November 12, 2015

Douglas J. Scheidt
Associate Director and Chief Counsel
Division of Investment Management
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: **Applicability of Rule 482 under the Securities Act of 1933 to Non-ERISA-Covered Plans**

Dear Mr. Scheidt:

We are writing to seek certain clarifications with respect to the staff no-action letter issued to the American Retirement Association ("ARA").[1] The ARA Letter extended staff no-action relief previously granted to the U.S. Department of Labor ("DOL") [2] to certain information furnished to plan participants in certain retirement savings plans under section 403(b) of the Internal Revenue Code of 1986 (the "Code") that are not subject to the Employee Retirement Income Security Act of 1974 ("ERISA") ("Non-ERISA 403(b) Plans"). The DOL Letter provided relief under Rule 482 under the Securities Act of 1933 ("Securities Act") with respect to disclosures required by DOL pursuant to Rule 404a-5(d) ("DOL Rule")[3]

[1] *American Retirement Association*, SEC Staff No-Action Letter (Feb. 18, 2015) ("ARA Letter" or "Letter") available at http://www.sec.gov/divisions/investment/noaction/2015/american-retirement-sssociation-021815-482.htm.

[2] *Department of Labor*, SEC Staff No-Action Letter (Oct. 26, 2011) ("DOL Letter") available at http://www.sec.gov/divisions/investment/noaction/2011/dol102611-482.htm.

[3] *See* Rule 404a-5 under ERISA, 29 CFR §2550.404a-5.

under ERISA.[4] In this letter, the Investment Company Institute,[5] The SPARK Institute,[6] The American Council of Life Insurers,[7] and The Committee of Annuity Insurers[8] request that you clarify certain aspects of the ARA Letter. Providing these clarifications would be helpful to allow retirement savings plans that are not subject to ERISA ("Non-ERISA-Covered Plans") to utilize the relief provided in the ARA Letter, as we believe was intended.

Investment Vendors in Non-ERISA-Covered Plans

As you know, the DOL Rule applies only with respect to participant-directed individual account retirement plans covered by ERISA (*e.g.*, most private sector 401(k) plans and many private sector 403(b)

[4] More specifically, in the DOL Letter, you agreed to treat specified investment-related information provided by a plan administrator, or a person designated by a plan administrator to act on its behalf, to participants and beneficiaries in participant-directed individual account plans, that is required by and complies with the disclosure requirements set forth in the DOL Rule ("DOL Required Investment Information"), as if it were a communication that satisfies the requirements of Rule 482. The DOL Rule is designed to ensure that plan participants are provided with sufficient information regarding the plan and designated investment alternatives, in a comparative format, to make informed decisions when managing their accounts.

We note that the "DOL Rule" (as such term is defined above) specifies that the disclosures must be made to plan participants and beneficiaries, including all employees that are eligible to participate under the terms of the plan, without regard to whether the participant has actually become enrolled in the plan. As used herein, the term "plan participant" refers to the same group of individuals, participants, beneficiaries, and all employees that are eligible to participate under the terms of the plan. *Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans; Final Rule* 75 Fed. Reg. 64912 (Oct. 20, 2010).

[5] The Investment Company Institute is a leading, global association of regulated funds, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's U.S. fund members manage total assets of $17.1 trillion and serve more than 90 million U.S. shareholders.

[6] 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. Through the combined expertise of its member companies, the Institute provides research, education, testimony and comments on pending legislative and regulatory issues to members of Congress and relevant government agency officials. Collectively, its members serve approximately 70 million participants in 401(k) and other defined contribution plans.

[7] The American Council of Life Insurers (ACLI) is a Washington, D.C.-based trade association with 284 member companies operating in the United States and abroad. ACLI advocates in federal, state, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing more than 90 percent of industry assets and premiums.

