THE SPARK Institute, Inc.

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November 2, 2010

Ms. Elizabeth Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: **Proposed Rule - Mutual Fund Distribution Fees and Confirmations (File Number S7-15-10)**

Dear Ms. Murphy:

The SPARK Institute, Inc.[1] appreciates this opportunity to comment on the U.S. Securities and Exchange Commission's ("SEC") proposed rule regarding mutual fund distribution fees and confirmations (the "Proposed Rule"). Our membership includes retirement plan service providers (i.e., retirement plan "intermediaries") who receive or process 12b-1 payments from mutual funds, as well as the fund companies who make such payments. As such, The SPARK Institute and its members are very concerned about the potential adverse impact that certain aspects of the Proposed Rule will have on the entire retirement plan community, including plan sponsors and participants. Our retirement plan intermediary member companies may provide either or both non-distribution services (e.g., trading, record keeping and administration services) and fund distribution services.

We support the SEC's objectives of increasing transparency of mutual fund sales charges, helping investors avoid paying disproportionate sales charges in certain share classes, and helping investors make more informed choices when selecting funds that impose sales charges.[2]

[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 more than 62 million employer-sponsored plan participants.

[2] See 75 Fed. Reg. 47064.

However, we are concerned that the approach taken in the Proposed Rule will impose significant burdens and costs on retirement plan intermediaries who provide important services, will adversely impact plan sponsors and participants, and have unintended consequences that run counter to the SEC's objectives. Our issues, concerns, and proposed alternative approaches are summarized below.

I. Summary of Proposed Alternative Approaches

This comment letter addresses four major issues and concerns. Our proposed alternative approach for each issue is summarized below and discussed in greater detail under their respective sections.

A. Fee Limitations Under Rules 12b-2 and 6c-10 - The SPARK Institute urges the SEC to modify the Proposed Rule to specifically allow mutual funds to charge up to 75 basis points under Rule 12b-2 on classes of shares that are restricted to investment by retirement plans only, provided that the amount charged under the share class or paid to a service provider under 12b-2 for sales and distribution services does not exceed 25 basis points, and provided further that if the share class charges more than 25 basis points under 12b-2, the fund either (1) discloses that the sales and distribution services portion of the 12b-2 fee does not exceed 25 basis points or (2) provides a specific breakdown between the sales and non-sales portions of the 12b-2 fee.

B. Statements and Purchase Confirmations - We urge the SEC to allow the Department of Labor ("DOL") fee disclosure rules to take precedent over the proposed statements and purchase confirmation provisions as they might otherwise apply to retirement plan investments in mutual funds. We request that the SEC include a comprehensive exemption to the statement and confirmation provisions in the Proposed Rule with respect to retirement plan investments.

C. Compliance Period - In order to provide adequate time for the affected mutual funds and retirement plan intermediaries to comply with the Proposed Rule if it is finalized in its current form, we urge the SEC to consider a compliance date of 30 months after the effective date.

D. Additional Rule Changes Regarding Revenue Sharing - The SPARK Institute urges the SEC to postpone the effective date of the Proposed Rule until such time that it either determines that it does not anticipate proposing rules regarding revenue sharing or until it is in a position to propose any of such rules together with the proposed 12b-1 rule changes.

II. Fee Limitations Under Rules 12b-2 and 6c-10 - Impact on Retirement Plans

The Proposed Rule limits the fees that can be charged under Rule 12b-2 to 25 basis points annually and Rule 6c-10 requires that amounts in excess of 25 basis points be considered ongoing sales charges subject to specific limitations. Additionally, when shares that are subject to charges in excess of 25 basis points have paid the maximum allowed under Rule 6c-10, such shares must be converted to a lower fee class of shares.[3]

A. Retirement Plan Intermediary Services and Synergies - As the SEC knows, retirement plan intermediaries perform many of the necessary record keeping and ongoing administration services for fund shareholders (i.e., investors through retirement plans).[4] Non-distribution services that are provided by a retirement plan intermediary may include one or more of the following, as examples and without limitation:

