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April 20, 2015

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

Re: Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans – Timing of Annual Disclosure (RIN 1210–AB68)

The SPARK Institute[1] is pleased to strongly support the Department of Labor's ("Department") direct final rule related to the Department's participant-level fee disclosure regulation. The SPARK Institute's members have a strong interest in the fee disclosure regulation because our members, which include leading recordkeepers, investment fund managers and other service providers, commonly assist plan sponsors with furnishing the disclosure or provide the information contained in the disclosure.

Annual Disclosure

As we said in our January 27, 2014 letter, the current participant-level fee disclosure regulation contains a rigid annual rule, and as a result, 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" operates. We recommended that the Department adopt a "compliance window" around the deadline to provide additional time and flexibility to furnish required materials as soon as practicable each year without accelerating the deadline for subsequent years.

The Department's approach, which amends the definition in 29 C.F.R. § 2550.404a-5(h)(1) (the "Regulation") of "at least annually" to refer to a "14-month period," is an elegant

[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 employer-sponsored plan participants.

and straightforward solution. We agree with the Department that the rule "achieves the correct balance" between providing plan administrators and service providers with flexibility in disclosing plan-related information, while ensuring that participants and beneficiaries receive disclosures of plan-related information on a consistent and regular basis.[2] Specifically, the new 14-month disclosure period, as opposed to the previous 12-month period, comports with the realities of preparing and distributing comprehensive disclosure statements that are both accurate and informative.

<u>Quarterly Disclosure</u>

As part of the direct final rule, the Department requested comments on whether the Department should also amend the regulatory definition of "at least quarterly" in paragraph (h)(2) of the Regulation. Currently, plan administrators – and the service providers that often assist them – must provide participants in participant-directed individual account plans a statement of certain fees and expenses charged to the participant's account. These fee and expense statements must be provided "at least quarterly," which is defined in the Regulation as "at least once in any 3-month period."[3] We do not believe that the definition of "at least quarterly" needs to be amended because it is our understanding that current Department guidance already provides plan administrators with the necessary flexibility.

The Regulation permits plan administrators to provide the statement of fees and expenses charged against the account "as part of a pension benefit statement."[4] Under ERISA section 105(a)(1)(A)(i), a pension benefit statement must be provided "at least once each calendar quarter," which is similar to the "at least quarterly" requirement for fee and expense statements. In 2006, the Department issued guidance in the form of Field Assistance Bulletin ("FAB") 2006-03, which permits plan administrators to furnish a pension benefit statement no later than 45 days following the end of the calendar quarter. In FAB 2006-03, the Department stated that furnishing the pension benefit statement within this 45-day window would "constitute good faith compliance" with the "at least once each calendar quarter" requirement under section 105(a)(1)(A)(i).

It is our understanding that the 45-day window permitted under FAB 2006-03 applies to any fee and expense statement that is furnished as part of a pension benefit statement. In other words, the 45-day window permitted by FAB 2006-03, also applies to the definition of "at least quarterly" as long as a plan administrator furnishes the fee and expense statement along with the pension benefit statement. Such an understanding is logical because the Regulation permits the two types of statements – both of which must be provided quarterly – to be furnished together, and DOL's guidance in FAB 2006-03 states that furnishing the pension benefit statement within

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[2] In issuing the direct final rule, the Department stated it will withdraw the rule if it receives any adverse comments, and subsequently issue the 14-month period as a proposed rule. If this occurs, we will continue to support the 14-month disclosure period and this comment letter should be treated as applying to the associated proposed rule.

[3] Regulation § 2550.404a-5(h)(2).

[4] Regulation § 2550.404a-5(e)(2).

45 days of the calendar quarter constitutes good faith compliance with the quarterly timing requirement.[5] We respectfully request that the Department confirm our understanding that FAB 2006-03 provides flexibility for plan administrators that furnish fee and expense statements as part of a participant's pension benefit statement.[6]

In the event that the Department does not share our understanding of the application of FAB 2006-03, then an amendment to the participant-level disclosure regulation is needed. This could be an amendment to the definition of "at least quarterly" along the lines of the amendment to the definition of "at least annually," or an amendment to make explicit that quarterly disclosures can always be provided under the same timing rules as quarterly pension benefit statements.

We note that the Department currently has a project to propose regulations under the pension benefit statement rule in ERISA section 105(a)(1)(A)(i). Department officials have indicated informally that this project could address the same issues as were addressed in the very helpful and balanced guidance in FAB 2006-03.[7] We are not aware of any concern that the basic 45-day window for pension benefit statements is too long or short. Nonetheless, if future regulations ultimately affect the timing by which plan administrators must send pension benefit statements after the end of the quarter, we urge the Department to continue to allow plan administrators to tie the quarterly disclosures in the participant-level fee disclosure regulation to the timing of disclosure of the pension benefit statement.[8] This would maintain the overall objective of the fee disclosure regulation which is to ensure that participants receive the information they need on a regular and periodic basis in order to make informed decisions about the management of their retirement savings.

The SPARK Institute appreciates the opportunity to provide these comments to the Department of Labor. 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).

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[5] Paragraph (e)(1) of the Regulation allows information in paragraphs (c)(1)(i), (c)(2)(i)(A), and (c)(3)(i)(A) to be provided as part of a summary plan description or a pension benefit statement, but only if the summary plan description or pension benefit statement is "furnished at a frequency that comports with paragraph (c)(1)(i)." In contrast, paragraph (e)(2) contains no such timing language, which strongly suggests that the ordinary timing of a pension benefit statement is appropriate for providing the "at least quarterly" disclosures.

[6] This written confirmation could come in various ways, such as a discussion in the preamble to a final or proposed regulation, a Field Assistance Bulletin, FAQ, or other similar guidance. We would be happy to provide further views on the form of the guidance if that would be helpful to the Department.

[7] As we have pointed out in other contexts, the SPARK Institute strongly supports the guidance in FAB 2006-03, including (a) allowing a plan administrator to send multiple benefit statements, (b) providing flexible but balanced rules for furnishing pension benefit statements electronically, (c) treating a loan feature as not, by itself, triggering the rules for participant-directed plans, and (d) concluding that benefit statements must include limitations and restrictions on participants' or beneficiaries' rights imposed "under the plan," but need not include limitations and restrictions imposed by investment funds, other investment vehicles, or by state or federal securities laws.

[8] We believe the 45-day window after the end of a quarter should apply even if charges against the account are not disclosed as part of a pension benefit statement.

Sincerely,

Robert G. Wuelfing

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