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November 17, 2020

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

Re: Pension Benefit Statements – Lifetime Income Illustrations (RIN 1210-AB20)

Dear Sir or Madam:

The SPARK Institute, Inc. appreciates the opportunity to comment on the Department of Labor’s (“the Department’s”) interim final rule (“IFR”) regarding the lifetime income illustration (“LII”) that must be provided on pension benefit statements pursuant to Section 203 of the Setting Every Community Up for Retirement Enhancement (“SECURE”) Act. 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 95 million employer-sponsored plan participants.

The SPARK Institute believes that the projections required by the IFR will provide retirement savers with a helpful snapshot of how they can convert their retirement accounts into a stream of lifetime payments. Nevertheless, the SPARK Institute also believes that the Department can improve the IFR by providing additional support for the voluntary LIIs that are currently provided to retirement savers by their plans and their service providers and by making other modifications to the IFR, as discussed in more detail below. Specifically, the SPARK Institute recommends that the Department:

- Confirm that plan representatives and service providers do not provide “investment advice” when presenting LIIs to retirement savers because LIIs, by themselves, are not “advice as to the value of securities or other property” or “recommendations as to the advisability of investing in, purchasing, or selling securities or other property.”
- Clarify the circumstances under which a plan fiduciary, administrator, or other service provider can provide additional voluntary LIIs and similar tools as “investment-related educational information,” as opposed to fiduciary “investment advice.”
- Enhance the IFR’s model explanations to appropriately encourage retirement savers to consult any voluntary LIIs that are made available to them.

- Clarify that voluntary LIIs can appear in participant communications beyond the benefit statement.
- Make the IFR's deferred income annuity disclosure optional and clarify the meaning of deferred income annuities under the IFR.
- Make the age 67 commencement date assumption uniform.
- Clarify the treatment of defaulted plan loans before the end of the regulatory "cure period."
- Permit plan administrators to add language to the IFR's model explanations in ways that are not inconsistent with the Department's models.
- Clarify that plan fiduciaries, sponsors, and administrators will not fail to be covered by the SECURE Act's liability protections merely because they reasonably rely on information provided by a third party.
- Confirm that the IFR's first LII is not required until 12 months after September 18, 2021.
- Provide a reasonable transition period if the final rules impose new obligations on plan administrators or require meaningful system changes.
- Coordinate with the relevant financial regulators (e.g., SEC, FINRA, and NAIC) who also play a role in overseeing our nation's private retirement savings system.
- Clarify how the IFR's LII requirements will apply to plans with multiple vendors, plans with multiple accounts for the same participant, and plans that use multiple documents to comply with ERISA's benefit statement requirements.

I. ADDITIONAL SUPPORT NEEDED FOR VOLUNTARY LIFETIME INCOME ILLUSTRATIONS

The SPARK Institute has long supported the use of LIIs to help defined contribution retirement plan participants better understand the amount of income their retirement savings may provide and whether they need to make changes to how they are saving and investing. That said, by its nature, the simple and standardized projection required by the IFR will only provide retirement savers with a limited snapshot of how they can convert their retirement accounts into a stream of lifetime payments.

While the standardized LII may be helpful to some participants, in order to provide retirement savers with a truly meaningful and realistic lifetime income projection, the SPARK Institute believes that the IFR's LII will need to be complemented by more state-of-the-art tools and illustrations. Many of these holistic tools and illustrations are already made available on a voluntary basis to retirement savers by plans and retirement plan service providers. These voluntary tools, which offer participants the ability to incorporate assumptions that go far beyond what is contemplated by the IFR, offer a more meaningful and realistic projection of lifetime income because they can account for variables such as future contributions, investment earnings, individualized retirement ages, and other potential sources of retirement income. Additionally, these tools can often be used in conjunction with one-on-one assistance from human financial professionals. Most importantly, SPARK members have found that these tools can lead to

meaningful changes in participant behavior, including an increase in savings and changes in investment decisions.

