The SPARK Institute, Inc.
SHAPING AMERICA'S RETIREMENT

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

RE: RIN1210–AB90, Electronic Disclosure by Employee Benefit Plans

Dear Sir or Madam:

The SPARK Institute Inc. strongly supports the Department of Labor's (the "Department's") proposed electronic delivery safe harbor for retirement plan notices and disclosures. The SPARK Institute shares the Department's belief that the proposed safe harbor will make retirement plan notices and disclosures more effective, more useful, and less costly for retirement savers. Ultimately, these benefits will improve outcomes for millions of Americans who work hard to save for a financially secure retirement. As further detailed in this letter, however, we also believe that the Department can and should make modifications to its proposal to further reduce costs and improve the effectiveness of disclosures generally. Accordingly, we strongly encourage the Department to adopt our recommendations as part of any final regulations.

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.

In addition to the comments below, we are also attaching an updated study examining the many benefits that would result from the expanded use of electronic delivery. Quantria Strategies prepared this new 2019 study for the SPARK Institute to update the projected cost savings that would result from the expanded use of electronic delivery and to explore a wide range of other benefits associated with the increased use of electronic communications. The study's findings, which are briefly summarized below, draw upon empirical data provided by our members and clearly demonstrate how the increased use of electronic delivery can significantly improve the retirement readiness of American workers.

I. ELECTRONIC DELIVERY MAKES DISCLOSURES MORE EFFECTIVE, LESS COSTLY, AND IMPROVES PARTICIPANT OUTCOMES

While, as discussed below, our letter contains some very important suggestions for clarifications and improvements to the proposal in later sections, we felt it critical to begin by explaining why, at a high level, the Department's efforts in this area will improve outcomes while ensuring important participant protections.

Electronic Delivery Makes Disclosures More Effective. The SPARK Institute has long supported legislative and regulatory efforts to allow plan administrators to make electronic delivery the default delivery method for retirement plan notices and disclosures, while also preserving the option to receive paper without any additional direct charge. Allowing plan sponsors to use default electronic delivery would help overcome the inertia that currently results in many plan participants remaining in default paper delivery despite their comfort with electronic delivery.[1] The SPARK Institute believes that electronic delivery makes disclosures more effective by providing participants constant real-time access to information about their retirement benefits and other online tools that can assist with retirement planning. Electronic delivery also allows retirement savers to more easily access their benefit statements and search for relevant information. In addition, electronic delivery enables plan sponsors to improve communications with plan participants by linking to financial wellness opportunities and educational materials.

Electronic Delivery Makes Disclosure Less Costly for Retirement Savers. Electronic delivery also creates significant cost savings. According to a 2019 study prepared for the SPARK Institute by Quantria Strategies, default electronic delivery reduces printing, mailing, and storage costs for plan administrators. These reduced costs will significantly benefit individual retirement savers. In fact, according to the 2019 Quantria study, an estimated $250 to $450 million in savings will accrue directly to plan participants annually if plan administrators are permitted to deliver required notices and disclosures electronically by default.[2] The Quantria study also calculated that participants could increase their retirement savings by nine percent during the accumulation phase due to an increase in their net investment returns resulting from reduced costs from electronic delivery of plan documents.[3]

Electronic Delivery Improves Participant Outcomes. Not only does electronic delivery make disclosure more effective and less costly, according to empirical data collected from our members, electronic delivery can also meaningfully improve participant outcomes in terms of savings rates and participant engagement. These improvements are reflected in the outcomes for

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[1] 2015 Telephone Survey Conducted by Greenwald & Associates for the SPARK Institute (finding that 84 percent of plan participants think it is acceptable to make electronic delivery the default option (with the option to opt-out at no direct cost to the participant)).

[2] Quantria Strategies, *Default Electronic Delivery Works: Evidence of Improved Participant Outcomes from Electronic Delivery of Retirement Plan Documents* (November 2019), at 2.

[3] *Id.*

all participant populations, regardless of age and regardless of whether documents are delivered electronically to new or existing participants.