- Maintaining shareholder identification (including personal and contact information) and beneficiary designations.
- Providing sub-accounting services and maintaining accurate sub-accounting records regarding shares owned by shareholders.
- Accepting shareholder requests for purchases and redemptions, facilitating and processing such requests on an omnibus account level with the fund's transfer agent.
- Trade settlement and clearing services.
- Answering shareholder inquiries regarding account status and history.
- Furnishing (either separately or on an integrated basis with other reports) statements and confirmations of all purchases and redemptions.
- Providing periodic statements showing a shareholder's account balances and other account information.
- Providing shareholder and fund information through websites, telephone customer service representatives, and automated voice response systems.
- Allocating dividends and capital gain distributions to shareholder accounts and updating their records.
- Transmitting proxy statements, annual and semi-annual reports, the funds' prospectuses and other communications from the funds to shareholders as may be required by law or by agreement.
- Processing shareholder distributions, including related tax reporting, as may be required by law or agreement.
- Adopting and maintaining appropriate security measures for identifying shareholders.
- Processing fund mergers, name changes and other fund actions.
- Applying mutual fund market timing restrictions, including the collection and remittance of redemption fees, monitoring trading activity, applying trading restrictions, and reporting individual investor activity to the fund as requested in connection with SEC Rule 22c-2.
- Applying investor fund minimums and blue sky restrictions at the plan sponsor level.
- Providing detailed reports on plan-level inflows and outflows.

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[3] Rule 6c-10 (b).

[4] 75 Fed. Reg. 47071.

The revenue paid to retirement plan intermediaries subsidizes the fees and expenses that the plan would otherwise be charged for the intermediaries' services. Generally, such fees that are charged to the plan are ultimately paid by the plan participants, based on the decision and direction of the plan sponsor/employer. Retirement plan intermediaries allow fund companies and retirement plans to leverage the overlap and synergies that exist between record keeping and administrative services. In fact, The SPARK Institute believes that by leveraging these synergies through the use of omnibus accounting and trading, retirement plan intermediaries are largely responsible for enabling the use of mutual funds as investment options in retirement plans since the early 1990s and the substantial growth in retirement plan assets in mutual funds and rollover IRAs. Defined contribution plans held approximately $72 billion in mutual fund investments as of December 31, 1990, representing 8% of assets in these plans at the time.[5] By December 31, 2009, defined contribution plan and IRA rollover assets in mutual funds had risen to an estimated $3.4 trillion, representing almost 49% of total assets in these retirement savings vehicles.[6]

Using omnibus accounts for retirement plan participant investors has made it possible to make mutual funds available to millions of participant investors who have small balances and contribute small amounts on a regular basis through their employer payroll systems.[7] In fact, retirement plans are the primary, and for many the only, practical and cost effective path for savers to invest in mutual funds. The retirement plan industry has been able to negotiate with mutual fund families to have all loads waived for participant investors, and omnibus trading enables participants to invest in funds that they would not otherwise have access to because of the application of minimum initial investment requirements.

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[5] Investment Company Institute 2010 Investment Company Fact Book, pp. 11 and 97. We note that rollover IRA data as of December 31, 1990 is not readily available. To the best of our knowledge, rollover IRA amounts as of such date would have been negligible and not meaningful to the issue at hand.

[6] Figures based on mutual fund holdings of 51% of $4.1 trillion in defined contribution plan assets (i.e., approximately $2.1 trillion) as of December 31, 2009, according to the Investment Company Institute 2010 Investment Company Fact Book (pp. 11 and 97), and 46% of an estimated $2.8 trillion in rollover IRA assets (including defined contribution and other qualified retirement plan assets), i.e., approximately $1.3 trillion, as of December 31, 2009, according to the 2010 SPARK Marketplace Update (p. 5) and SPARK Institute estimates.

[7] As noted above, retirement plan investors receive substantial services and are able to invest in mutual funds through their retirement plans cost effectively because of omnibus record keeping and trading. The SPARK Institute does not believe that retirement plan investors receive fewer services than other investors. In some instances, plan investors may receive more robust services because of the synergies that are leveraged. We also do not believe that the use of omnibus accounts obscures distribution fees since most retirement plans do not use share classes with front end or deferred sales loads. Additionally, the total expense ratios of mutual fund investment options are disclosed to participants through many channels by retirement plan intermediaries and the plan administrators, i.e., employers. As discussed more fully below, the DOL's "Participant Disclosure Rules" require that the expense ratio information be provided to participants in a summary chart of all plan investment options.

