plan participant or beneficiary that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary.[8]

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6 2510.3-21(c)(1)(i)(A)(2), and 2510.3-21(c)(1)(ii).

7 2510.3-21(c)(1)(ii)(C).

8 2510.3-21(c)(1)(ii)(D).

We are concerned that the language in foregoing sections of the Proposal either is intended to or can be misinterpreted to mean that a non-fiduciary service provider that makes recommendations to a plan about plan investments, but does not meet the substantive requirements under the second clause in the preceding paragraph, could still be deemed to have provided investment advice if it is affiliated with an Investment Adviser. The Proposal appears to cause the deemed fiduciary outcome even though the affiliated Investment Adviser is not involved in providing the recommendation made by the provider with the direct relationship to the plan, or other plan representatives.

Our members are concerned that the regulation, as written, creates a double standard and extremely low threshold that will cause service providers who are merely affiliated with an Investment Adviser to become unintentional plan fiduciaries. As discussed in the sections that follow in this letter, the double standard will force such providers to stop providing many services to their plan customers and prospects in order to avoid becoming an unwilling fiduciary and engaging in unintentional prohibited transactions. This will put such providers at a competitive disadvantage relative to other service providers and disrupt the existing balance in the retirement plan industry.

In order to resolve this issue, we urge EBSA to modify the language in the Proposal to clarify that merely being affiliated with an Investment Adviser will not cause a service provider to be treated as having rendered investment advice, and that such service provider will only be treated as having rendered investment advice if it meets one of the other requirements under Section (c)(1)(ii).

C. Investment Platform Exception – EBSA recognized that absent an exception to the new fiduciary definition, retirement plan investment platform providers and plans could be adversely impacted. Accordingly, the Proposal includes an exception for investment platform providers that states that a service provider will not be treated as rendering investment advice as a result of

> "[m]arketing or making available (e.g., through a platform or similar mechanism), without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property from which a plan fiduciary may designate investment alternatives into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, if the person making available such investments discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice."[9]

[9] 2510.3-21(c)(2)(ii)(B).

Although we commend EBSA for including the investment platform exception, as noted above, we are concerned that the Proposal establishes a broad and very low threshold for when a service provider becomes a fiduciary and that the exception does not provide clear and sufficient protection that is needed by investment platform providers to be able to continue to offer broad investment choices and critical services to plans and plan fiduciaries. We believe these product structures and services should not be considered investment advice under the final rule.

As EBSA knows, many plan service providers allow plan sponsors to choose their plans' investment options from a list of funds that could include fifty or thousands of choices. At various times in the relationship between a plan and a service provider, plan representatives, including employees or other professionals hired by a plan, may ask the service provider to provide information, tools, education or other guidance to help narrow down the choices of funds available to the plan. Service providers are able to respond to these requests in various ways in today's regulatory environment and provide plan sponsors valuable assistance in a non-fiduciary capacity. Plan sponsors are informed that the service provider is providing non-fiduciary guidance and tools, and that the plan sponsor is ultimately responsible as a fiduciary for selecting and monitoring the investment options on behalf of the plan. This allows the plan sponsor to get the help it needs in narrowing down the investment choices available to it without incurring potentially substantial additional costs for a third party to serve as a fiduciary. We are concerned that the new definition establishes a broad and very low threshold that will force service providers to stop providing these services in order to avoid unintentionally and unwillingly becoming fiduciaries, and engaging in prohibited transactions.

The following is a summary of some of the situations where plan sponsors ask for help and the approaches and tools that service providers offer in response.

1. Prospects, RFPs and the Sales Process – At the outset, we note that although the Proposal includes an exception for certain sales activities, we are concerned about potential limitations and uncertainty in its scope that could significantly limit its usefulness. When looking for a new service provider for a plan, plan sponsors will ask detailed questions about the investment options offered by prospective providers. They also ask about the tools and assistance that are available to help them select their plans' investment options. Additionally, plan sponsors typically ask service providers to provide a sample fund lineup for the plan or to identify specific funds from its investment platform that are comparable to those that the plan currently uses. The plan sponsor may provide parameters for the service provider to consider in making those recommendations, such as using the existing funds as a guide or may provide other criteria such as information from a plan's investment policy statement.