[8] The Committee of Annuity Insurers was formed in 1982 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of securities, banking, and tax policies regarding annuities. For three decades, the Committee has played a prominent role in shaping government and regulatory policies with respect to annuities, working with and advocating before the SEC, CFTC, FINRA, IRS, Treasury, Department of Labor, as well as the NAIC and relevant Congressional committees. Today the Committee is a coalition of many of the largest and most prominent issuers of annuity contracts. The Committee's member companies represent more than 80% of the annuity business in the United States.

plans) ("ERISA Plans"). However, Non-ERISA-Covered Plans, including plans that are recognized and established by certain tax-exempt organizations and governmental employers under different sections of the Code (*e.g.*, many church plans, certain 403(b) plans, and 457(b) plans),[9] are similar to ERISA Plans, but they are not subject to the DOL Rule.[10] As established in the ARA Letter, participants in Non-ERISA-Covered Plans would benefit from the DOL Required Investment Information about Investment Options available under their plans. Participants in Non-ERISA-Covered Plans are similarly situated to participants in ERISA-covered 401(k) plans, for example, because they make salary deferrals into their plan accounts and must direct how their accounts are invested among the different investment options available under the plan, typically annuity contracts, open-end management investment companies ("funds") registered under the Investment Company Act of 1940, or other investment alternatives specifically permitted under applicable law.

The factual information provided by ARA and referenced in the ARA Letter focus on Non-ERISA 403(b) Plans, which generally permit investment only in annuity contracts and funds. Accordingly, the ARA Letter defines the terms "Investment Vendor" and "Investment Option" narrowly to reflect the limited options available in 403(b) plans. But the Letter also states that the views expressed:

> extend to retirement savings plans that similarly are not subject to ERISA and that are governmental 457(b) plans, governmental 401(a) plans, 415(m) plans, church 401(a) plans, non-governmental 457(b) plans, and 409A plans or 457(f) plans of governmental or tax-exempt entities . . . ("Other Non-ERISA Plans").

Because these Other Non-ERISA Plans may make other investment alternatives available to plan participants beyond those permitted under 403(b) plans, the ARA Letter specifies that the term "Investment Option" includes any such other lawful investment alternative, provided that it meets the definition of "designated investment alternative" in the DOL Rule. The ARA Letter, however, does not similarly expand the definition of "Investment Vendor" to include other types of service providers (such as broker-dealers, banks, or other entities) selected by the employer and with which employers offering Other Non-ERISA Plans may enter into agreements to perform necessary services, including making available Investment Options to plan participants, providing administrative services, and supporting compliance requirements. We believe it is important to provide legal certainty, through a clarification to the ARA letter, that these other types of service providers qualify as Investment Vendors for purposes of Other Non-ERISA Plans.

We also believe it would be helpful to clarify certain other aspects of the first and third conditions of the ARA Letter to ensure a clear understanding of its intended scope.

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[9] These include non-electing 401(a) church plans, 403(b) plans maintained by tax-exempt organizations that are intended to fit within the DOL's safe harbor exemption from ERISA pursuant to 29 C.F.R. § 2510.3-2(f), and 403(b) plans as defined in Code §3121(w)(3)(A) which are exempt from ERISA pursuant to Section 4(b) of ERISA.

[10] Certain governmental defined contribution plans, although they are not subject to ERISA, may be subject to fiduciary requirements under state law or common law, while others might voluntarily adopt fiduciary standards, including ERISA-based fiduciary standards, for their plans. In either case they are not legally obligated under ERISA generally, and thus are not obligated under ERISA to follow the DOL Rule, making them unable to rely on the DOL Letter and the relief it provides from Rule 482.

First Condition: Written Agreement

> The first condition in the ARA Letter provides in relevant part that:
>
> Each Investment Vendor will provide the DOL Required Investment Information to participants in the Non-ERISA 403(b) Plan pursuant to a *written agreement* with the employer (or its designee) that requires the Investment Vendor to provide the DOL Required Investment Information for each Investment Option that the Investment Vendor offers under the Non-ERISA 403(b) Plan and also, to the extent available to the Investment Vendor, all fee and expense information as specified in Rules 404a-5(c)(2)(i)(A) and 404a-5(c)(3)(i)(A) under ERISA (together, the "Information"). (Emphasis added.)

