Testimony of

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Before the

United States Department of Labor
Employee Benefits Security Administration

Regarding the

"Proposed 408(b)(2) Regulations Amendment"

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Assistant Secretary Campbell and members of the panel, my name is Larry Goldbrum and I am the General Counsel of The SPARK Institute, an industry association that represents the interests of a broad-based cross section of retirement plan service providers, including banks, mutual fund companies, insurance companies, third party administrators and benefits consultants. Our members include most of the largest service providers in the retirement plan industry and our combined membership services more than 95% of all defined contribution plan participants. It is an honor for me to share our organization's views on the proposed 408(b)(2) regulations amendment. I would like to make an opening statement and then welcome the opportunity to respond to your questions.

I. INTRODUCTION

As you may know, The SPARK Institute has publicly supported and advocated for more robust fee disclosure by retirement plan and investment providers, as well as by employers to their employees. We believe that greater fee transparency will ultimately not only benefit plan sponsors and plan participants, but also the retirement plan and investment management industries. We commend the Department of Labor for taking a flexible concept-based approach in the proposed regulations that will allow service providers to tailor disclosures to their products and customers' needs. As the Department knows, fee disclosure in the retirement plan and investment industries is extremely complex due to the diversity of investment products, the diversity of service provider business models, the demands of plan sponsors to shift the administrative costs of their plans to participants, and the costs associated with gathering and presenting the information. We urge the Department to continue to take the lead in resolving these issues and to take deliberate and measured steps as it develops new rules and regulations.

II. CERTAIN CONCERNS AND RECOMMENDATIONS

Opposition to Prescribed Forms and Methodology - We urge the Department to retain the flexible approach to fee disclosure. The SPARK Institute strongly opposes the recommendations made in certain comment letters that urge the Department to require that disclosure be made through a prescribed one-size fits all form, in pre-determined categories, as a percentage of assets regardless of the fee structure, or that obligates a bundled provider to aggregate and present information from third parties in a single document. The retirement plan and investment industries are very competitive and dynamic so no single form or methodology can adequately address the diversity of products and service structures without favoring one segment of the industry over others. Additionally, mandating disclosure in a prescribed format or according to a specific methodology will be more costly for service providers, and ultimately for plan participants.

Non-Plan Asset Funds - We are concerned that the proposed regulation appears to override legislative and long standing regulatory authority regarding the definition of "plan assets." The SPARK Institute recognizes the importance of, and complexity associated with, developing disclosure requirements that address the Department's concerns but that are not overly broad. The final regulations should not impose additional detailed disclosure requirements on investment managers of, and service providers to, non-plan asset funds, e.g., mutual funds. The Department's disclosure rules with respect to such parties should not go beyond the disclosure rules of the SEC or such other regulatory authority with specific jurisdiction over the particular investment vehicle.

We recognize that many investment products are made available to plans through intermediaries and that investment providers may not know of or deal directly with the investing plans. However, the regulations should not shift the existing investor disclosure

obligations of the investment fund to the intermediary. Instead, the investment provider and the intermediary should be permitted to determine how the disclosures will be delivered to the plan as part of the arrangement between the parties to make such funds available. Under our approach, an intermediary could agree to deliver a mutual fund's statutory prospectus to the plans it services, on behalf of the fund, in order to assist the fund in meeting the fund's disclosure obligations. Our recommended approach is not intended to relieve the intermediary of any obligation to disclose to the plan the compensation it will receive from an investment provider, such as payments under a 12b-1 program.

Bundled Arrangements - One of the most difficult issues that the proposed regulations attempt to address is disclosure with respect to bundled service arrangements. As we noted in our comment letter, these arrangements come in a variety of forms, continue to evolve in an ever changing market, and may be impossible to adequately define by regulation without being overly broad or too narrow. Regardless of how these arrangements are ultimately defined, several specific issues should be addressed in order to facilitate compliance with the final regulations.

We commend the Department for recognizing that bundled providers should not be obligated to unbundle their services and disclose the internal allocation of fees among affiliated companies. Bundled providers should disclose their compensation and fees for the services they consider to be part of their bundled arrangement, but should not be obligated to make disclosures for other entities and services that the bundled provider does not consider to be part of its bundled arrangement. For example, when a bundled service provider, at the direction of a plan sponsor, makes payments to a third party that the service provider does not consider to be part of its bundled arrangement, the third party should be responsible for satisfying any applicable disclosure and contractual obligations under the final regulations. Additionally, when a record keeper makes an accommodation for a plan and agrees to record keep or hold a special asset or plan specific investment, the record keeper should have no fee disclosure or contract obligations with respect to such asset, except that the record keeper should have to disclose the compensation it or its affiliates will receive for the services it provides in connection with the special asset.

Fiduciary Status - We agree with comments made by other groups that the fiduciary attestation requirement will be unworkable and we are concerned that it will create opportunities for frivolous lawsuits. It is common for service providers to perform a variety of services for a plan, some of which may be fiduciary services and others which are not. Additionally, whether a service provider is a fiduciary is an inherently factual issue. We are concerned that the attestation will create traps for providers, including those who use their best efforts to comply with the requirement, and could have devastating consequence for the most well meaning service providers.

Conflicts - We agree with comments made by other groups that the proposed conflicts disclosure provisions are too broad and will be extremely difficult to satisfy. We urge the Department to take a more targeted approach that focuses on disclosure by a service provider of its financial interests with respect to plan assets. The regulation should focus on revenue sharing agreements and payments from third parties. Although disclosure practices vary among service providers, most large and mid-sized retirement plans are already provided with information that discloses the provider's potential financial interests in the investment of plan assets. However, disclosure practices can be improved if all service providers that deal directly with a plan are required to disclose the financial interests they may have in connection with how plan assets are invested.

Error Remediation - The SPARK Institute agrees with comments made by other groups that a service contract should not result in a prohibited transaction when a service provider makes reasonable efforts to comply with the regulation and corrects errors within a reasonable time after discovering them. The proposed rules are complex, will require a learning period, and will likely be subject to different interpretations. Imposing liability on service providers with no opportunity to remediate errors could be unduly harmful to the industry.

Additionally, the SPARK Institute requests that the Department expressly provide protection from penalties and liability for service providers when a plan sponsor fails to take the necessary and requested affirmative action to amend their service agreement after reasonable advance notice regarding such required action. Service providers should be protected from any adverse consequences associated with continuing to service the plan and receiving compensation for its services, provided that it had otherwise attempted to comply with the regulations but was unable to obtain affirmative consent from the plan sponsor. Absent such relief, plan service providers will be put in the untenable position of having to either refuse compensation while continuing to perform services or discontinue providing services to the plan. Neither of those options serves the best interests of any of the parties involved, including plan participants.

Compliance Deadline - The SPARK Institute requests that the Department extend the compliance deadline for the new regulations and adopt a two-tiered approach. For new customer arrangements, the final regulations should not be effective until at least six months after they are published. For existing customer arrangements, the compliance deadline to either amend an existing service agreement or sign a new one should be at least 18 months following the date the final regulations are published. Under this approach, during the first six months following the publication date of the final regulations the affected parties will be able to prepare to comply with them, and have a longer period to address existing arrangements that may need to be amended.

III. CONCLUSION

On behalf of The SPARK Institute, I thank the panel for the opportunity to share our views on these important issues, and I welcome your questions.