B. Retirement Plan Record Keeping Compensation and Costs - The costs associated with maintaining the systems and staff required to provide the record keeping, administrative services, and other services in order to comply with SEC, Internal Revenue Service ("IRS"), DOL, and other rules that apply to retirement plan investments in mutual funds are substantial. The SEC recognized in the preamble to the Proposed Rule that retirement plan intermediaries are often paid 50 basis points or more from 12b-1 programs for the services they provide.[8]

Although the SEC does not appear to question or object to the validity, payment for and value of the intermediary services, the Proposed Rule limits a mutual fund's ability to pay for the services under Rule 12b-2. The SPARK Institute believes that the 25 basis point compensation limitation under 12b-2 will be disruptive to the entire retirement plan community, including plan sponsors, participants, mutual funds and retirement plan intermediaries. As discussed more fully below, many intermediaries will be forced to either (1) accept a significant pay cut, (2) stop offering mutual fund investments to small plans, or (3) undertake expensive system upgrades or other changes, including renegotiating all of their service and compensation agreements with the mutual funds they offer and plans they service, simply to preserve their current reasonable compensation levels. Moreover, retirement plan investors are not likely to receive any benefit in return for the expected disruption.

C. Impact on Record Keeping Systems – Cost Prohibitive Upgrades - As the SEC knows, in order to comply with the Rule 6c-10 limitations, retirement plan record keepers would have to track and age every purchase made by each individual participant in every retirement plan. Additionally, record keepers would be required to automatically identify shares that would have to be transferred to another share class and initiate the transfer. However, a critical feature of retirement plan record keeping and trading systems is that they do not do individual share trade and lot tracking for each investor, which helps simplify the otherwise costly aspects of the services they provide. Individual investor (i.e., plan participant) lot tracking is not needed to comply with DOL, IRS and other rules and regulations that apply to retirement plans. Retirement plan record keepers also do not have the capability to automatically initiate transfers between share classes based on aging schedules and would be unable to comply with the Proposed Rule.

As noted above, today's record keeping systems, practices and procedures have made it feasible and cost effective to make mutual funds available as investment options to tens of millions of American retirement plan investors. The conditions under Rule 6c-10 (i.e., lot tracking and share conversion) disrupt the basic foundation of retirement plan record keeping systems and will be cost prohibitive to satisfy. Additionally, the payments under proposed rule 12b-2 will not permit adequate compensation for many retirement plan intermediaries, particularly with respect to small plans with low account

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[8] Id.

balances. The SEC states that it anticipates that some record keepers (approximately 177) will upgrade their systems to manage the ongoing sales charges in compliance with the new limitations.[9] The SEC estimates that the cost to comply with the Proposed Rule will be $1,000,000 in one-time costs, and $1,500,000 annually for each service provider.[10] However, based on our discussions and feedback provided to us by our members, **none intend to upgrade their systems to comply with the Proposed Rule**. Our members believe that the complexity, potential difficulty, and costs associated with complying with the rules have been underestimated and are far too significant to undertake, particularly at this time. Additional information about our concerns and the potential impact of the Proposed Rule on the retirement plan industry, plan sponsors and participants is provided below.

D. Compliance Complexity

1. Lot Tracking – Lot tracking would require record keepers to maintain two share classes of the affected funds in each plan. For many plans this would double the number of funds that have to be record kept, complicate participant education and communications, and impact all of the systems maintained by service providers (e.g., web and automated voice response systems). There are many more reasons and complications associated with lot tracking that we have not detailed here because, as noted above, our members do not intend to upgrade their systems based on the issues they have already been able to identify.

2. Share Conversion – The maximum sales load and possible annual sales charges under proposed rule 12b-2 have the potential to create unlimited variability of the timing of when shares would have to convert for retirement plan investors. Retirement plan record keeping systems do not have the ability to maintain this information electronically in order to facilitate automatic share conversions. Moreover, record keepers are reluctant to accept the affirmative responsibility and potential liability for errors in connection with determining the timing of and initiation of investor transfers. A record keeper's potential responsibility and liability could extend to thousands of non-proprietary funds that they make available to their plan customers. Although the Proposed Rule would allow transfers to be made at the end of the month in which the conversion date is reached, it does not address the broader concerns of our members about share conversions.

3. Dividend Reinvestment – Under the Proposed Rule, reinvested dividends would have the same conversion period as the shares on which the dividend is paid.[11] Dividends paid with respect to retirement plan investments are always reinvested.

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[9] Id. at 47121.

[10] Id.

[11] Rule 6c-10(b)(1)(ii).