- *Savings Rates.* According to the 2019 Quantria study, the average deferral rates for plan participants with electronic delivery was at least 25 percent higher than for those not using electronic delivery.[4] Although this higher deferral rate may, in part, be attributed to the fact that individuals who affirmatively elect to receive electronic disclosures are also more likely to be engaged in their personal retirement planning, the Quantria study states that, even accounting for those circumstances, higher deferral rates are tied to electronic delivery because it is "likely that electronic communication provides a stimulus or a nudge to encourage participants" to view their accounts and make necessary changes to those accounts.[5] This is evidenced by the fact that, even among populations of participants who received disclosures electronically, participants with four or more electronic communications increased deferral rates at higher rates than those that were not digitally engaged.[6]

- *Participant Engagement.* The Quantria study also presents empirical evidence indicating that participants are more likely to access their account through a provider website after switching to the electronic delivery of their statements.[7] After accessing their accounts online, participants are able to engage with various online tools that help participants understand the adequacy of their retirement savings and their overall financial wellness. Again, the Quantria study attributes this improvement to the fact that electronic delivery enables participants to receive electronic nudges to view their accounts.

- *Missing Participants.* Electronic delivery allows for uninterrupted notice of and access to retirement plan documents for both active and separated participants who move their physical addresses without informing the plan administrator. Under the proposal, notifications can be delivered to a personal electronic address, which is more likely to remain a permanent address than a physical mailing address, thereby avoiding missing participant issues.

II. The Department's Proposal Strikes an Appropriate Balance

The SPARK Institute commends the Department for proposing an electronic delivery framework that strikes an appropriate balance among what can be, at times, competing policy goals – i.e., improving communications for participants who are comfortable receiving documents electronically and preserving the right to paper for participants who prefer traditional delivery methods.

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[4] *Id.* at 26.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 27.

As stated above, the expanded use of electronic delivery will make retirement plan disclosures more effective and improve participant outcomes for participants who are comfortable receiving communications electronically. Moreover, consistent with the President's order to reduce the costs and burdens associated with retirement plan notices and disclosures, the Department's proposal will also create significant cost savings for retirement plan participants.

Also consistent with the directives from other Presidential orders to limit new regulatory costs, the SPARK Institute is pleased with the flexibility extended to plan administrators through the proposed safe harbor. By designing a safe harbor that is completely voluntary and allowing plan administrators to continue relying on the Department's 2002 electronic delivery regulations, the Department's proposal offers plan administrators flexibility in a way that will not require additional burdens or costs for plans to comply with the existing regulations. In a similar regard, the SPARK Institute commends the Department for issuing a proposal that will allow plan administrators to apply the new safe harbor exclusively to employees that are not covered by the 2002 regulations, thus avoiding the challenge of having to comply with the proposed safe harbor's conditions for employees who provide affirmative consent or that are "wired at work," in accordance with existing rules. This is a critical feature of the Department's proposed safe harbor and we strongly encourage the Department to preserve this limited application of the new safe harbor conditions in any final regulations.

We also understand from our members that participants who register for and regularly engage through their plan's secure web portal are less susceptible to fraud. Plans and service providers have developed multi-factor authentication procedures to prevent fraud through these online systems, in addition to the anti-fraud measures that are employed by our members to prevent fraud through more traditional communication channels, like call centers and mail. By fostering the electronic delivery of notices and disclosures required by the Employee Retirement Income Security Act of 1974 ("ERISA"), the SPARK Institute believes that the Department's proposed safe harbor will increase online engagement by retirement plan participants, thereby extending additional anti-fraud protections to those participants.

We believe the proposal appropriately facilitates electronic delivery, while ensuring important protections for plan participants and beneficiaries. Most notably, for participants who prefer to receive retirement-related disclosures in paper, the proposed safe harbor creates a right for participants to request documents in paper at any time without any charge and requires plan administrators to notify participants of this right. For the benefit of these participants, the proposed safe harbor also requires plan administrators to send an initial paper notice, which is not required under the Department's existing electronic delivery regulations, alerting participants to the fact that: (a) documents will be furnished electronically; (b) the individual has a right to request paper versions of the documents; and (c) an explanation of how the individual can exercise that right. The SPARK Institute has long-supported these types of protections, especially the right to receive paper at no additional direct charge.

Beyond the initial paper notice and right to request paper, the SPARK Institute also supports other proposed conditions that are intended to promote the likelihood that participants and beneficiaries actually receive notices and disclosures, and the conditions that will ensure participants can readily access their documents. Specifically, the SPARK Institute supports the proposed condition that would require plan administrators to have systems that alert the administrator of invalid or inoperable electronic addresses. This condition will provide current and former employees with an important level of protection. Further, the SPARK Institute supports the condition that will require plan administrators to keep documents posted online until it is appropriate to remove them. The SPARK Institute agrees that these requirements are common sense protections, although, as noted below, we have some suggestions for clarifications and improvements. Also, in this regard, we encourage the Department to provide administrators the flexibility to define systems and procedures that work best for their plans and participants.