   Prospective providers that do not respond to these requests are generally eliminated from consideration by the plan sponsor. When responding to such requests, service providers disclose that they are doing so in a non-fiduciary capacity. We note that these types of requests may also be made by plan sponsors

when they are conducting their periodic plan reviews and when they are considering replacing a fund. In all cases, service providers inform the plan sponsor that the information and assistance it provides is not intended to be investment advice and that the plan sponsor must make its own decisions based on its particular facts and circumstances. Investment advice and fiduciary service in these situations would involve higher fees and require greater time and effort by the service provider because of the increased responsibility and risk. However, many plan sponsors are unwilling or unable to pay to have such recommendations and information provided to them by someone serving as a fiduciary.

We also note that plan sponsors often must make choices about what class of shares to use in their plans. Different share classes have different expense ratio and revenue sharing arrangements which give plan sponsors greater choices in determining how to pay for plan services. As with most other decisions of this type, plan sponsors typically ask the service provider for assistance. Indeed, many service providers are indirectly compensated from investment options and plan sponsors may seek information and guidance from such service providers as to how the selection of certain investment options will affect the fees paid by the plan and the potential charges that the plan sponsor may have to pay out-of-pocket. For example, a record keeper might inform a plan sponsor that the plan sponsor may select investment options for its plan from a particular fund family, but that if it does so, a record keeping fee will apply. We are concerned that such responses and statements could be misinterpreted or construed, particularly in hindsight, as constituting advice or a recommendation as to the advisability of including a particular fund in the plan. It is likely that service providers will be unwilling to provide any information or assistance to plan sponsors on these issues under the proposed rule.

We are concerned that, absent a clarification of, or modification to, the final rule, service providers will likely either stop providing the assistance and information that plan sponsors need and often demand, or only do so when they are specifically hired to provide investment advice and paid to provide fiduciary services in a manner that does not give rise to a non-exempt prohibited transaction. Service providers will be forced to take very conservative and restrictive approaches in order to avoid being unintentionally and unwillingly treated as fiduciaries, and engaging in prohibited transactions, based on a hindsight analysis.

2. Plan Conversions and Fund Replacements – Additional concerns arise in connection with discussions about the process of moving the investments from an outgoing provider to a new provider (a "conversion"), and when a plan adds or replaces a fund. There are several ways to accomplish a conversion which inevitably involves discussions about the investment options. The approaches include:

   a. Liquidating the old investments, holding them in cash for a period of time and then reinvesting them in the new funds with the new vendor. This option

carries with it market risk for all plan participants and for all of the plan assets while they are held as cash.

b. Liquidating all of the plan assets and transferring or "mapping" them into a single fund or series of funds (e.g., target date funds) pending reinvestment in the investment options that will be used under the new provider's platform. The interim funds may not be comparable to the old funds and are intended for short term use in order to facilitate a smooth transition and to mitigate some market risk. This option is easier and faster to accomplish than the third option, discussed below, but in many instances requires the plan sponsor to pick the transition fund(s). Some providers allow plan sponsors to choose this option but require that a specific fund or funds be used. Others may require, for administrative convenience, that the plan use this approach and also require that the plan use a specific fund or funds that are identified by the provider in advance.

c. Reregistering the investment options that will be retained from the outgoing provider to the new provider, and liquidating and transferring assets from the old options that are being replaced. This approach is more complicated than the previous two because it requires coordination between many parties (i.e., the fund companies), whereas liquidating assets and transferring cash, is generally less complicated and more time efficient.

d. A combination of any number of the first three approaches.

Plan sponsors need help understanding this process and the options available to them. Service providers are familiar with conversions and their complexities because these transactions are an integral part of their business. Plan sponsors, in contrast, might not go through a conversion for many years and are generally not familiar with the process. The conversations that must take place to ensure a smooth transition have investment option issues embedded in them. These issues may be raised in the RFP and sales process but they continue in conversations after the plan selects a new vendor. Service providers are concerned that under the Proposal (a) they will not be able to provide the assistance and information that plan sponsors need and demand, without becoming plan fiduciaries, and (b) if they become a fiduciary, such assistance and information may constitute a non-exempt prohibited transaction if the service provider is compensated indirectly from investment options in the plan. The sales exception does not appear to provide adequate protection because many of these issues are discussed and resolved <u>only after</u> the plan and service provider have established a formal relationship.