The dividends are shared among the participants that hold the affected fund on a pro-rata basis based on each participant's account balance. Reinvested shares are allocated to individual accounts, but historically are not tied to the shares on which the dividends are paid under the omnibus accounting approach.

Our members have informed us that tracking dividends the way that is proposed would be extremely complex, and perhaps not even reasonably possible. Under the proposal, each dividend allocation would have to be assigned to each of the participant's aging "buckets" on the record keeping system. With monthly contributions and a five-year aging timeframe, that could translate into splitting a dividend into 60 different buckets per participant, per fund. The allocations become exponentially more complex for employers with more frequent payroll cycles (e.g., every 2 weeks, which is more common) and when multiple contribution types are involved (e.g., employer matching contributions, which must be tracked separately from employee salary deferrals). If, under the example above, the payroll cycle was every other week and involved two contribution sources, the number of different buckets per participant per fund would increase from 60 to 240 (i.e., 24 (contributions per year) x 2 (contribution sources) x 5 (aging timeframe). The effort involved in doing this does not seem to be justifiable given the issue it attempts to address and the amounts involved. Even if this can be done it will be extremely confusing to explain to plan sponsors and participants.

4. <u>Implications on Transferability of Retirement Plan Accounts</u> – Proposed Rule 12b-2 would require record keepers to be able to store, transfer and receive historical trade information in order to facilitate plan transferability. This would affect plans' ability to change record keepers, participants' ability to rollover their investments when they leave an employer and are eligible for a distribution, and transfers within a plan between funds from the same fund company. Our members have informed us that they do not have this functionality and consider this requirement as a major impediment that would be very costly to address. In addition to the demands on each record keeping system that this imposes, there are no industry standards, practices and procedures for sharing this information among all of the affected parties. Based on our experience in developing data sharing standards for 403(b) plans and in connection with lifetime income options,[12] we are very concerned that the lack of standards would increase the costs of compliance for the entire mutual fund and retirement plan community.

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[12] The SPARK Institute developed and maintains information sharing standards for 403(b) plans that became necessary after the IRS adopted new compliance rules that went into effect in 2009. We also recently released data standards to facilitate the use of lifetime income products in defined contribution plans where a customer-facing record keeper elects to make an unaffiliated insurance company's income products available. Each of these data standards took over a year to develop, they continue to evolve and, although complex, we anticipate that a historical data standard initiative that would be required under the Proposed Rule would be substantially more complicated. The data standards mentioned above are available on our website at www.sparkinstitute.org under the "Comments and Materials" tab.

Additionally, we anticipate that it would take years to develop, reach consensus and accomplish wide spread adherence to any information sharing data standards. We expect that the Proposed Rule would have an adverse affect on portability, even if retirement plan intermediaries upgraded their systems to comply with the other aspects of proposed rule 12b-2.

E. Compliance Costs - Our members believe that the costs they would incur to upgrade their systems and on an ongoing basis are significantly higher than the SEC's estimates. For example, one of our members who is a large retirement plan intermediary estimated that initial systems developments would be between approximately three to five million dollars, and ongoing costs would be approximately four million dollars to comply with rule 6c-10. Another one of our members has informed us that their preliminary estimate for systems upgrades (i.e., to analyze, build specifications, code and test the required changes) may cost several million dollars. We reiterate that these members, along with our other members, have concluded that the costs they would incur are so significant that they are unwilling to attempt to upgrade their systems.

We also note that the retirement plan industry is currently experiencing unprecedented regulatory activity that is imposing significant demands on compliance and system resources. For example, service providers are in the process of complying with new DOL rules regarding vendor to plan sponsor fee disclosure, complying with new DOL rules regarding disclosure of plan fees from plan sponsors to plan participants (the burden of which will be borne by plan intermediaries), complying with new DOL annual retirement plan informational and fee reporting on Form 5500, modifying systems and complying with new legislation that allows certain plan participants to convert their accounts to Roth accounts inside a 401(k) plan, among other compliance related initiatives. Additionally, service providers have also had to evaluate and react to numerous pending rules and regulations that could require additional significant compliance efforts. These include, for example, pending SEC target date fund rules, proposed DOL changes in the definition of "fiduciary" under the Employee Retirement Income Security Act ("ERISA"), pending retirement plan participant investment advice regulations, and DOL, Department of Treasury and U.S. Congress initiatives with respect to lifetime income products in retirement plans. All of these changes are impacting retirement plan service providers and their resources today. The vast majority are simply unwilling to undertake upgrading their systems to comply with the Proposed Rule, at costs that they believe far exceed the SEC's estimates.