Finally, the SPARK Institute commends the Department for recognizing the changing nature of communication and increased internet access since the Department last published regulations on the use of electronic media in 2002. More than ever, Americans have access to, and are comfortable, conducting financial business online. The expansion of broadband internet and the proliferation of smartphones, in particular, have created a landscape that makes it appropriate for the Department to foster default electronic delivery. In this regard, the SPARK Institute appreciates how the preamble to the Department's proposed safe harbor expressly recognizes the important technological developments that have been summarized in multiple reports commissioned by SPARK, including the fact that 99 percent of retirement plan participants have internet access at home or work.[8]

III. THE DEPARTMENT'S PROPOSED SAFE HARBOR

Notwithstanding the SPARK Institute's strong support for the Department's proposal, we have also identified areas where the proposal's solid foundation can be improved and areas where additional clarification would help our members implement the Department's final rules. These recommendations and suggestions are discussed in more detail below. We believe that, if these recommendations and suggestions are adopted, the Department can issue regulations that further reduce costs, increase efficiencies, and improve participant outcomes.

A. Allow Paper Notices of Internet Availability

As an initial matter, before discussing our more technical comments on the proposal, we want to first urge the Department to reconsider whether it would be appropriate to expand the safe harbor to allow plan administrators to furnish the notice of internet availability ("NOIA") through the mail in paper form. Because the proposed safe harbor is conditioned on a plan administrator obtaining and sending notices to a participant's electronic address – whether email address or smartphone number – it does not envision a plan administrator that posts documents online and sends a NOIA to a participant in paper through the mail. The SPARK Institute urges the Department to reconsider this limitation and finalize safe harbor rules that permit default

[8] 2015 Telephone Survey Conducted by Greenwald & Associates for the SPARK Institute.

electronic delivery for individuals who receive a NOIA by paper through the mail, provided the safe harbor's otherwise applicable conditions are satisfied.[9]

The Department previously endorsed this delivery method for pension benefit statements through Field Assistance Bulletin ("FAB") 2006-03 and we believe it would also be consistent with the electronic delivery methods permitted under regulations published by the Treasury Department and Internal Revenue Service ("IRS"). Further, the SPARK Institute believes that a paper NOIA that alerts participants of their rights to request paper documents protects participants who are not comfortable receiving, or do not wish to receive, retirement plan documents electronically. As explained below, this option will be particularly important if the Department eliminates any of the alternative delivery methods previously endorsed by the Department, like the methods described in FAB 2006-03 and FAB 2008-03. <u>However, as noted in detail in Section V, below, we recommend that the Department preserve FAB 2006-03.</u>

B. <u>Notice and Access Framework</u>

Under the proposed "notice and access" framework, the administrator of a pension plan would be treated as satisfying its obligation to furnish covered documents to covered individuals if the administrator: (1) sends an initial paper notice of electronic delivery to covered individuals; (2) makes the covered documents available online; and (3) sends a NOIA to a participant's electronic address each time a covered document is posted online, subject to an exception for consolidating NOIAs. The following comments summarize the issues we have identified with respect to this proposed framework.

- *Welfare Plans.* Many of SPARK's members administer health and welfare benefit plans and we understand that representatives of plan sponsors are seeking to have the Department extend its proposed safe harbor to health and welfare plans. The SPARK Institute strongly supports those comments and encourages the Department to take them seriously. If, however, the Department needs additional time to consider delivery methods for health and welfare plans, the SPARK Institute encourages the Department to finalize its proposed safe harbor for retirement plans without delay and then separately propose rules addressing health and welfare plans. One member suggested that, if documents with respect to welfare plans for which the Department shares jurisdiction with other agencies (such as for group health plans) require additional study, the Department could incorporate other welfare plans into the final regulation while the various agencies work to resolve any issues relating to those documents. Regardless, the SPARK Institute does not support delaying a final regulation for resolution of such issues.

- *Initial Paper Notice.* In order to rely on the proposed safe harbor, a plan administrator must furnish an initial paper notice to each covered individual

[9] To achieve this result, the Department would have to expand the definition of "covered individual" to include individuals who receive a NOIA through traditional mail and permit plan administrators to furnish a NOIA through traditional mail.

indicating: (a) documents will be furnished electronically; (b) the individual has a right to request paper versions of the documents; and (c) an explanation of how the individual can exercise that right.

The SPARK Institute recommends that the Department create and publish a model for this initial paper notice that plan administrators can use to satisfy their initial obligation. However, any such model should be completely optional for plan administrators and the Department should not delay a final rule to develop this model. Unlike other notifications contemplated by the proposed safe harbor, the initial paper notice generally will not vary based on the circumstances of individual plans or participants, and therefore, it lends itself to an optional model from the Department.