Additionally, we note that these same issues and concerns arise when a plan replaces an investment option. The sales exception would clearly not provide protection from fiduciary status in that situation either.

3. <u>Product Features and Requirements</u> – Our members have informed us that some of their products include specific fund requirements that a plan must abide by in order

to use a particular product or get certain pricing. Examples of such requirements include using a minimum number of the provider's proprietary funds as investment options, mandating the use of a qualified default investment alternative ("QDIA"), using a certain fund or family of funds as the plan's QDIA, or setting a maximum number of funds that can be used as investment options in a plan. We are concerned that service providers will not be able to structure their products and services as needed under the Proposal. Additionally, many providers may have to restructure their existing products and services and renegotiate contracts with existing customers to avoid becoming unwilling fiduciaries, and engaging in prohibited transactions.

Some providers may offer "warranty" programs that certify to a plan sponsor that the funds that the plan sponsor has chosen meet their fiduciary requirements. In order to be eligible for the warranty, the plan sponsor must include at least one fund in each asset class identified by the warranty provider and may also be required to offer a series of asset allocation portfolios (e.g., target date funds). The platform and warranty provider does not pick the funds for the plan and discloses that it does not intend for its products and services to cause it to become a fiduciary. We are concerned that because of the broad scope of the Proposal and uncertainty regarding the platform exception, such programs would have to be eliminated by service providers who are concerned about unintentionally and unwillingly becoming plan fiduciaries, and engaging in prohibited transactions.

4. QDIAs – Many service providers educate plan sponsors about the use of QDIAs, and as noted above, some require plan sponsors to include one in their plan. This issue inevitably leads to conversations about which funds can be used. We are concerned that because of the broad scope of the Proposal and uncertainty regarding the exceptions, service providers will not be able to provide the assistance and information that plan sponsors need.

5. Investment Option Selection and Monitoring Tools – Many service providers offer tools that are designed to assist plan sponsors in selecting and monitoring their plan investment options. These tools may be provided directly to plan sponsors or may be used by others (e.g., brokers and advisors) who work with the plan sponsor. These tools are intended to educate the plan sponsor regarding a selection and monitoring process including the criteria that could be used to evaluate funds (e.g., asset class, historical performance, and fees). A tool may also provide a list of investment options that meet the criteria that the plan sponsor or its representative decides to use. There are a significant number of tools and approaches that are available. Unless the service provider intends to, and agrees to, become a fiduciary by providing investment advice for a plan, the tools and related materials disclose that they are for educational purposes only and that the service provider is not providing investment advice and is not a fiduciary. We are concerned that because of the broad definition of fiduciary under the Proposal, such tools could not be offered by service providers without substantially increasing the risk that they can become involuntary and unintentional fiduciaries. Consequently, absent clarification of, or a modification to, the final rule, service

providers may discontinue offering investment selection and monitoring tools to plan sponsors.

In order to address our concerns, we urge EBSA to clarify or modify the Proposal in the following ways. Service providers should be permitted to make recommendations and provide information to a plan, plan sponsor, participant and beneficiary about plan investment options in a non-fiduciary capacity provided that any such assistance is based on "objective criteria" including criteria recommended by the service provider, and provided further that the service provider discloses that the assistance is not intended to be advice, that the service provider is not acting in a fiduciary capacity, that the service provider may have a financial interest regarding the decisions that are made (if applicable), and that the recipient is ultimately responsible for making the final decision. "Objective criteria" should be broadly defined and include criteria identified by the service provider, information from a plan's investment policy or other information provided to the service provider by the plan sponsor, and the identity and characteristics of a plan's current investment options. Examples of this type of criteria would be asset classes, historical performance, manager tenure, expense ratios, peer ranking and comparisons, and quality ratings, among others.