Given that the vast majority, if not all, of retirement plan record keepers will not upgrade their systems if the Proposed Rule is finalized as written, all service providers (including brokers) who currently receive more than a total of 25 basis points in payments under a fund's 12b-1 program will be forced to restructure their compensation arrangements with the mutual funds they make available in order to avoid taking pay cuts and to keep offering mutual funds to retirement plans. Retirement plan intermediaries will also have to renegotiate their compensation arrangements with their retirement plan customers and restructure the way they make investment options available to them (e.g., unitize the underlying funds and include wrap charges). The wrap charges may be for additional distribution fees or for record keeping and administrative services.

F. Impact on Plan Sponsors and Participants - We are concerned that the Proposed Rule and the response that we expect among record keepers will have unintended consequences that are inconsistent with the SEC's stated objectives for making these rule changes. Additionally, the Proposed Rule will have a negative impact on retirement plans and participants, with little or no benefit. The wide spread changes in the classes of shares that must be used and that will be included in plans, and the ongoing reporting of fund performance will confuse participants. Participants will generally not be able to unilaterally reduce the fees and expenses they pay in connection with plan investments because they can only use the funds made available by the service provider that are selected by the plan sponsor. The costs associated with saving for retirement through mutual funds will go up for many participants because the costs of complying with the rules will be significant and will ultimately be passed on to the participants. Worse still, some plans, particularly smaller employer plans with relatively low account balances, will not have mutual funds available to them as investment options.

As noted above, retirement plan service providers (including record keepers and brokers) will be forced to restructure their compensation arrangements, including switching from offering shares to retirement plan participants at net asset value ("NAV") to wrapping the funds in unitized accounts. This may allow many service providers to preserve their current level of compensation for the service they provide but it will likely create confusion for participants and increase costs. The investment returns of the unitized accounts that will be used in a plan will be different from the underlying fund's official NAV returns. Participants will not be able to match their individual returns to those of the fund. This will create significant confusion and frustration among plan sponsors and participants at best, and may cause participants to make mistakes when comparing the performance of funds, resulting in poor investment decisions. Additionally, the wrap charges will be embedded and accrued on a daily basis inside the unitized account instead of the mutual fund. Although the wrap fees will be identified separately from the underlying fund fees, it is unlikely that doing so will increase participants' understanding of the various fees they pay to invest and save through a retirement plan. The costs associated with unitizing plan investment options, maintaining the unitized accounts, and accounting for, collecting and paying the wrap compensation will increase service provider costs, and ultimately be passed on to plan sponsors and participants. The increased costs associated with complying with the Proposed Rule will not yield meaningful benefits for plan participants but are likely to make it harder for them to understand investment performance.

G. Impact on Small Employers and Small Plans - The SPARK Institute is concerned that small employers with start-up and low account balance plans will be the most adversely affected by the Proposed Rule. Large plans with large account balances typically do not use fund share classes that pay more than 25 basis points in 12b-1 fees. When viewed on the basis of how much retirement plan money is invested in funds that pay

25 basis points or less in 12b-1 fees it may appear that the Proposed Rule will not affect many plans and participants. However, when viewed on the basis of the number of plans affected based on plan size, a more accurate conclusion is that a substantial majority of plans will be affected. According to the 2010 SPARK Marketplace Update, as of December 31, 2009, 354,000 out of 510,500 401(k) plans (approximately 69%) had less than one million dollars in plan assets. Another 135,600 401(k) plans (approximately 27%) had between one and ten million dollars in plan assets.[13] Based on this data and the information below, we believe that approximately between 70 and 85% of all 401(k) plans could be adversely affected by the Proposed Rule. The total assets in all 401(k) plans with 10 million dollars or less in plan assets was approximately $515 billion.[14]

Many of our members have informed us that it will be administratively impractical to restructure their compensation arrangements, billing and fee collection processes and procedures for certain small retirement plans. Our members have also informed us that, although theoretically possible, it will not be cost effective or practical to offer unitized accounts with mutual funds as the underlying investments with wrap fees to small plans.[15] Consequently, many small employer retirement plans will have to use other investment options that may not be subject to SEC jurisdiction and that could be more expensive for retirement plan participants (e.g., bank collective investment products and variable annuities).