The SPARK Institute also asks the Department to consider whether an initial paper notice should be necessary for any participants who have already affirmatively consented to receive documents electronically in accordance with the Department's 2002 electronic delivery regulations. For participants who have already affirmatively consented to electronic delivery, we do not think the one-time paper notice should be necessary.

- *Notice of Internet Availability.* The proposal anticipates that the NOIA will be sent as a single electronic communication containing certain elements. The SPARK Institute commends the Department for designing a safe harbor that will permit notices to be delivered to a smartphone number, in addition to an email address. This broad approach is consistent with the Department's goal of technical neutrality and we strongly encourage the Department to preserve delivery options designed around smartphone numbers in its final regulations.

  Nevertheless, we also encourage the Department to look forward and permit the use of additional technologies to send the NOIA in ways that we may not currently use or even anticipate using. The bipartisan Receiving Electronic Statements to Improve Retiree Earnings ("RETIRE") Act, which the SPARK Institute has long supported, has an elegant solution to accommodate future technological advancements.[10] Specially, the RETIRE Act would permit certain documents to be delivered to an electronic address or by "other electronic means reasonably calculated to ensure actual receipt of the material by the participant." The SPARK Institute encourages the Department to adopt language that is identical, or similar, to the quoted language to describe the types of media that can be used to deliver a NOIA to participants. This type of language would promote technical neutrality and prevent the Department from having to undertake a future rulemaking project should the current means of electronic delivery change due to technological advancement.

  To further make the proposal as future proof as possible, we also recommend that the Department allow the NOIA requirement to be satisfied, in certain circumstances, by

[10] The RETIRE Act was introduced as H.R. 4610 and S. 3795 in the 115th Congress.

sending a simplified version of the NOIA along with a link to the full NOIA. This layered approach to the NOIA is intended to promote technical neutrality for media that cannot accommodate every required element of the NOIA. For example, if a text message or other medium cannot include every required element of the NOIA because of character limitations, it would be helpful for the Department to clarify that a plan administrator can satisfy the safe harbor by sending a simplified version of the NOIA along with a link to the full NOIA.

The proposal asks whether a model NOIA would be useful to plan administrators. Our members have expressed mixed views on whether it would be helpful for the Department to publish a model NOIA. In a similar regard, some of our members believe it would be helpful for the Department to specifically offer standard descriptions of the documents that are identified in the NOIAs, as required by Proposed Labor Reg. § 2520.104b-31(d)(3)(iii). Like the models that may be created for the initial paper notice, if the Department chooses to make models available, they should be completely optional and should not delay the Department's publication of final regulations.

Finally, one of our members thought the Department should consider whether it would be appropriate for plan administrators, on an optional basis, to include information in a NOIA that is not described in Proposed Labor Reg. § 2520.104b-31(d)(3). For example, it could be beneficial to allow plan administrators to provide a brief description of any material changes that have been made to the documents for which a NOIA is being sent. This optional information could make it more likely that participants will take steps to access covered documents. In a similar regard, the Department could also permit, but not require, NOIAs to include links to websites that provide summaries of the key information included in each of the required disclosures.

- *Consolidated Notice of Internet Availability.* As an exception to the requirement to have a NOIA sent each time a covered document is posted online, the proposed safe harbor would permit a combined NOIA for a certain subset of seven common and recurring documents. The preamble to the proposed safe harbor asks whether the Department should, instead of the explicit list of seven documents, adopt a principle-based or categorical approach to the covered documents that are eligible for the safe harbor through a consolidated notice.

  The SPARK Institute believes that a set list of documents provides a firm guide for plan administrators on the covered documents that are most appropriate for a consolidated notice. In addition to this list, however, the SPARK Institute also encourages the Department to create a principles-based standard that would allow documents beyond the seven enumerated documents to satisfy the safe harbor through a consolidated notice. This principles-based approach would be particularly useful in the event that the Department creates any new disclosures that are not currently on the list but should be eligible for the consolidated NOIA. As a starting point, the

Department should consider providing that any notice or disclosure that must be furnished at least once a year, rather than upon the occurrence of a particular event, and does not require action by a covered individual by a particular deadline, would be eligible to be included in the once-a-year NOIA.