We very much appreciate the statements in the preamble expressing the Department's desire to encourage these voluntary tools. We remain concerned, however, that the IFR does not go far enough to protect and promote the use of voluntary LIIs and other related tools. Specifically, because plan fiduciaries and administrators will receive liability protections when furnishing an LII in accordance with the IFR, the SPARK Institute believes that some plan fiduciaries, administrators, and consultants may be unnecessarily reluctant to offer lifetime income tools and projections that are not designed in accordance with the IFR's assumptions. Accordingly, unless the Department offers additional support, voluntary lifetime income tools and projections could be viewed as "too risky" from a fiduciary liability perspective. The SPARK Institute disagrees with this view but nevertheless believes that appropriate guidance from the Department would help prevent plans from taking such an unnecessarily defensive position.

In order to prevent the IFR's LII from stifling innovation and limiting the ability of recordkeepers to share useful information with retirement savers, the SPARK Institute recommends that the Department: (1) expressly confirm that it is not investment advice to furnish an LII to a retirement plan participant; (2) enhance the IFR's model explanations to appropriately encourage retirement savers to consult any voluntary LIIs that are made available to them; and (3) expressly clarify that the LII required by the SECURE Act and the IFR do not prevent plan administrators from presenting voluntary LIIs on communications other than the benefit statement.

- **Voluntary LIIs Are Not Investment Advice.** In order to help prevent the IFR's LII from supplanting currently available and more realistic lifetime income projections, the Department should expressly confirm that plan representatives and service providers do not provide "investment advice" when presenting LIIs to retirement savers because LIIs, by themselves, are not "advice as to the value of securities or other property" or "recommendations as to the advisability of investing in, purchasing, or selling securities or other property."

To further explain this principle, the Department should also clarify the circumstances under which plan fiduciaries, administrators, and other service providers can *voluntarily* provide LIIs and other similar tools as investment-related educational information, as opposed to fiduciary investment advice. Specifically, the SPARK Institute recommends that the Department amend Interpretive Bulletin 96-1 ("IB 96-1") to offer a broad, flexible, and principles-based description of the types of LIIs and related tools that will be treated as investment education. In this effort, we urge the Department to avoid any prescriptive standards that could: (a) undermine the ability of recordkeepers to continue offering tools that are proven to benefit participants; or (b) limit future innovation in this area. IB 96-1, as recently reinstated by the Department in 2020, provides that

“interactive investment materials” are considered education, but the definition in IB 96-1 is focused on investments and asset allocation, rather than retirement income.¹

Either in connection with the final rule or as an update to IB 96-1, we also urge the Department to reinstate the relevant parts of the amended version of IB 96-1 that was invalidated in 2018 when the Fifth Circuit Court of Appeals struck down the Department’s 2016 Fiduciary Rule. Specifically, the SPARK Institute urges the Department to expressly make clear that investment education includes: “Information and materials that . . . describe . . . the impact of preretirement withdrawals on retirement income, retirement income needs, varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options (e.g., immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distributions, or describe product features, investor rights and obligations, fee and expense information, applicable trading restrictions, investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses of investment alternatives available under the plan or IRA.”²

- **The Required LII Explanations Should Encourage Participants to Consult Voluntary LIIs.** The SPARK Institute also requests that the Department enhance the explanations that must accompany the IFR’s LII to expressly recognize the importance of information that can be obtained from reviewing additional LIIs provided on a voluntary basis to retirement savers. Thus, in addition to the 11 explanations required by the IFR, the Department’s final rule should expressly permit, but not require, plan administrators to supplement the required explanations to: (a) direct participants and beneficiaries to voluntary LIIs made available by the plan;³ (b) explain that voluntary LIIs will differ from the required LII; (c) explain how the assumptions supporting any voluntary LIIs