We note that many of the services and assistance described above are comparable to the non-fiduciary participant education services defined by EBSA in IB 96-1. Although the concepts in IB 96-1 are helpful by analogy, IB 96-1 does not provide the direct protection and assurances that service providers need. We believe that comparable protection for a service provider is appropriate because the provider is generally helping a plan fiduciary who is more financially sophisticated than the typical participant. Moreover, the plan fiduciary receiving the help has specific legal obligations to the plan under ERISA. We urge EBSA to consider developing guidance that is comparable to IB 96-1 to address many of the concerns identified in this letter. Additionally, we urge EBSA not to finalize the Proposal or make it effective before issuing such guidance.

Our suggested changes will avoid forcing plans, plan sponsors, participants and beneficiaries from having to hire a fiduciary for the assistance they need and paying higher fees for it. It will also allow service providers to provide assistance to their customers and prospects without substantial risk that they will unwillingly and inadvertently become plan fiduciaries, and engage in prohibited transactions. The interests of plan sponsors, plans, plan participants and beneficiaries will be protected through the required disclosures described above.

D. **Seller's Exception** – EBSA recognized that service providers must be able to sell their products and services, and provided an exception for certain sales activities. Under the Proposal, generally, a service provider will not become a fiduciary with respect to

> "the provision of advice or recommendations if … such person can demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing

> the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice."[10] (Emphasis added.)

We support EBSA's apparent objective of helping plan sponsors and participants better understand when a service provider is acting in a selling capacity. Although we commend EBSA for including the sales exception in the Proposal, we are concerned that it casts all sales activities in a negative light as being "adverse" to the interests of plan sponsors and participants. We are also concerned about the potential limitation on the scope and usefulness of the exception.

1. Seller's Activities as Adverse – The language in the Proposal characterizes every seller and prospective customer relationship as adverse. We presume that the term "adverse" was used in a technical and legal sense. Although sellers have a financial interest in the decisions made by prospects, the vast majority of sellers and prospects would not characterize the circumstances as adverse, in the plain English meaning of the word to the average person. Buyers generally understand and accept that a seller has a financial interest in making a successful sale. However, we are concerned that the Proposal could be interpreted as requiring the term "adverse" to be used in disclosures, which may cause needless concern for plan sponsors and participants and result in them mistrusting their service providers.

   In order to address our concerns, we urge EBSA to modify the quoted language from the Proposal as follows:

   > "the provision of advice or recommendations if … such person can demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, **has a financial interest in the decision that the recipient makes**, and that the person is not undertaking to provide impartial investment advice." (Recommended new language is in bold.)

The SPARK Institute believes that the modified disclosure, combined with the disclosures that a prospect turned customer will receive from a service provider as

[10] 2510.3-21(c)(2)(i).

required under 408(b)(2) of ERISA, will provide substantial information and protection for plans, plan sponsors and participants.

2. Persons Who Have Acknowledged Fiduciary Status – Under the Proposal, a person that has acknowledged its status as an investment fiduciary is unable to rely on the seller's exception. The SPARK Institute urges EBSA to expand the seller's exception so that a fiduciary may also rely on it with respect to advice and recommendations provided outside the scope of the fiduciary's current engagement. For example, if a plan hires a company to manage its fixed-income assets, the company should not be barred from relying on the seller's exception to promote its investment expertise in other fields (e.g., domestic equities, international, etc.), provided that the investment fiduciary clearly discloses that it is acting outside its existing fiduciary capacity. Without the requested relief, the investment provider may be unable to promote its investment management capabilities out of fear of becoming a plan fiduciary for advice and recommendations provided at the marketing stage before the plan sponsor has affirmatively agreed to expand the provider's fiduciary engagement. Thus, the Proposal may interfere with a plan or plan sponsor's ability to hire an investment manager on a limited basis in order to evaluate the manager's performance before deciding to expand the manager's role if it meets performance expectations.