- *Participant-Level Fee Disclosures (404a-5).* The SPARK Institute also asks the Department to expand the list of disclosures that are eligible for the consolidated NOIA by expressly adding the plan-related information that must be disclosed in accordance with Labor Reg. § 2550.404a-5(c). Although, Proposed Labor Reg. § 2520.104b-31(i)(5) would permit the investment-related disclosures required by Labor Reg. § 2550.404a-5(d) to appear on the consolidated NOIA, it does not extend similar treatment to the plan-related disclosures. The SPARK Institute believes that the plan-related disclosures required by Labor Reg. § 2550.404a-5(c) should generally be subject to the same delivery requirements as the investment-related disclosures required by Labor Reg. § 2550.404a-5(d).

- *Internet Website.* The proposed safe harbor would require plan administrators to ensure the existence of an internet website at which a covered individual is able to access covered documents, subject to certain standards. The SPARK Institute requests clarification on two issues relevant to this website requirement.

  - First, the SPARK Institute requests clarification that a plan administrator will satisfy the website requirement if a document is made available through a mobile app that connects to the internet, as long as all of the other proposed website standards are satisfied. In a similar regard, we also request that the Department clarify the internet website requirement to account for potential technology shifts in the future. Specifically, we ask the Department to clarify that the internet website element of the proposed safe harbor can be satisfied through the use of an "internet website or other internet or electronic information repository to which access has been granted to the intended recipient."

  - Second, the SPARK Institute requests clarification on a plan administrator's obligation to establish and maintain a website for posting covered documents. As proposed, the safe harbor says that "[t]he administrator *must ensure* the existence of an internet website at which a covered individual is able to access covered documents (emphasis added)." SPARK requests that the Department modify this standard so that plan administrators are required to "*take measures reasonably calculated to ensure* the existence of an internet website at which a covered individual is able to access covered documents." This clarification would be consistent with the flexibility extended by the Department to the other technical standards specified in the proposed regulation. We appreciate the general flexibility offered in section (j) of the proposed regulations for "unforeseeable events or circumstances beyond the control of the administrator," but also believe additional clarification for the website condition would be helpful.

- *Online Document Postings.* According to the proposal, a covered document must remain available on a website until it is superseded by a subsequent version of the covered document. The preamble to the proposal asks whether a final rule would be clearer if a covered document must remain available online "until it is superseded by a subsequent version of the covered document *or, if applicable, until it ceases to have continued relevance* (emphasis added)." The SPARK Institute believes that the final regulations should, consistent with the Department's question, require a covered document to be available, "until it is superseded by a subsequent version of the covered document or, if applicable, until it ceases to have continued relevance."

  The SPARK Institute also strongly recommends that the Department make clear that the safe harbor's requirement for covered documents to remain on a website for a certain period of time does not preclude a plan administrator from relying on the safe harbor when the administrator switches recordkeepers and certain documents will no longer be available through a former recordkeeper's website.

  Also, as a general matter, plan administrators should not be required to post a document online longer than the administrator is required to retain a document under ERISA's general retention standards. Similarly, the SPARK Institute asks the Department to confirm that the safe-harbor's requirement for documents to remain on the website for a specified duration does not otherwise affect the general document retention rules described in ERISA §§ 107 and 209.

- *Rehired Employees.* The proposed safe harbor does not address how plan administrators should handle elections made during previous rounds of employment by rehired employees. For example, consider an employee who elects to receive paper documents, instead of receiving documents through a "notice and access" system. If the employee separates from service and is rehired by the same employer, must the plan administrator continue to furnish documents in paper? Or, can the administrator provide the initial paper notice that would otherwise be sent to newly hired employees and satisfy its delivery obligations through the notice and access safe harbor, until the rehired employee elects to receive documents in paper?

- *Additional Verification Procedures upon Severance from Employment.* The proposed safe harbor is conditioned on a plan administrator taking measures that are reasonably calculated to ensure the continued accuracy of a participant's electronic address when an individual who is an employee severs from employment. The SPARK Institute believes that this condition is unnecessary in light of the separate requirement for plan administrators to have systems for furnishing NOIAs that are "designed to alert the administrator of a covered individual's invalid or inoperable electronic address." If a participant receives a NOIA through an employer-provided electronic address, that address should become inoperable after the employee terminates employment. If a participant receives a NOIA through an employee-provided electronic address, there is no reason to believe that the employee's electronic address will be impacted by the employee's termination and plan administrators should be able to assume employee-provided addresses are still valid. Accordingly, we request that the Department remove the "special rule for severance from employment" described in Proposed Labor Reg. § 2520.104b-31(h).