¹ “Interactive Investment Materials. Questionnaires, worksheets, software, and similar materials which provide a participant or beneficiary the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income, where: (i) Such materials are based on generally accepted investment theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time; (ii) there is an objective correlation between the asset allocations generated by the materials and the information and data supplied by the participant or beneficiary; (iii) all material facts and assumptions (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) which may affect a participant's or beneficiary's assessment of the different asset allocations accompany the materials or are specified by the participant or beneficiary; (iv) to the extent that an asset allocation generated by the materials identifies any specific investment alternative available under the plan, the asset allocation is accompanied by a statement indicating that other investment alternatives having similar risk and return characteristics may be available under the plan and identifying where information on those investment alternatives may be obtained; and (v) the materials either take into account or are accompanied by a statement indicating that, in applying particular asset allocations to their individual situations, participants or beneficiaries should consider their other assets, income, and investments (e.g., equity in a home, IRA investments, savings accounts, and interests in other qualified and non-qualified plans) in addition to their interests in the plan.” Labor Reg. § 2509.96-1(d)(4).

² Labor Reg. § 2509.96-1(b)(2)(iv), as finalized in 81 Fed. Reg. 20946, 20998 (Apr. 8, 2016) and subsequently vacated through *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360 (5th Cir. 2018).

³ For example, a plan administrator should clearly be permitted to provide specific instructions on how a participant can obtain a voluntary LII by calling the plan’s recordkeeper or visiting the recordkeeper’s website.

differ from the assumptions supporting the required LII;⁴ and (d) describe the limitations inherent in the final rule's LII.

- **Voluntary LIIs Beyond the Benefit Statement.** Paragraph (g) of the IFR says that, “[n]othing in this section precludes a plan administrator from including lifetime income stream illustrations *on the benefit statement* in addition to the illustrations described in [the IFR], as long as such additional illustrations are clearly explained, presented in a manner that is designed to avoid confusing or misleading participants, and based on reasonable assumptions” (emphasis added). The SPARK Institute requests that the Department clarify that the required LII does not preclude a plan administrator from including or making available a voluntary LII on the benefit statement *or any other participant communication or interface*. Moreover, this protection should also apply to a service provider that provides this voluntary LII under the direction and supervision of the plan administrator.

II. ASSUMPTIONS FOR LIFETIME INCOME ILLUSTRATIONS

As stated above, the SPARK Institute believes that the IFR's LII, within its limits, will provide some retirement savers with a helpful snapshot of what their retirement accounts might mean as a stream of lifetime payments. Given the limited utility of the IFR's simple and standardized LII, we recommend that the Department prioritize simplicity and uniformity for the assumptions that it will include in its final LII regulations. Further, in addition to this general call for simplicity and uniformity, the SPARK Institute offers the following recommendations and comments:

- **Make the IFR's Deferred Income Annuity Disclosure Optional.** According to the IFR, plan administrators are required to exclude the value of any deferred income annuity (“DIA”) actually purchased by a participant or beneficiary when generating an LII. For any portion of a participant's accrued benefit that has been used to purchase a DIA, the IFR directs the plan administrator to separately disclose the amount and frequency of the payments payable under the DIA, along with other details specific to the purchased annuity. The SPARK Institute opposes the IFR's mandatory separation of DIAs that have been purchased by a participant or beneficiary. This requirement is inconsistent with Section 203 of the SECURE Act, wrongfully denies liability protections for plan administrators, and may create misleading illustrations for participants.

The IFR's mandatory exclusion of DIAs is inconsistent with ERISA section 105(a)(2)(D)(i)(I), which requires a lifetime income disclosure setting forth “the lifetime income stream *equivalent* of the *total benefits accrued* with respect to the participant or beneficiary” (emphasis added). Because the statute requires the lifetime income stream “equivalent” to reflect the “total benefits accrued,” the Department's IFR is inconsistent with the statute to the extent that it requires DIAs to be broken out separately from the

⁴ A description of the assumptions supporting a voluntary LII may require a detailed discussion. Accordingly, we request that the Department permit any description of the assumptions supporting a voluntary LII to be presented within the IFR's required explanations or separately accompany any voluntary LII.

rest of a participant's benefit. If Congress had intended for the new LII to require amounts invested in DIAs to be disclosed in separate illustrations, it could have drafted the SECURE Act to say so. Accordingly, plans should be given the option to include DIAs in a participant's aggregate account balance *or* separate any DIAs purchased by a participant from the rest of the account balance.

