Testimony of

Larry H. Goldbrum, Esq.

General Counsel, The SPARK Institute

Before the

United States Department of Labor
Employee Benefits Security Administration

Regarding the

Proposed Definition of Fiduciary

March 1, 2011

The SPARK Institute[1] appreciates this opportunity to present its views to the Employee Benefits Security Administration ("EBSA") regarding the proposed definition of fiduciary (the "Proposal"), what activities constitute investment advice, and distribution counseling services. The SPARK Institute supports the concept of clarifying the definition of who is a fiduciary and appreciates EBSA's need to address the challenges it has faced in litigation. We believe that it is vital that any changes to the definition meet certain principles that are summarized below.

I. DEFINITION OF FIDUCIARY

A. Clear and Precise Guidance – Any change to the definition of fiduciary must be clear and precise. It is crucial that service providers are able to structure their products, services, and compensation arrangements with reasonable certainty about whether they will be a fiduciary with respect to a plan. Absent clear and precise guidance, service providers will be at substantial risk of unintentionally and unwillingly becoming fiduciaries and engaging in prohibited transactions. Unfortunately, the Proposal includes broad changes that are unclear and will result in substantial unintended consequences. Additionally, the availability and scope of the exceptions under the Proposal are unclear. As a result, unintentional fiduciary status will be a realistic possibility for service providers in many situations. For example, we are concerned about investment platform providers' ability to provide non-fiduciary information and assistance to plan sponsors to help them narrow down the investment choices available to the plan, for example from 1,000 funds available on a platform to 30 possible alternatives. We are also concerned about a provider's ability to rely on the seller's exception because of the complexities associated with the selling process and how and when plan sponsors make decisions about plan investments. For example, investment decisions may be resolved after a general services agreement is signed, but the plan sponsor will expect the seller to continue to provide the information and guidance about investments that was provided before the agreement was entered into. The stakes for service providers are very high because a misinterpretation of the rules or an unintentional violation could affect a provider's entire line of products and services and all of its plan relationships. We urge EBSA to provide clear and precise guidance and to consider the value, importance, and complexity, of retirement plan products and services.

B. Flexibility and Choice – Today, service providers have the ability to structure their products and services so that they can provide important and necessary fiduciary and non-fiduciary services that plans need and demand. We believe that service providers and plan sponsors should have flexibility and discretion in determining and agreeing on a service provider's role and whether a fiduciary relationship is mutually expected. The Proposal substantially lowers the threshold for when a service provider will be considered a fiduciary, and in some instances treats some services as investment advice that in our view should not be treated as such. As a result, service providers will be forced 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

[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.

with being a fiduciary. Many plan sponsors do not want, and cannot afford, to hire someone to serve in a fiduciary capacity to provide the limited non-fiduciary assistance and guidance that they are able to get today. If plans are forced to hire a fiduciary for many of the services that would have to be discontinued, plan participants will ultimately bear the burden of such higher fees. We believe that this does not advance EBSA's other goals of facilitating lower cost ways for American workers to save for retirement.

Additionally, our comment letter included a safe-harbor recommendation that would allow service providers and responsible plan fiduciaries to determine and agree, in writing, on the service provider's role and whether a fiduciary relationship is mutually expected. The service provider would have to disclose the financial interests it may have regarding any decisions that the plan may make in connection with the plan and plan assets. We also recognize that under certain circumstances EBSA would be unwilling to allow the service provider and plan representative to agree to non-fiduciary status for the service provider. For example, when the service provider exercises discretion or when the provider provides "individualized" investment advice to a plan that is clearly and mutually intended to be the primary basis for the plan representative's investment option decisions. Those circumstances should be clearly defined in any final rule about fiduciary status. We urge EBSA to consider including the safe harbor in its final rule.

C. Avoid Unintended Potential Harm – We are concerned that the Proposal is likely to cause unintended harm and be disruptive to the retirement plan community in at least two ways. First, as already discussed, under the Proposal service providers will be forced to discontinue providing certain services or charge substantially higher fees to account for being a fiduciary. Some organizations that represent financial advisors that typically provide fiduciary services will argue and try to convince EBSA that this is a good outcome. Others may urge EBSA to finalize the Proposal in its current form based on narrowly focused desired outcomes. Such views seemingly overlook, oversimplify or underestimate the issues, concerns and potential harm that are identified in the vast majority of the comments submitted to EBSA. While the Proposal may be good for financial advisors who are willing to serve and charge for serving as a plan fiduciary, it will likely be harmful and disruptive to the vast majority of the retirement plan community, particularly small plans that cannot afford to hire outside fiduciaries.

Second, service providers should not be subject to the significant risk that an arrangement to provide non-fiduciary products and services will be treated, after the fact, as a fiduciary services arrangement. 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 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.

D. Measured and Coordinated Changes – The proposed changes are significant and, as mentioned above, will have substantial unintended consequences. Additionally, the Securities and Exchange

Commission is also evaluating regulatory action that 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. We urge EBSA to take measured steps in changing the definition of fiduciary and what constitutes investment advice for retirement plans. We also urge EBSA to continue to engage the retirement plan community, as it is doing today, as it evaluates the issues and concerns raised by many different organizations. We believe that significant changes to the Proposal are needed and that the retirement plan community would benefit greatly if EBSA re-proposed a modified rule. 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 and plan participants. Contrary to what has been suggested by the limited number of groups that submitted comments to EBSA encouraging them to move quickly to finalize the Proposal, uncertainty and inconsistencies in the fiduciary rules and regulations will not help or benefit anyone in the retirement plan community except for litigators and financial advisors who want to expand the number of plans for which they provide fiduciary services.

E. Adequate Time for Compliance – The issues raised by a broad change 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. We urge EBSA to allow 18 months from the date that any final rule is published for the retirement plan community to evaluate the rules, determine how to comply with them, and for service providers to educate their customers about the rules and to modify their service arrangements.

II. DISTRIBUTION COUNSELING

The SPARK Institute supports EBSA's efforts to safeguard the interests of participants and beneficiaries in connection with plan distributions, and encourages it to develop further guidance, but not in connection with the current effort to redefine who is a fiduciary. EBSA has received many comments on this topic with differing views. However, most agree that plan participants want and need assistance when deciding whether to take a distribution, what type of distribution to take and what to do with the proceeds. Groups will disagree over who a participant can trust when seeking help on these issues. We agree that a plan fiduciary should neither be able to act in its own interest nor be able to influence its own compensation when helping a plan participant who is considering taking a distribution. We also believe that it is equally, if not more important, for EBSA to consider concerns about unknown advisers who make "cold calls" to plan participants and their ability to exercise greater influence when participants are unable to get the assistance that they need from plan sponsor representatives and the plan service providers. Moreover, we do not believe that the solution to this problem is to deem all distribution counseling to be fiduciary activities. That would have a chilling effect on the availability of help. Instead, we urge EBSA to issue additional guidance that is comparable to Interpretive Bulletin 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.