In the alternative, if this condition is retained in the final safe harbor, it would be very helpful to have some guidance on what such procedures might entail. For example, assume that, in connection with the plan administrator being informed that a participant has terminated employment, the plan sends a notice to the electronic address in the plan's records, and a notice to the physical address in the plan's records. This notice lists the electronic address on file and states that the plan administrator will assume that the electronic address will continue to be accurate unless the participant provides an updated electronic address. If the email neither bounces back, nor the participant provides a new electronic address, the plan administrator concludes that the electronic address is still accurate. As another example, suppose the plan administrator's procedures assume that if the electronic address on file does not end with the company domain, the address is a personal email address and thus should continue to be treated as accurate (until it bounces back). We believe that these straightforward procedures are the kind of measures the Department has in mind. We ask the Department to provide clarification on the extent to which these measures would satisfy the safe harbor.

In addition, as we described above, another option that the plan administrator might utilize would be to send the NOIA in paper through regular mail. This would be particularly useful in the event that an employee experiences a severance from employment and the employer cannot verify an electronic address.

- *Covered Individuals.* The preamble to the proposed safe harbor indicates that the Department "intends to provide a sufficient level of flexibility to administrators" in determining whether a participant is a "covered individual" by virtue of the individual providing an electronic address to the plan administrator. The SPARK Institute commends the Department for stating this intended flexibility.

  Nevertheless, the SPARK Institute also requests clarification on the extent to which a plan administrator can rely on an email address or smartphone number that is transferred between recordkeepers. Email addresses are often transferred from a plan's prior recordkeeper to a new recordkeeper. We assume a new recordkeeper (on behalf of the plan administrator) can rely on that information, as recordkeepers do with other information like a physical address, but we are requesting that the Department clarify that a plan administrator can continue to rely on an electronic address provided directly to a recordkeeper, when the plan switches recordkeepers. A change in service provider should not require the plan administrator or new recordkeeper to independently solicit or verify the participant's contact information, in the same way that one recordkeeper can rely on the physical address in the plan's records held by a prior recordkeeper. In a similar regard, the new recordkeeper should not be required to send an initial paper notice to participants simply because the plan sponsor has chosen to change service providers.

C. Paper Documents Upon Request

According to the proposal, "Covered individuals must have the right to opt out of electronic delivery and receive only paper versions of *some or all* covered documents (emphasis added)." The SPARK Institute agrees that participants should be able to request a paper copy of any requisite notice or disclosure free of any additional direct charge. We think it would be helpful, however, to slightly modify this requirement because the proposed safe harbor could be interpreted as requiring a plan administrator to permit participants to select on an ongoing basis, certain individual disclosures in paper and other documents electronically.

While we believe that some plan administrators and service providers will want to offer such an *a la carte* delivery option, we think other plan administrators will conclude that the cost to the plan of offering individual selection of documents outweighs the value to most participants. Thus, some plan administrators may conclude that a participant's election for paper should be treated as a global election to receive all documents in paper form. Note that as a practical matter, most providers will continue to post documents on a plan's secure website electronically even if a paper copy is sent.

Accordingly, the SPARK Institute recommends that the Department clarify the proposed safe harbor so that it can be satisfied if a plan administrator offers participants the right to receive, upon request: (1) individual documents in paper free of additional direct charge; and (2) all future covered documents in paper free of additional direct charge. Additionally, the Department should permit an a la carte paper delivery option to serve as an alternative to the delivery of all covered documents in paper free of additional direct charge. This should be an option regardless of whether the plan administrator gives participants a right to elect to receive every required notice and disclosure in paper on an individual basis or the plan administrator limits the types of documents that can be requested in paper on an ongoing basis.

As drafted, the Department's proposal generally requires administrators to make paper documents available free of charge, without qualification. The SPARK Institute requests the Department clarify that individuals have a right to request paper documents free of any *additional direct* charge. Paper is not free; the only question is whether all participants should bear the cost of those who elect paper, or individual participants should bear that cost. We fully agree that participants should not be assessed any additional direct charge for requesting paper documents, but in a general business sense, the potential cost of any paper delivery services will likely factor into the pricing of any service agreement between plan administrators and their services providers. We believe that an express reference to "additional direct charges" will make clear that the general fees charged by service providers will not prevent reliance on the proposed safe harbor for electronic delivery.

IV. ALLOW DOCUMENTS TO BE DELIVERED DIRECTLY TO EMAIL ADDRESSES

The Department's proposed safe harbor is based on a "notice and access" delivery framework. By its terms, it does not appear that a covered document can be delivered directly to covered individuals via email, either in the body of the email or as an attachment. Once a plan administrator has an electronic address to which a NOIA is delivered, it would seem odd not to be able to send the actual document to that address.