The IFR's mandatory exclusion of DIAs also wrongfully denies the liability protections contemplated by ERISA section 105(a)(2)(D)(iv) for the DIA-specific projections required by the IFR. The liability protections described in ERISA section 105(a)(2)(D)(iv) are designed to apply, consistent with the language quoted in the preceding paragraph, to "the lifetime income stream equivalent of the *total benefits accrued* with respect to the participant or beneficiary" (emphasis added). Because DIAs are a part of the total benefits accrued with respect to participants and beneficiaries, the Department does not have the authority to remove these liability protections, notwithstanding any views the Department might have on the litigation risks associated with DIA projections.

In addition, we believe that the Department has not provided the necessary clarity regarding *which* contracts and plan features are subject to the mandatory rule for DIAs versus contracts and plan features that are subject to the optional rule for distribution annuities. As noted in the next section, there is significant uncertainty about what the Department means by a "DIA." Moreover, by imposing this special rule on one kind of annuity feature, the Department may be inadvertently discouraging innovation in this area.

Finally, the IFR's mandatory separation of DIAs has the potential to create misleading illustrations for participants and beneficiaries. Because the IFR's assumptions for generating an LII in accordance with Labor Regulation section 2520.105-3(c) are so conservative, we are concerned that the LII generated for DIAs based on the actual terms of the DIAs will cause DIAs to appear relatively more valuable than they actually are. Although the IFR's lengthy explanations will technically inform participants and beneficiaries of this "apples to oranges" comparison, we do not anticipate that these differences will be immediately apparent or understood by ordinary plan participants.

- **Clarify the Meaning of Deferred Income Annuities.** Although the IFR applies special rules to the portion of a participant's accrued benefit that has been used to purchase a DIA, including a qualified longevity annuity contract ("QLAC"), the IFR and its preamble do not clearly define what a DIA is for purposes of these special rules. The IFR itself defines a DIA only as an arrangement under which a "deferred lifetime income stream is purchased by the participant." This is true for all annuities, whether fixed or variable, because all annuities by definition must allow a participant to annuitize the contract. But many annuities are used in plans where annuitization is only one option. That is, the participant has the right to a lump sum, installments, or other kinds of payouts other than a straight single life or joint life annuity. In fact, participants may be able to reallocate those funds to another investment option under the plan. We would have thought that the Department is focused on annuities under which the participant has

irrevocably purchased a deferred lifetime income stream. (A QLAC is an example of such a DIA; a QLAC generally cannot be surrendered for a lump sum by the participant.) The preamble notes that participants’ “ownership interests in DIAs often can be converted to a lump sum cash amount, but not always,” which suggests the Department might mean any annuity under which both a lump sum and life annuity is available – but that definitional guidepost would cover *every annuity*. Similarly, an annuity that has a surrender charge or a temporary liquidity restriction would not, by itself, be considered to be a deferred income annuity as we believe the Department intends. The SPARK Institute requests that the Department provide clarification on the types of products and arrangements under which a “deferred lifetime income stream is purchased by the participant” and treated as a DIA. We would suggest the appropriate definition for a DIA is a contract under which the amounts invested may not be transferred out of (or withdrawn from) the contract, the payments are fixed when amounts are invested, and the payments will be made in the form of a life annuity with no option to accelerate the payment in the form of a lump sum or installments.

- **Make the Age 67 Assumption Uniform.** Under the IFR, the required LII must assume that the participant or beneficiary is age 67 on the commencement date, unless the participant is older than age 67. If a participant or beneficiary is older than age 67, the IFR requires the plan administrator to use the participant’s actual age as of the last day of the statement period.

The SPARK Institute recommends that the Department permit plan administrators to use a uniform age assumption across all participants and beneficiaries, regardless of whether an individual participant or beneficiary is younger or older than the assumed age designated in the final regulation. SPARK Institute members have a range of views on the age that is the most appropriate assumption for the commencement date for lifetime income payments. Some members support the IFR’s use of age 67. Others believe that an older age, such as age 72, would be more appropriate based on its connection to the Internal Revenue Code’s required minimum distribution rules. And finally, others believe that the plan’s normal retirement age is the correct number because relatively few individuals wait until age 67 to start receiving Social Security payments. Given the limited purpose of the LII required by the IFR, no matter what commencement age the Department chooses, it should permit plan administrators to use that assumption uniformly for all participants and beneficiaries.