We request clarification that the term "written agreement" may be read to include any written instruction or directive from the employer (or its designee) accepted by the Investment Vendor, including an instruction or directive communicated electronically (*e.g.*, via e-mail) by the employer (or its designee) to the Investment Vendor and agreed to, also electronically, by the Investment Vendor. We request the same clarification with respect to the "written notification" referenced in the Letter that the Investment Vendor will send to the employer (or its designee) stating that the Investment Vendor is complying with the condition as a term of an existing written agreement.[11] The requested clarifications would address common business practices used today, including the use of e-mail.

The first condition also provides, in relevant part, that "[e]ach *written agreement* will specify a date on or before which the Investment Vendor will provide the Information to all current participants in the Non-ERISA 403(b) Plan." (Emphasis added.) We request that you clarify that the requirement to "specify a date" may be satisfied by the Investment Vendor stating that it will provide the information to existing participants "as quickly as administratively possible after the date of the agreement."[12] It is not common for agreements to specify an exact date for providing the initial round of disclosures to existing participants because the actual date on which the disclosures are made can depend on numerous factors outside of the Investment Vendor's control, including, among other things, the date on which the Investment Vendor receives the participant contact information. The requested clarification recognizes this while still assuring that existing participants receive important information in a timely manner.

The first condition also provides by footnote that "[i]nformation provided by an Investment Vendor as DOL Required Investment Information shall not include information about an Investment Option prior to the effective date of the registration statement for that Investment Option." We request clarification that this statement applies only with respect to an Investment Option for which a registration statement has been or will be filed.

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[11] Footnote 6 of the ARA Letter provides that "Investment Vendors may satisfy this "written agreement" condition by providing written notice to the employer (or its designee) on or after the date of this letter that the Investment Vendor is complying with this condition as a term of an existing written agreement."

[12] The Investment Vendor could use the language suggested above or other similar language conveying the same intent.

Third Condition: Furnishing information to new participants prior to initial investment

The third condition in the ARA Letter provides:

> The Information will be furnished to (i) new participants in the Non-ERISA 403(b) Plan *prior to* their initial investment, and (ii) each participant at least annually in accordance with the timing requirements in the DOL Rule. (Emphasis added.)

We request that you clarify that "prior to" means "*on or before* the date on which a participant can first direct his or her investments," (emphasis added) as permitted under the DOL Rule (*see* Rule 404a-5(d)(1)). This is important to reflect situations where participants are immediately eligible to participate and direct investments in the plan upon hiring, in which case it would be impossible/impractical to provide the information earlier than the date on which the participant can direct his or her investments.

Also with respect to the third condition—specifically, furnishing the Information to each participant "at least annually"—we note that DOL recently amended the definition of "at least annually" under the DOL Rule to mean at least once in any 14-month period.[13] Therefore, we request that you clarify that Investment Vendors may rely on the ARA Letter provided they provide the Information in accordance with DOL timing requirements, including the new guidance.

* * *

We look forward to discussing our request with you at your earliest convenience. Please feel free to contact the undersigned if you have any questions or would like additional information.

Sincerely,

/s/ Dorothy Donohue

Dorothy Donohue
Deputy General Counsel
Investment Company Institute

/s/ Tim Rouse

Tim Rouse
Executive Director
The SPARK Institute, Inc.

/s/ James Szostek

James Szostek
Vice President, Taxes & Retirement Security
American Council of Life Insurers

/s/ Clifford Kirsch

Clifford Kirsch, Partner
Sutherland Asbill & Brennan LLP
On behalf of the Committee of Annuity Insurers

[13] *Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans—Timing of Annual Disclosure; Direct Final Rule* 80 Fed. Reg. 14301 (Mar. 19, 2015), amending 29 CFR §2550.404a-5(h)(1).

cc: Nadya Roytblat, Assistant Chief Counsel, SEC
Timothy D. Hauser, Deputy Assistant Secretary, DOL