Participants may also be exposed to market risk during the transition and potentially more financial harm. Some small employers may decide that the transition is not worth the effort and decide to terminate their plans in favor of the company owners saving through other means on their own. This would leave employees without an employer-sponsored plan and less attractive ways for them to save for retirement on their own.

H. Proposed Alternative Approach - In order to address these concerns and potential consequences, The SPARK Institute urges the SEC to modify the Proposed Rule to specifically allow mutual funds to charge up to 75 basis points under Rule 12b-2 on classes of shares that are restricted to investment by retirement plans only, provided that the amount charged under the share class or paid to a service provider under 12b-2 for sales and distribution services does not exceed 25 basis points, and provided further that if the share class charges more than 25 basis points under 12b-2, the fund either (1)

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[13] 2010 SPARK Marketplace Update, p. 10.

[14] Id.

[15] Many small plans do not use an institutional trustee and are instead self-trusteed by one or more company representatives. Unitization becomes more complicated when a plan is self-trusteed because the employer representatives cannot be the legal owners of shares that are otherwise held in the name of an institutional trustee (often an affiliate of the record keeper) in order to facilitate omnibus trading. Offering unitized accounts to small plans would require more parties to be involved in the process (e.g., an institutional custodian) which also adds costs.

discloses that the sales and distribution services portion of the 12b-2 fee does not exceed 25 basis points or (2) provides a specific breakdown between the sales and non-sales portions of the 12b-2 fee. This would provide flexibility for mutual funds to pay retirement plan service providers as much as 75 basis points for non-sales services, or to pay up to 25 basis points for sales services and 50 basis points for other services, without having to do lot tracking and share conversions. It would also allow many plan intermediaries to continue to preserve a reasonable level of compensation with respect to small plans without substantial disruption. For example, based on information provided to us by one of our members, the median size of plans that currently use their 75 basis points 12b-1 fee share class has $250,000 in total assets and 10 participants. The annual 12b-1 fee on the median size plan is $1,875 per year which is paid to a broker or brokerage firm. Under the Proposed Rule the gross compensation payable under 12b-2 would have to be cut to $625 per year, which would make continuing to service the plan economically non-viable. In another example, plans that currently use the company's 50 basis points 12b-1 fee share class have $750,000 in total assets and 15 participants. The annual 12b-1 fee on the median size plan is $3,750 per year that is paid to a broker or brokerage firm. Under the Proposed Rule, the gross compensation payable under 12b-2 would have to be cut to $1,875 per year, which would also make continuing to service the plan economically non-viable.

The SPARK Institute believes that our proposed modified approach is consistent with the SEC's objectives of increasing transparency of sales charges, limiting the amount that can be paid as distribution fees under 12b-2, limiting the potential disruption to the retirement plan community, while allowing mutual funds and plan service providers to continue to be paid adequately and efficiently for important services. Our recommended approach will also substantially avoid the potential disruption to all affected parties described throughout this letter.

III. Statements and Purchase Confirmations

The Proposed Rule imposes new transaction reporting and purchase confirmation requirements.[16] As noted throughout this comment letter, the vast majority, if not all, of retirement plan record keepers will not upgrade their systems to accommodate lot tracking. Therefore, it appears that the only change that may be required for retirement plans is to include certain language provided by the SEC in the preamble to the proposal, a modified version of which is restated below.

> You will pay marketing and service fees of x% for as long as you own the fund. In addition to marketing and service fees, you will also incur additional fees and expenses in connection with owning this mutual fund, as set forth in the fee table in the mutual fund prospectus; these typically will include management fees and other expenses. Such fees and expenses are generally paid from the assets of the

[16] Rule 10b-10.

mutual fund in which you are investing. Therefore, these costs are indirectly paid by you. [17]

In the preamble of the proposal, the SEC states that the purpose of this disclosure is to ensure that customers are aware of the uses of mutual fund assets to pay for distribution and other ongoing costs in connection with owning mutual funds. The Proposed Rule also makes corresponding changes to the alternative periodic reporting provisions of rule 10b-10(b), which, in part, permit quarterly reporting for transactions involving investment companies.[18] The preamble to the proposal points out further that rule 10b-10(b) permits the disclosure of transaction related information in periodic account statements rather than in confirmations for securities purchased or sold on a periodic basis through "investment company plans" such as retirement plans.[19]