If plan administrators are required to create customized illustrations based on the ages of individual participants and beneficiaries, this will create additional implementation costs. The SPARK Institute does not believe that this limited degree of customization would generate benefits that could be justified by the cost of implementation. Moreover, given the wide availability of voluntary and customizable LII tools that are already made available by retirement industry service providers, participants and beneficiaries above age 67 typically have access to more personalized projections if they are interested in exploring this measurement further. Finally, those participants that have reached retirement age really should not be relying on such a simplified calculation; for example,

even if the participant's age assumption is correct, the assumptions regarding the spouse's age may not be.

- **Adjustments for Earnings.** According to the IFR, the account balance used to create the required LII must be based on “the value of the account balance as of the last day of the statement period.” Accordingly, the projection contemplated by the IFR does not reflect additional contributions and investment earnings that will likely accrue within a participant's account between the furnishing of the annual LII and the participant's retirement.

Some of SPARK's members think that the IFR's approach to earnings should be revisited and changed to permit the required LII to account for future earnings. Those members are concerned that the IFR's “immediate annuity” approach is likely to be misleading and underestimate substantially the actual value of a participant's account at retirement, especially in the case of younger workers for whom investment earnings will likely increase the value of their present-day account balances. The IFR's assumptions essentially conclude that a 35-year-old participant with \$100,000 will have the same retirement income at age 67 as a 67-year-old participant with \$100,000, when that is clearly not true, unless the 35-year-old participant has no investment earnings above inflation for the next 32 years. Without the ability to account for potential earnings, some of SPARK's members are concerned that the IFR's assumptions could discourage future savings, as opposed to encouraging such savings.

Among SPARK's members that support an earnings adjustment, there is a wide range of views on what the Department should do about this. Some members think that, on balance, a lower earnings assumption will encourage more savings than it will discourage. Others suggest that the Department include an earnings assumption similar to that proposed by the Department in 2013 (a nominal 7 percent return, with 3 percent inflation assumed, leading to a 4 percent real rate of return). Notwithstanding these different opinions, if the Department permits potential future earnings to be reflected in the assumptions described in its final regulations, we recommend that this earnings calculation be uniform for all plans. There should not, for example, be a range of investment assumptions from which an administrator could choose to build into their model.

Other SPARK members, by contrast, support the IFR's immediate annuity approach and do not think that the required LII should account for earnings. In their view, the required LII can only provide a limited snapshot of how plan participants can convert their retirement accounts into a stream of lifetime payments. Thus, without the ability to account for other variables, such as future contributions and a participant's actual retirement age, participants should only look to the required LII as a simple and standardized projection, rather than a realistic or individualized projection of future income.

- **Plan Loans.** Section (c)(4) of the IFR states that, in calculating the account balance used for generating the required LII, “[t]he account balance includes the outstanding balance

of any participant loan, unless the participant is in default of repayment on such loan.” The SPARK Institute requests that the Department clarify that, for this purpose, a loan is not treated as in default until after the expiration of any regulatory “cure period” permitted by the plan administrator.⁵

III. ADDITIONAL FLEXIBILITY FOR MODEL DISCLOSURES

According to the IFR, the LII fiduciary liability protections provided by the SECURE Act are only available if a plan administrator provides: (a) the Department’s model lifetime income explanations; or (b) language that is substantially similar in all material respects to the Department’s explanations. SPARK requests that the Department expressly clarify in its final regulations that plan administrators may rely on the SECURE Act’s fiduciary liability protections, even if they add to the Department’s model language in ways that are not inconsistent with the model language. For example, in the case of plans that do not offer annuity options, the administrator should be able to expressly notify participants that no such option exists under the plan.