For a variety of reasons, most SPARK members will tend to use the "notice and access" model because the covered document can be maintained behind a secure web portal. If the covered document contains personal information, it is not a best practice to include it in the body of an email or as an attachment. However, there are other documents which are not specific to a plan participant, such as the summary plan description, summary of material modifications, and the summary annual report. Also, some documents may not be furnished by the plan's service provider when it is the plan sponsor's responsibility to do so. Plan sponsors often attach documents to emails when using the existing electronic delivery regulation with employees who regularly use a computer for work. We think the Department should consider expanding the safe harbor to cover this method of delivery. As with the proposed safe harbor, the email would need to include the important information contained in the NOIA, including the right to receive the document in paper at no additional direct charge.

In the alternative, the Department should clarify that covered documents can be sent via email, provided that all of the other safe harbor conditions are satisfied. Mechanically, this could work by allowing plan administrators to include covered documents as part of any NOIA sent via email, either in the body of the email or as an attachment. As proposed, the safe harbor requires the NOIA to be sent separately from any other documents. The Department should add an exception to this requirement for cases in which the covered document is included in the email.

V. PRESERVE FIELD ASSISTANCE BULLETIN 2006-03

As proposed, the safe harbor would supersede the portions of FAB 2006-03 that many of our members have relied upon to deliver pension benefit statements to retirement plan participants. Specifically, FAB 2006-03 permits plan administrators to deliver pension benefit statements electronically in one of three ways: (1) in accordance with the Department's 2002 electronic delivery regulations; (2) in accordance with Treas. Reg. § 1.401(a)-21; or (3) in accordance with a continuous access model described in FAB 2006-03.

Our members are concerned that the elimination of the delivery methods described in FAB 2006-03, especially its continuous access delivery model for benefit statements, will significantly disrupt existing systems and procedures designed to deliver pension benefit statements in accordance with FAB 2006-03. Accordingly, the SPARK Institute strongly recommends that the Department preserve FAB 2006-03 by expressly extending the proposed regulatory safe harbor to cover pension benefit plan statements that are delivered in accordance with the requirements described in FAB 2006-03.

Preserving FAB 2006-03 is particularly important for plan administrators who have developed systems to deliver benefit statements by providing participants continuous access to benefit statement *information,* as opposed to “point-in-time” statements, through one or more secure websites. These continuous access websites provide information in a way that is more dynamic than a “point-in-time” quarterly benefit statement. Moreover, the delivery of pension benefit statements through a continuous access website is consistent with ERISA § 105(a)(2)(A)(iv), which allows pension benefit statements to “be delivered in written, electronic, or other appropriate form *to the extent such form is reasonably accessible to the participant or beneficiary* (emphasis added).” It is also consistent with the explanation offered by the Joint Committee on Taxation, which interpreted this quoted text to permit, for example, “benefit statements to be provided on a continuous basis through a secure plan website for a participant or beneficiary who has access to the website.”[11] In proposing a new safe harbor to generally promote the use of electronic delivery for all ERISA-required notices and disclosures, we do not think the Department should limit the specific flexibility offered by Congress through ERISA § 105(a)(2)(A)(iv) for pension benefit statements.

Finally, one of the purposes of FAB 2006-03 was to provide interim guidance until the Department could propose regulations implementing the changes to ERISA § 105 made by the Pension Protection Act; these regulations have been delayed but continue to be on the Department’s agenda. At a minimum, FAB 2006-03 should continue to be fully applicable until the Department undertakes a rulemaking focused on ERISA’s benefit statement requirements.

If the Department does not entirely preserve the delivery methods described in FAB 2006-03, it should clarify that benefit statements may continue to be delivered by providing participants continuous access to benefit statement *information* through one or more secure websites, provided that the safe harbor’s other conditions are satisfied. As currently proposed, the Department’s notice and access safe harbor might be interpreted not to cover this type of delivery because it envisions the delivery of a covered document that is captured at a particular point in time and stored on a website until it is superseded by a subsequent version or, if applicable, until it ceases to have continued relevance.

VI. DOL, IRS and SEC Coordination

A. IRS Coordination

The preamble to the proposed safe harbor says that the proposal is intended to align with Treas. Reg. § 1.401(a)-21(c) for applicable notices. Under that cited regulation, a plan may use an electronic medium to provide applicable notices required by the Internal Revenue Code (“Code”) to: (a) participants who have affirmatively consented to receive notices electronically; and (b) participants who have the “effective ability to access” electronically delivered notices, if

[11] Joint Committee on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006", as Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006 (JCX-38-06), August 3, 2006.

such participants are advised of their right to request the applicable notice in paper and the notice is provided to the recipient at no charge upon request.

