



Submitted Electronically

January 27, 2014

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

Re: **Required Annual Participant Disclosures Compliance Deadline**

Dear Mr. Canary:

The SPARK Institute, Inc.¹ appreciates this opportunity to provide its views and recommendations to the Employee Benefits Security Administration of the U.S. Department of Labor ("EBSA") regarding a possible regulatory amendment to the compliance deadline in the 404a-5 participant disclosure regulations.² At the outset, we commend EBSA for issuing Field Assistance Bulletin ("FAB") 2013-02 that provided transitional relief with respect to such deadline through a temporary enforcement policy. FAB 2013-02 provided much needed flexibility for many plan sponsors and their service providers.

EBSA acknowledged in FAB 2013-02 that the transitional relief it provided did not resolve concerns that the current timing requirements in the 404a-5 regulations may result in a fixed annual deadline. Accordingly, EBSA indicated that it is considering a regulatory amendment that would provide additional flexibility on a permanent basis.³ As discussed more fully below, The SPARK Institute supports such permanent compliance deadline flexibility.

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.

² 29 C.F.R § 2550.404a-5.

³ See FAB 2013-02 (July 22, 2013).

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I. Discussion

According to our member companies that furnish disclosures to participants on behalf of plan sponsors, they strive to do so as soon as practicable after the information they need from third parties becomes available. However, the early delivery of materials in one year can accelerate the compliance deadline for subsequent years because of the manner in which the current definition of "at least annually" appears to operate. The regulations define such term as "at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis."⁴

EBSA recognized and solved a similar concern with respect to participant statements in FAB 2006-03 by providing that furnishing a benefit statement not later than 45 days following the end of a calendar quarter or calendar year constitutes good faith compliance with the timing requirements. The SPARK Institute believes that comparable flexibility with respect to the participant disclosure regulations will provide sufficient permanent relief.⁵

II. Requested Guidance

The SPARK Institute requests that EBSA issue guidance that specifies that "furnishing the required materials not later than 45 days following the anniversary of the day on which the materials were furnished for or during the preceding year will constitute good faith compliance with the requirement to furnish such materials at least annually." Additionally, we request that such relief covers the disclosures of plan-related information under 404a-5(c) and of investment-related information under 404a-5(d)(1) & (2).

The requested relief will provide plan sponsors and service providers the additional time and flexibility to furnish required materials as soon as practicable each year without accelerating the deadline for subsequent years. Such approach will help avoid potential situations of non-compliance when additional time is needed in a subsequent year for valid reasons.

For example, the participant disclosure regulations allow for some of the required disclosures to be included as part of the pension benefit statements that must be furnished to participants.⁶ As noted above, FAB 2006-03 provides a 45-day compliance window. Providing a comparable 45-day window for the participant disclosure materials will allow plan sponsors who prefer to combine their statements and disclosure materials to continue to avail themselves of the full 45-day compliance period that is currently available for statements. A 30-day window with respect to the disclosure materials will, as a practical matter, shorten the

⁴ 29 C.F.R § 2550.404a-5(h)(1).

⁵ The SPARK Institute submitted a request for guidance to EBSA about these matters on June 10, 2013. We had requested broader permanent relief prior to the issuance of FAB 2013-02. However, as a result of the issuance of such FAB, we believe now that a possible permanent 45-day grace period referenced in the FAB and proposed herein should be sufficient for the vast majority of service providers and plan sponsors.

⁶ 29 C.F.R § 2550.404a-5(e)(2).

current good faith compliance period for statements for plan sponsors that want to combine the materials. This could become an issue when some of the information that is required for the statements delays them from being furnished for more than 30 days following the end of the reporting period. In such a situation, the plan sponsor would have to provide the materials separately and may incur higher plan expenses in doing so.

Additionally, the requested flexibility mitigates the incentive that plan sponsors and service providers may have to delay furnishing the materials when they may otherwise be able to send them sooner, in order to avoid accelerating subsequent compliance deadlines. Plan sponsors and service providers rely on third parties to furnish some of the important information that must be included in the disclosure materials (e.g., the investment options comparative chart). A 45-day window will mitigate concerns that some service providers may have about providing materials early in one year and not receiving necessary information from third parties in a timely manner in a subsequent year. Resolving this concern will also benefit plan participants because it will facilitate expedited furnishing of the materials when it is feasible for providers and plan sponsors to do so.

Finally, we request that EBSA consider issuing the requested regulatory amendment as a direct final rule, unless it has reason to believe that it will be controversial or generate adverse comments. The SPARK Institute is unaware of any organization that would oppose the requested approach.

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Thank you for considering our request on this very important issue. The SPARK Institute is available to provide additional information and clarification regarding this request. Please do not hesitate to contact us at (704) 987-0533.

Respectfully,



Larry H. Goldbrum
General Counsel