3. Scope of Seller's Exception

    a. Selling Period - As noted above, we commend EBSA for recognizing the need for an exception under the Proposal for the advice or recommendations that a service provider may provide during the selling process. However, many of the conversations and issues related to a plan's investments may begin during the sales process without a plan sponsor making any final decisions (e.g., selecting the exact investment options, or whether and what fund to use as a QDIA). As discussed above in connection with the platform exception, a service provider may provide various forms of assistance in the sales process (e.g., providing a list of comparable funds as investment options) that, absent an exception, could be treated as investment advice under the Proposal. This may happen in response to an RFP or in conversations and interviews as a plan sponsor narrows down its choices among providers. Plan sponsors generally make final decisions about their investment options after signing the service agreement with the provider. This allows them more time to consider their investment choices and to focus on the specifics of those decisions separately from administration, record keeping and general services decisions. It would also be unreasonable and overly burdensome for a service provider to provide all of its service and assistance related to the fund selection process with every plan sponsor before the plan sponsor has committed to hiring it.

    We are also concerned that the activities covered under the sales exception will be based on the parties, particularly the seller, being able to identify and demonstrate when the sales process ends. However, as the examples above show, it is not always clear when the sales process ends. Although certain

decisions in connection with a sale may be resolved after an agreement is signed, a plan sponsor will expect the assistance and conversations on many other issues to proceed. The exception in the Proposal does not appear to extend its coverage in this situation. As a result, plan sponsors and service providers will be in an awkward and difficult position with respect to each other. The plan sponsor will expect follow-through and resolution of the investment related issues, but the service provider will be forced to stop providing help unless it has agreed to serve as a plan fiduciary.

In order to resolve our concerns, we urge EBSA to clarify that the seller's exception is intended to cover the advice and recommendations of the seller until the recipient makes a decision with respect to an unresolved matter, even if an agreement has been signed or decisions have been made by the recipient with respect to other matters. We also urge EBSA to consider the recommendations and suggested modifications made throughout this letter in order to provide more flexibility and certainty for plan sponsors and service providers. By adopting the foregoing recommendation in combination with several others in this letter, e.g., those relating to the platform exception, service providers will be better able to provide information that plan sponsor prospects need and be responsive to their questions during the sales process.

b. Investment Platform Providers - We are concerned that the seller's exception may not have been intended to apply, or the language used in the Proposal may be misinterpreted as not applying to investment platform providers. As written, the seller's exception refers to persons providing advice or making recommendation in a "capacity as a … seller of a security or other property." Our members who are investment platform providers may find it necessary or beneficial to rely on the seller's exception in certain situations so that they can continue, in a non-fiduciary capacity, to provide information, tools, education and other guidance to plan sponsors in narrowing down the choices of funds available to the plan. However, it is unclear who will be considered a seller of securities under the Proposal and whether the determination is intended to be based on federal securities laws, or other laws that may apply.

   In order to address our concerns, we request that EBSA clarify that the seller's exception is intended to apply to a seller of products and services, including platform providers.

c. Agents and Third Parties - The Proposal appears to expressly provide that the seller's exception can be used by anyone selling plan products and services, including an agent or unaffiliated third party selling a product on behalf of another provider. However, as noted above, EBSA officials have indicated informally that the exception would only be available to service providers and their affiliated intermediaries selling their own products and services. We are concerned that this limitation on the seller's exception can cause the entire Proposal to have unintended consequences which could potentially be disruptive to existing service arrangements, and needlessly limit the availability and

distribution of certain products through non-fiduciary intermediaries. We raised this question on the recent Regulatory Agenda Chat with EBSA.[11] We are pleased that EBSA responded that the seller's exception "is not limited to agents selling their own products."[12] However, as recommended by EBSA, together with its response, we have summarized our concerns below.

In evaluating the Proposal, including how service providers will be able to continue to provide existing non-fiduciary services without involuntarily and unintentionally becoming fiduciaries, it has become evident that many may have to rely on the seller's exception in situations where the platform exception may not apply. Absent further clarification from EBSA about a number of issues addressed in the letter, this is likely to be necessary in connection with many of the plan investment option selection and monitoring activities discussed above. However, many platform providers include investment options from unaffiliated companies as part of the choices for plan sponsors. Consequently, we are concerned that open architecture platform providers will not be able to rely on the seller's exception with respect to investment options of unaffiliated fund providers in the fund selection and monitoring processes.

This may be particularly disruptive to small plans that are more likely than larger plans to buy from, and work with, intermediaries. Limiting the seller's exception could force intermediaries to charge higher fees as a result of having to serve in a fiduciary capacity and the greater risk and responsibility of doing so, or stop selling the affected products and service. In either case, this will be detrimental to plan sponsors who will either have to pay greater fees or have fewer choices in service providers, products and services. Such a limitation will also disrupt existing product and service sales and distribution channels.