As the SEC knows, the DOL has just completed two major rulemaking initiatives on the disclosure of plan fees and expenses. One of these initiatives establishes comprehensive and detailed requirements for retirement plan service providers to disclose all direct and indirect compensation, fees and expenses in connection with providing plan services (the "Service Provider Disclosure Rules").[20] The second initiative establishes comprehensive and detailed rules for plan administrators (i.e., generally the employer who offers the plan to its employees) to make detailed disclosures to plan participants of all of the fees and expenses they may pay in connection with their plan accounts (the "Participant Disclosure Rules").[21] Retirement plan service providers and plan sponsors are still in the process of working to understand these new requirements so that they can modify their systems, processes and procedures, and take other necessary steps in order to comply with the rules by their effective dates.[22]

Under the Service Provider Disclosure Rules, plan service providers are required to disclose to a responsible plan fiduciary, all mutual fund fees and expenses, as well as all direct and indirect compensation the service provider receives in connection with the mutual fund investment. The responsible plan fiduciary is typically responsible for selecting and monitoring the funds that are made available in the plan and is subject to strict fiduciary requirements under ERISA. Under the Participant Disclosure Rules, the plan administrator

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[17] See 75 Fed. Reg. 47083. The language has been modified to remove references to ongoing sales charges.

[18] See 75 Fed. Reg. 47083-4.

[19] See 75 Fed. Reg. 47084, fn. 231.

[20] See Reasonable Contract or Arrangement Under Section 408(b)(2) - Fee Disclosure; Interim Final Rule, 75 Fed. Reg. 41600.

[21] See Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans; Final Rule, 75 Fed. Reg. 64910.

[22] The Service Disclosure Rules require compliance for all existing service arrangements by July 16, 2011. The Participant Disclosure Rules are effective for most plans as of January 1, 2012.

(i.e., as noted above, typically the employer) is responsible for providing participants with detailed information about their investment options and the related fees and expenses generally before the participant invests through the plan, and must also provide quarterly participant statements. These statements will include detailed information about mutual fund fees and expenses that the DOL has determined is critical for plan participants. The DOL's rules also take into account a broad range of different investment vehicles and alternatives that are frequently included in retirement plans.

The SPARK Institute is concerned that mutual fund companies, retirement plan service providers and plan sponsors will be faced with complying with multiple sets of rules from different regulators that are either duplicative and add extra costs at best, or that are inconsistent and potentially confusing, at worst. A significant amount of time, energy and resources have been devoted to fee disclosure issues in retirement plans over the last three years by regulators, legislators, service providers, industry professionals, and trade associations representing all possible interested parties. The DOL's recently released rules are the end product of a long and complicated process. Therefore, we urge the SEC to allow the DOL fee disclosure rules to take precedence over the proposed statements and purchase confirmation provisions as they might otherwise apply to retirement plan investments in mutual funds.[23] We request that the SEC include a comprehensive exemption to the statement and confirmation provisions in the Proposed Rule with respect to retirement plan investments.

IV. Compliance Period

The SEC has stated that it expects to provide a compliance period of at least 18 months after the effective date for funds to comply with the Proposed Rules.[24] It is our understanding that if the Proposed Rule is finalized as currently written, mutual funds with 12b-1 fees in excess of 25 basis points will be able to use the compliance period to, among other things, recharacterize a portion of a fund's 12b-1 fees in order to comply with rule 12b-2 without the necessity of converting shares to another class. Based on information provided to us by our mutual fund family members, we are concerned that 18 months will not be enough time for all fund companies to complete an orderly recharacterization of their compensation, to amend their fund-related documents, and renegotiate their agreements with retirement plan intermediaries. Even if 18 months is enough time for the mutual fund companies to do what they are required to do to comply with the new rules, we are concerned that by the time the fund companies are ready to work with retirement plan intermediaries and renegotiate their agreements as will be required, retirement plan intermediaries will not have enough time to do what they must do to comply and facilitate an orderly transition for their customers.

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[23] We note that we have not responded to the specific questions included by the SEC in the preamble to the proposal on this topic because we do not believe that such rules should apply to retirement plan investments. Responses to many of those questions would require providing information, history and details about how these issues have been debated for years in the retirement plan industry and are beyond the reasonable scope of this comment letter.

[24] 75 Fed. Reg. 47101.