IV. SCOPE OF LIABILITY PROTECTION

Under Section 203 of the SECURE Act and paragraph (f) of the IFR, plan fiduciaries, plan sponsors, and other persons are relieved of any liability under ERISA arising solely by reason of furnishing an LII in accordance with the SECURE Act’s requirements and the Department’s interpreting regulations. These protections similarly extend to cases in which the LII is not required to be furnished to participants by the SECURE Act.

With regard to these liability protections, the SPARK Institute requests that the Department expressly clarify that, in generating any LII required by the SECURE Act, plan fiduciaries, sponsors, and administrators can reasonably rely on information provided to them by third-party service providers – e.g., when plan administrators will need to rely on information provided to them by third-party annuity issuers. The Department has previously offered this type of relief in other disclosure contexts and it would be appropriate for the Department to extend similar relief in the case of LIIs.⁶

V. EFFECTIVE DATE & TRANSITION PERIOD

Effective Date. The IFR becomes effective on September 18, 2021 and will apply to pension benefit statements furnished after such date. Based on public statements from Department officials made in connection with the IFR’s rollout, we understand that the Department intends for the IFR’s applicability date to require the SECURE Act’s LII to appear on a pension benefit statement furnished to a participant no later than September 18, 2022. Conversely, we

⁵ See Treasury Regulation section 1.72(p)-1, Q&A-10.

⁶ See e.g., Labor Reg. § 2550.404a-5(b)(1) (“A plan administrator will not be liable for the completeness and accuracy of information used to satisfy these disclosure requirements when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment option.”).

understand these statements from Department officials to also mean that the SECURE Act's LII does not need to be presented on the first quarterly benefit statement due after September 18, 2021.

The SPARK Institute requests that the Department confirm that the above-described understanding of the IFR's applicability date is correct. Further, we request that the Department provide express confirmation of this understanding as soon as possible. If the IFR's LII must appear on the first quarterly benefit statement due after September 18, 2021, plan administrators must know this as soon as possible in order to prepare.

Transition Period. Based on comments received by the public, we anticipate that the Department may make at least some modifications to the IFR. To the extent that such changes will impose new obligations on plan administrators or require meaningful system changes, we request that the Department provide a reasonable transition period under which affected plan administrators and their service providers can rely on the rules described in the IFR published in September. Without knowing the changes that the Department might make, it is difficult to estimate an appropriate amount of time for such a transition period, but we would generally expect that a one-year transition period would be appropriate for modest modifications to the IFR.

VI. REGULATORY COORDINATION

As the Department works to review public comments and issue final regulations on its LII project, we urge the Department to coordinate with the relevant financial regulators who also play a role in overseeing our nation's private retirement savings system, including the Securities & Exchange Commission ("SEC"), the Financial Industry Regulatory Authority ("FINRA"), and the National Association of Insurance Commissioners ("NAIC"). Specifically, we request that the Department seek confirmation that the disclosures included in its IFR and final regulation will not cause plan administrators, investment managers, broker/dealers, insurance companies or their agents, or service providers to violate any rules within the jurisdictions of those regulators.⁷ This regulatory coordination should account for the IFR's application to ERISA-covered plans, as well as non-ERISA church and governmental plans that are likely to adopt the IFR's LII as a matter of best practice.

VII. MULTIPLE VENDORS, PARTICIPANT ACCOUNTS, AND DOCUMENTS

Multi-Vendor Plans. The LII requirement is part of the broader requirement under ERISA to provide a pension benefit statement on a regular basis, generally quarterly for participants in defined contribution plans that allow participants to direct the investment of their account. In Field Assistance Bulletin ("FAB") 2006-03, the Department noted that "in the case of individual account plans that provide for participant direction, the information required to be included in pension benefit statements will, in many instances, involve multiple service providers, each of

⁷ For example, the Department should confirm that providing the LII and associated disclosures will not violate the SEC's advertising rules, FINRA's rule 2210 regarding communications with the public, or state insurance laws regarding annuity illustrations, including with respect to plans that are not subject to ERISA.

whom is a source for some, but not all, of the required information.” This is particularly true in Section 403(b) plans that have multiple investment providers (called “vendors”), each of whom separately send a statement to participants based on the accrued benefit held under that vendor’s products. FAB 2006-03 states that “good faith compliance with the pension benefit statement provisions does not preclude the use of multiple documents or sources for benefit statement information, provided that participants and beneficiaries have been furnished notification that explains how and when the information required by section 105 will be furnished or made available to participants and beneficiaries.” The guidance in the FAB remains the only guidance the Department has provided on this important issue, and the IFR does not address it.