We request that EBSA reiterate that the seller's exception will be available to agents and independent third parties who sell and distribute products and services of other companies.

E. **<u>Financial Information and Reporting Exception</u>** – Under the Proposal, a service provider renders investment advice, and would be a plan fiduciary, when it "[p]rovides advice or an appraisal or fairness opinion, concerning the value of securities or other property."[13] EBSA recognized that, absent an exception, the noted change would limit service providers' ability to provide important financial information to plan sponsors and participants and limit service providers' ability to help plan sponsors meet certain reporting requirements, including providing participant statements. Accordingly,

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11 Regulatory Agenda Chat with EBSA, Question submitted by Larry Goldbrum (January 4, 2011).

12 Id.

13 2510.3-21(c)(1)(i)(A)(1).

EBSA included an exception in the Proposal that states that "advice, or appraisal or fairness opinion" does not include the

> "preparation of a general report or statement that merely reflects the value of an investment of a plan or a participant or beneficiary, provided for purposes of compliance with the reporting and disclosure requirements of the Act, the Internal Revenue Code, and the regulations, forms and schedules issued thereunder, unless such report involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries."[14] (Emphasis added.)

We commend EBSA for recognizing the need for an exception under the Proposal. However, we are concerned about the scope of the changes that will treat certain valuation services as fiduciary services. We are also concerned that the proposed exception does not provide clear and sufficient protection that is needed by service providers to be able to continue to provide important information and services that plans need. As discussed more fully below, the limitation under the exception for reports on assets that do not have a generally recognized market value is likely to create significant problems for plan sponsors and service providers. The SPARK Institute believes that many of the activities that would be treated as fiduciary services under the proposed definition should not be considered investment advice and should not cause a service provider to become a plan fiduciary.

For example, record keepers provide benefit statements, maintain call centers and provide web sites for participants to access information about their plan accounts. The account balance information that is provided is also used for purposes of making distributions. However, the asset values are generally not determined or established by the service provider that provides the information through the channels noted above. Some investment options, such as bank collective funds, separately managed accounts and other non-registered options may not have a generally recognized market value because they are not publicly traded but their underlying investments generally are. In some instances, a record keeper may, as an accommodation to the plan, provide record keeping and administrative services, including those noted above, for an asset that does not have a generally recognized market value. In such instances, the asset may be valued by the investment provider or another party and supplied to the record keeper to display and use as needed. If a plan holds a group annuity contract or other insurance company investment products, the product provider would have to provide a value to the plan sponsor and record keeper for informational and distribution purposes including for calculating a required minimum distribution.

Additionally, an investment option may be valued based on the prices of publicly traded securities owned by or held in the investment option (e.g., a "fund of funds"

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[14] 2510.3-21(c)(2)(iii).

that holds multiple publicly traded mutual funds, or an employer stock fund that holds a cash component (e.g., money market fund) and employer stock). The fund may be maintained for the plan by a record keeper on a "unitized" basis. The record keeper or some other service provider may calculate the value of the units on a daily basis. While these unitized funds do not have their own generally recognized market value, their value is based solely on the value of publicly traded securities.

These are just a few examples that demonstrate our concerns about the scope of the Proposal and limitations on the exception. As we have noted throughout this letter, we are very concerned that the implications of the proposed rule change are likely to be dramatic and have many unintended consequences.

Given our concerns and the importance of the affected service to retirement plans, we request that EBSA address these matters in a separate initiative. We request that EBSA study these issues and their potential impact on the retirement plan community before issuing a final rule. Accordingly we urge EBSA to withdraw Sections (c)(1)(i)(A)(1) (which defines valuation services as investment advice) and (c)(2)(iii) (which provides exceptions).