As previously stated, our members do not intend to upgrade their systems to support funds with ongoing sales charges. The Proposed Rule prohibits new investments in share classes with 12b-1 fees after the compliance date, which technically would require a retirement plan to maintain balances in two different classes of the same fund, i.e., the grandfathered shares and a 12b-2 compliant replacement class of shares (the "Replacement Fund"). However, The SPARK Institute believes that the combined effect of certain ERISA fiduciary obligations imposed on plan fiduciaries, the administrative burden of maintaining two share classes of the same fund, and the potential for participant confusion and processing errors, will cause most plan sponsors and record keepers to transition shares to 12b-2 compliant shares as quickly as possible. Our reasoning for this conclusion is summarized below.

The Replacement Fund that retirement plans will have to include after the effective date of the Proposed Rule may be either (1) a lower cost class of shares of the same mutual fund or (2) a unitized fund account that includes the mutual fund as the underlying investment with wrap charges deducted in order to preserve service provider compensation. If the Replacement Fund is a lower cost class of shares, the plan sponsor will likely demand that all monies held in the grandfathered shares be transferred to the Replacement Fund immediately in order reduce participant costs. Additionally, the plan sponsor's representative(s) responsible for fiduciary investment decisions may insist that the existing balances in the old class of shares be transferred as quickly as possible in order to satisfy potential fiduciary responsibility issues under ERISA.

If the Replacement Fund is a unitized fund account with wrap charges that preserve the service provider's fees, the service provider and plan sponsor are likely to conclude that including the grandfathered fund and the Replacement Fund at the same time may not be desirable. Maintaining both share classes for an extended period of time creates the potential for participant confusion, and will result in increased administrative complexity and costs. Accordingly, The SPARK Institute believes that record keepers and plan sponsors will be motivated to transition to the 12b-2 compliant shares as quickly as possible and avoid maintaining two share classes, regardless of the type of the Replacement Fund they use.

The conversion or transition to the 12b-2 compliant funds will be a significant undertaking for retirement plan intermediaries that will require them to coordinate with the fund companies and their plan sponsor customers, renegotiate all of the plan service agreements, renegotiate all of their mutual fund servicing agreements, modify their systems, processes and procedures,[25] and notify plan participant investors about the changes. Additionally, given the work that mutual fund companies must do during the compliance period before they are ready to work with the retirement plan intermediaries that use their funds, and the practical limitations on the intermediaries' ability to accomplish a significant number of transitions for all of their affected plans at once, it is unlikely that retirement plan

[25] Retirement plan intermediaries will likely have to make certain changes to their systems, processes and procedures even if they do not upgrade their systems to accommodate funds with ongoing sales charges.

intermediaries will be able to comply with the new rules within 18 months of the effective date.

In order to address these concerns and provide adequate time for the affected mutual funds and retirement plan intermediaries to comply with the Proposed Rule if it is finalized in its current form, we urge the SEC to consider a compliance date of 30 months after the effective date.

V. <u>Additional Rule Changes Regarding Revenue Sharing</u>

In the preamble to the Proposed Rule, the SEC states that it is considering further rule amendments related to revenue sharing payments made by fund advisers to service providers.[26] As noted previously, compliance with the Proposed Rule will require retirement plan intermediaries and the mutual funds that they offer to renegotiate and restructure their services and compensation arrangements. Additionally, plan intermediaries will also have to modify their plan service contracts, potentially renegotiate their compensation arrangements, and modify their fee disclosures as may be required by the DOL under ERISA. These changes will potentially affect hundreds of thousands of contracts and will require substantial time and significant resources. We recognize that if the Proposed Rule is adopted, such efforts will have to be undertaken. However, we are concerned that service providers, mutual funds and plan sponsors, in restructuring their contracts and agreements, may leverage revenue sharing or other payment options, without knowing whether future SEC rulemaking initiatives are forthcoming and will require such arrangements to be changed again. Such changes could be needed if future rules adopted by the SEC limit the availability of revenue sharing payments by fund advisers. This potential duplication of effort and its related costs should be eliminated to the greatest extent possible by the SEC issuing comprehensive rules related to fees and compensation at the same time. The SPARK Institute urges the SEC to postpone the effective date of the Proposed Rule until such time that it either determines that it does not anticipate proposing rules regarding revenue sharing or until it is in a position to propose any of such rules together with the proposed 12b-1 rule changes.

We thank you for the opportunity to comment on this very important effort. Should you have additional questions or need additional information regarding this comment, please do not hesitate to contact us at (704) 987-0533.

Respectfully,

Larry H. Goldbrum
General Counsel

[26] 75 Fed. Reg. 47068-9, fn. 65.