As we understand the current IRS and proposed Department standards, a plan administrator that complies with the proposed Department safe harbor through a notice and access system will comply with the standard described in Treas. Reg. § 1.401(a)-21(c).[12] To promote greater certainty, we recommend that the Department seek confirmation from the Treasury Department and IRS that a plan administrator satisfying the Department's proposed safe harbor will satisfy the IRS's rules for electronically delivering notices to retirement plan participants under the "effective ability to access" standard.

Express clarification from the IRS and Department is particularly important for IRS and Department notices that are bundled together into a single document – e.g., a document that combines the annual notices necessary to satisfy the Code's nondiscrimination safe harbors and ERISA's qualified default investment alternative ("QDIA") rules. Pursuant to FAB 2008-03, those annual notices can currently be delivered in a single communication using a single delivery standard – i.e., Treas. Reg. § 1.401(a)-21(c). Especially if the Department's final safe harbor will supersede FAB 2008-03, administrators should have the comfort of knowing that these combined notices can continue to be delivered in reliance on a single regulatory delivery standard.

B. SEC Coordination

The SPARK Institute also encourages the Department to coordinate with the Securities and Exchange Commission ("SEC") to clarify the extent to which the SEC is willing to treat the delivery of documents in accordance with the Department's safe harbor rules as satisfying the SEC's own delivery standards. This would be helpful, for example, in the case of a summary plan description that includes prospectus information for a plan that allows for investment in employer securities.

VII. EFFECTIVE DATE AND TRANSITION GUIDANCE

A. Effective Date

Under the Department's proposal, the new electronic delivery safe harbor would become *effective* 60 days after publication in the Federal Register. However, the new safe harbor would not become *applicable* until the first day of the first calendar year following publication in the Federal Register. Assuming a normal rulemaking timeline, we expect this to mean that the new safe harbor, as proposed, will likely become applicable on January 1, 2021.

[12] We do not, however, understand the opposite to be true. That is, a plan administrator who satisfies the standard described in Treas. Reg. § 1.401(a)-21(c) will not necessarily satisfy the standard described in the Department's proposed safe harbor.

The SPARK Institute encourages the Department to adopt a single effective and applicability date that would make the new safe harbor effective and applicable 60 days after publication in the Federal Register. As proposed, we understand the electronic delivery safe harbor would generally be optional and would not require action by plan administrators that rely on the Department's 2002 electronic delivery regulations. If the Department determines that the proposed safe harbor is an appropriate method for furnishing notices and disclosures to ERISA-covered participants, it should not delay the applicability date until the start of the following calendar year.

B. Transition Guidance

The SPARK Institute is concerned about the implementation challenges that could arise if, as proposed, the Department eliminates a plan administrator's ability to rely on any of the delivery methods that have previously been endorsed by the Department through FAB 2006-03, FAB 2008-03, and Technical Release 2011-03R.

As noted above, we recommend that the Department: (1) fully preserve some of this guidance, namely FAB 2006-03; and (2) build some of the key features from this guidance into its generally applicable safe harbor, namely by allowing NOIAs to be delivered in paper form. However, even if the Department adopts both of these recommendations, but especially if it does not, there will be differences between the Department's final regulations and the existing delivery rules. Plan administrators and their service providers should be given an appropriate amount of time to adapt to these changes.

Plan administrators and their service providers have implemented systems that are designed to satisfy existing delivery standards to furnish documents to millions of plan participants. If the final regulations eliminate any of these existing methods, plan administrators and their service providers will be required to identify the affected participant populations, halt communications being sent through those alternative channels, and transition these groups to one of the regulatory safe harbors. If affected plan administrators do not take these steps, their only option will be to send paper documents to these affected groups.

In light of these issues, the SPARK Institute recommends that the Department create a transition period for plan administrators who currently rely on any approved delivery method that will no longer be available after the new safe harbor becomes effective. These plan administrators should be permitted to rely on existing guidance until the end of the second full calendar year following the Department's publication of the final safe harbor in the Federal Register.

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The SPARK Institute appreciates the opportunity to provide these comments to the Department. If the Department has 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 or 202-347-2230).

Sincerely,

Tim Rouse
Executive Director

Attachment:

Quantria Strategies, *Default Electronic Delivery Works: Evidence of Improved Participant Outcomes from Electronic Delivery of Retirement Plan Documents* (November 2019)