Alternatively, if EBSA does not accept our preferred approach, we urge EBSA to modify the exception at issue by deleting the following language from paragraph (c)(2)(iii), "unless such report involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries." Additionally, we urge EBSA to modify the Proposal to provide that a service provider shall not be considered a fiduciary as a result of reporting, providing statements, using, relying on or taking any other necessary action for a plan based on, or in connection with, the value of any plan assets, including assets that do not have a generally accepted market value, unless such provider independently establishes or determines the value of such asset. We also urge EBSA to provide that a service provider will not become a fiduciary as a result of calculating the value for an investment option that does not itself have a recognized market value, where the value is otherwise determined based on the prices of the investment options' underlying publicly traded securities. We request that the final rule provide that group annuity contracts and other insurance company investment products that must be valued by the insurance provider should not cause the insurance product provider to become a plan fiduciary.

F. **Pending Securities and Exchange Commission Standards of Care** – As discussed more fully under Section III, B, on January 22, 2011 the SEC released a study evaluating the regulatory standards of care for brokers, dealers, investment advisers, and persons associated with them (the "SEC Study").[15] The 208 page study must be evaluated by the regulated community and any resulting legislative or regulatory

[15] SEC Study on Investment Advisers and Broker-Dealers, As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (January 2011).

action will have a direct impact on brokers and advisers that provide services to retirement plans and participants. We note that the views expressed in the SEC Study were formally criticized by SEC Commissioners Kathleen L. Casey and Troy A. Paredes in a statement released with the study. Accordingly, as noted earlier, we urge EBSA to take a measured and restrained approach in changing the definition of investment advice and fiduciary. This will provide additional time for the regulated community, EBSA and the SEC to evaluate any potential SEC and EBSA initiatives together. We believe that this will ultimately result in a more harmonized set of rules and regulations governing these matters, and a more effective and cost efficient transition for everyone affected, including plan sponsors, plans, plan participants and service providers.

G. **Compliance Deadline** – As noted throughout this letter, the issues raised by the proposed changes to the definition of fiduciary and what activities constitute investment advice, are very complex, raise substantial concerns about unintended consequences, will dramatically impact the products and services available to plans, plan sponsors and participants, and could have devastating consequences for any service provider who unintentionally and unwillingly becomes a fiduciary and unintentionally engages in a prohibited transaction. The entire regulated community will need substantial time to evaluate any final rules and to determine how to comply with such rules. Additionally, service providers will likely need substantial time to work with their customers to educate them about the new rules and the impact on their product and services arrangements. This process can be particularly time consuming and burdensome for service providers to the extent that new contracts or amendments must be signed by their customers. Service providers are not able to control when their customers respond to requests to sign new agreements and amendments. Those that involve technical legal issues and changes in roles and responsibilities tend to be even more time consuming.

Accordingly, we urge EBSA to allow 18 months from the date that any final rule is published in the Federal Register for the regulated community to comply.

III. **Distribution Counseling** – In the preamble of the Proposal, EBSA requested comments regarding whether the final regulations should define the provisions of investment advice to encompass recommendations related to taking plan distributions. The SPARK Institute supports EBSA's efforts to safeguard the interests of participants and beneficiaries in connection with plan distributions. Participants frequently need assistance and to be educated about the distribution options available to them (e.g., leave the money in the plan, take a lump sum distribution, take advantage of certain lifetime income options, or rollover to another plan or IRA). Many of these choices involve considerations of a much wider range of issues than simply investment management (e.g., age, health, tax situation, and account consolidation). Similarly, in many cases, the participant has already determined to take a distribution from a plan (e.g., because he or she no longer has any connection to the sponsoring employer), and only wishes to obtain advice on the investment of the proceeds following distribution.

Accordingly, The SPARK Institute urges EBSA to maintain its current position that distribution counseling services and recommendations that a person take a distribution are not investment advice under ERISA, even when combined with recommendations as to how to invest the distributed funds.[16] Additionally, we urge EBSA to issue additional guidance that is comparable to IB 96-1 that clearly defines acceptable distribution counseling, assistance and education that can be provided by the plan sponsor and service providers to the plan, including plan fiduciaries. However, these issues are different from the in-plan or ongoing investment advice issues that are dealt with in the Proposal, and therefore, we urge EBSA to handle them separately in order to allow it and the regulated community adequate time to fully evaluate the alternatives and implications of any changes. The following discussion includes our responses to certain questions raised by EBSA, more detailed information about our concerns, and additional recommendations.