We assume, but ask for clarification that, so long as the vendor explains in its benefit statement that the LII relates solely to the benefits held with that vendor, and that the participant may have benefits with other vendors, the “separate document principle” described in FAB 2006-03 applies to LIIs. Thus, in the multi-vendor 403(b) context, each unaffiliated vendor would only be responsible for generating an LII with respect to the information within its own control. We believe that the best way for the Department to provide our requested clarification is through an amendment to the IFR, making clear that the LII requirement can be satisfied through the use of multiple documents or sources, “provided that participants and beneficiaries have been furnished notification that explains how and when the information required by section 105 will be furnished or made available to” them. A preamble discussion reinforcing the FAB would also be helpful, but could create uncertainty if FAB 2006-03 is ever modified or withdrawn.

We would point out that one advantage of the LII that the Department promulgated is that the same calculation is required by all plans and vendors. This decision should help the Department be comfortable that participants will be able to combine their LII disclosures if they have savings with multiple vendors. Additionally, we must emphasize that any participant benefits flowing from the receipt of a single disclosure in this context, as opposed to multiple documents reflecting a standardized LII, are substantially outweighed by the costs that would be incurred to coordinate and prepare such a disclosure across vendors.

Multiple Accounts under MEPs. Multi-vendor 403(b) plans are not the only type of arrangement for which the separation of a participant’s interests under a plan will be appropriate when generating the required LII. For example, a participant could have multiple accounts within a multiple employer plan (“MEP”), with each account being linked to a separate participating employer. In this case, the Department should confirm that the LII requirements may be satisfied if a plan’s service provider creates and furnishes separate LIIs to reflect an individual’s separate accounts under a MEP, notwithstanding the fact that each account may be maintained by the same service provider.

Multiple Documents and Webpages. Finally, the SPARK Institute requests that the Department expressly clarify that, consistent with the “separate document principle” described in FAB 2006-03, a plan administrator can satisfy the SECURE Act’s LII requirement for benefit statements, even if the LII does not directly appear on a printed benefit statement or on the same webpage as an electronic benefit statement, “provided that participants and beneficiaries have been furnished notification that explains how and when the information required by section 105 will be furnished or made available to” them. For example, a plan administrator should be

permitted to attach the new LII to the end of a printed benefit statement or present the LII electronically on a webpage that can be accessed separately from the rest of the benefit statement. This would not only be consistent with the approaches described in FAB 2006-03, it would also be consistent with the part of the Department's current rulemaking permitting the model explanations to be inserted into, or attached to, pension benefit statements. Likewise, the Department should provide this clarification through an amendment to the IFR.

New Regulation Required for Different Answer. Here is the critical point. If the Department decides that the LII must cover all of a participant's benefits held under a plan, that is, the Department will be revoking that part of FAB 2006-03, **the Department should only take such action through a new regulation implementing the general benefit statement rule, with notice and comment.** It would be inappropriate to make such a significant change to the rules for benefit statements as part of a final rule with respect to the LII.⁸

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Again, the SPARK Institute appreciates the opportunity to provide comments on the Department's IFR on the SECURE Act's LII requirement for pension benefit statements. If you have any questions or would like more information regarding this letter, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com).

Sincerely,



Tim Rouse
Executive Director

⁸ In connection with such a project, a few points would be critical. First, we would ask the Department to provide that a plan administrator does not violate its disclosure responsibility if the LII does not include any pre-2009 Section 403(b) contracts that are "grandfathered" and not held under the plan document. The Department provided similar relief in Field Assistance Bulletin 2009-02. Second, because systems must be built to coordinate this information among multiple vendors, a long transition period is required.