A. <u>Distribution Counseling and Education</u> – As noted above, plan participants generally need and demand assistance when deciding whether or not to take a distribution from a retirement plan, what type of distribution to take and what to do with the proceeds. These decisions are impacted by many factors, including the alternatives available under the plan, the circumstances giving rise to a possible distribution (e.g., changing jobs, termination, retirement, among others), and personal circumstances (e.g., age and other available assets). EBSA's position under AO 2005-23A allows a completely unrelated adviser, who is likely to have a financial interest in recommending that the participant take a distribution, to discuss these matters and even make specific recommendations. However, the rules make it harder for plan sponsor representatives and service providers, including those who are not fiduciaries, to provide comparable assistance. Plan sponsor representatives and service providers generally take a restrictive approach and provide limited assistance on these matters because the guidance in the AO specifically assumes that "the planner or adviser is neither chosen nor promoted by plan fiduciaries and is not otherwise a fiduciary with respect to the plan."[17]

We recognize and appreciate EBSA's view that a plan fiduciary should not be able to act in its own interest and should not be able to influence its own compensation, but the current regulatory scheme actually makes it harder for plan representatives who are likely to have a longer and more trusted relationship with plan participants to provide the needed help. The current regulatory environment gives unknown advisers who may be making "cold calls" to plan participants the ability to exercise greater influence over their decisions. If plan participants are unable to get the assistance that they need from plan sponsor representatives and the plan service providers, it is more likely that they can be influenced by unknown advisers when they seek help. Additionally, we are concerned that a sudden reversal of EBSA's position, absent additional guidance, will

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16 See DOL AO 2005-23A, Question 3 (Dec. 7, 2005).

17 Id.

likely be more harmful to greater numbers of participants who will either not be able to get the assistance they need from plan sponsor representatives and plan service providers, or cause such services to be provided at costs that reflect the increased responsibility and risk of being a fiduciary.

In order to address these issues, as noted above, we request that EBSA study these issues further and consider issuing additional guidance that is comparable to IB 96-1. Any guidance should clearly define acceptable distribution counseling, assistance and education that can be provided by the plan sponsor and service providers to the plan. We urge EBSA to consider allowing anyone who is otherwise a plan fiduciary to provide assistance and make recommendations to participants, provided that the fiduciary meets established guidelines, including disclosing to the participant any financial interest they may have in the decisions that are made. The SPARK Institute believes that a service provider should not be precluded from providing assistance and making recommendations to participants, or be subject to the fiduciary duty and prohibited transaction rules under ERISA in connection therewith, as a result of having been hired by the plan to provide other unrelated fiduciary services. For example, a bundled service provider that provides record keeping services, an investment platform and serves as the directed trustee of the plan (i.e., has no investment discretion and does not otherwise provide investment advice to the plan) should be able to provide distribution assistance and recommendation to participants. The SPARK Institute and its member companies welcome the opportunity to provide EBSA with additional information about current industry practices, participant needs and potential solutions on these issues.

B. Other Applicable Laws – As noted above, on January 22, 2011, the SEC released a 208 page study that evaluates the effectiveness of existing legal or regulatory standards of care for brokers, dealers, investment advisers, and persons associated with them when providing personalized investment advice and recommendations about securities to retail investors. The SEC Study also addresses whether there are gaps, shortcomings, or overlaps in legal or regulatory standards in the protection of retail customers relating to the standards of care for these intermediaries."[18]

As noted above, the SEC Study must be evaluated by the regulated community. Any resulting legislative or regulatory action will have a direct impact on the standards of care and fiduciary obligations of brokers, dealers, and investment advisers that deal with investors, including retirement plans and participants. Any new rules and regulations that may be proposed by the SEC will impact advisers who may currently be able to give advice to participants about distributions without being subject to the fiduciary rules under ERISA. While this may be a positive development, it is impossible to know at this early stage of their process. However, in order to avoid

[18] SEC Study on Investment Advisers and Broker-Dealers, As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (January 2011).

potentially conflicting rules and duplication of effort by everyone that could be impacted, we urge EBSA to continue to evaluate these issues, including considering future action by the SEC or Congress, but to otherwise postpone any action that would reverse its current position under AO 2005-23A.

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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