The SPARK Institute, Inc.
SHAPING AMERICA'S RETIREMENT

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RE: Request for Guidance under the CARES Act

Dear Ms. Weiser and Ms. Judson:

On behalf of the SPARK Institute, we are writing to request guidance under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, as enacted on March 27, 2020, with respect to certain provisions that affect the administration of retirement plans and individual retirement arrangements ("IRAs").

This letter is in follow up to our letter of March 23, 2020, in which we asked for guidance and relief related to the COVID-19 pandemic. We appreciate the extraordinary efforts of the Department of the Treasury and the Internal Revenue Service ("IRS")[1] to provide guidance and address taxpayer and other stakeholder concerns in connection with the significant and ongoing disruption being caused by the COVID-19 pandemic, and the legislation that Congress has enacted in response to the pandemic. For example, the IRS has provided for delays in a number of deadlines mentioned in our March 23 letter, including the deadlines set forth in section 8 of Revenue Procedure 2018-58 (see Notice 2020-23), and the deadlines to adopt 403(b) plan and pre-approved defined benefit plan amendments.

Because our prior letter predated the CARES Act, some of the requests in that letter were addressed in the new legislation. Our goal for this letter is to provide our input on the guidance that defined contribution plan and IRA administrators have identified, to date, as being particularly necessary in light of the immediate deadlines and administrative challenges created by the CARES Act.

The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third-party administrators, trade clearing firms, and benefits consultants. Collectively, our members serve approximately 95 million employer-sponsored plan participants.

[1] For purposes of this letter, references to "IRS" generally refer to both the Treasury Department and IRS.

<u>Need for Flexible Guidance Due to the CARES Act's Immediate Effective Dates and Unprecedented Scope of Relief</u>

As you know, sections 2202 and 2203 of the CARES Act provide for coronavirus-related distributions ("CRDs"), increased plan loan amounts, loan repayment relief, and a waiver of required minimum distributions ("RMDs") for 2020. These provisions took effect immediately upon enactment, and SPARK members have already received a tremendous number of requests from plan sponsors, participants, and IRA owners seeking to take advantage of the new relief, often due to very pressing financial needs. Between the immediate effective date and abbreviated time period in which the relief applies, many SPARK members had no choice but to move forward promptly with the communication and implementation of the CARES Act changes to plans and IRAs despite not yet having the benefit of any guidance from the IRS to inform or confirm critical administrative decisions. Administrators' swift implementation of the CARES Act changes is consistent with both the statute's immediate effective dates and Congress's goal of expediting relief to individuals. Even so, it has placed administrators in the undesirable position of interpreting and quickly applying what in some cases is ambiguous or incomplete statutory language without the assistance or comfort of IRS guidance.

To the extent possible, SPARK members have reviewed IRS guidance that was issued following similar disaster relief legislation, such as Notice 2005-92, which was issued in connection with the Katrina Emergency Tax Relief Act of 2005 ("KETRA"). However, we do not know at this time whether the IRS's current views remain consistent with any such prior guidance. Furthermore, the potential application of prior IRS guidance to sections 2202 and 2203 of the CARES Act is unclear to the extent that there are variations between the statutory language of the CARES Act and prior disaster relief legislation. In light of these challenges and SPARK members' good faith efforts to provide individuals with access to the relief to which they are entitled as soon as possible, ***we urge the IRS to avoid the issuance of overly prescriptive guidance under the CARES Act that could force plan and IRA administrators to unwind communications, processes, or transactions that were made under a good faith, reasonable interpretation of the statute***.

We would emphasize that the relief provided in response to COVID-19 is unprecedented in its scope and its application throughout the entire country. If plan and IRA administrators are forced to unwind or redo reasonable actions taken in good faith, it would likely involve a massive and costly undertaking for administrators, in addition to compounding the upheaval already being experienced by the individuals involved in each transaction.

Similarly, plan and IRA administrators have gone to extraordinary lengths to develop procedures and adjust their systems to make the provisions of the CARES Act available to participants and IRA holders. Although providers and plan sponsors are implementing controls to help ensure that these provisions are administered in a manner that is consistent with the Act's provisions and related guidance, the speed of change and manual nature of some processes could result in errors. We therefore also urge the IRS to approach corrective measures with flexibility and to allow corrections that reflect a good faith interpretation of the statute and corrective guidance.

Related to this need for flexibility, a plan sponsor that adds CRDs as an in-service distribution may wish to eliminate it or restrict it later in the year, for example, if the plan sponsor determines that there is no further need for distributions of up to $100,000 for its participants. It would be helpful to confirm whether the right to a CRD is an optional form of benefit that must be preserved.[2]

<u>Restarting Delayed Loan Repayments</u>

Section 2202(b)(2) of the CARES Act provides that, in the case of a qualified individual with an outstanding loan from a qualified employer plan, the due date for any repayment occurring during the period beginning on the date of enactment through December 31, 2020 is delayed for one year, with any subsequent repayments adjusted to reflect the delay and any interest accrued during the delay. In addition, for purposes of determining the five-year period in section 72(p)(2)(B), the suspension period is disregarded.

There is significant ambiguity in how to apply this provision. As discussed above, recordkeepers have already had to make decisions with respect to how they are implementing loan repayment delays without the benefit of guidance from the IRS. For example, the statute provides for a one-year delay in the due date of any repayment due during the delay period. Taken literally, the language seems to indicate that a loan repayment originally due on April 1, 2020 would become due on April 1, 2021, a loan repayment originally due on May 1, 2020 would become due on May 1, 2021, and so on. But that approach would result in many participants facing the restart of payments on January 1, 2021, and double loan payments on some dates in 2021 (e.g., both the delayed April 1, 2020 repayment and the regularly scheduled April 1, 2021 repayment would be due on April 1, 2021). Such an outcome would be inconsistent with how suspension periods are typically administered, would be challenging to implement, and would likely be a surprising and upsetting consequence for many participants.

A more straightforward approach that many recordkeepers would prefer and that we expect would also be widely preferred by participants would be to reamortize the outstanding loan balance at the end of the suspension period, adding additional time to the end of the loan equal to the period of the suspension. For example, repayment suspension could end, and reamortization could occur, on January 1, 2021 (i.e., the day following the end of the period referred to in section 2202(b)(2)(A) of the CARES Act),[3] March 27, 2021 (i.e., 12 months from the date of enactment), or, for the example provided in the paragraph above, April 1, 2021 (i.e., 12 months after the first delay in a loan repayment). We have also heard from SPARK members

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[2] CRDs are conceptually similar to hardship distributions, which can be eliminated prospectively without violating Code section 411(d)(6). Treas. Reg. section 1.411(d)-4, Q&A-2(b)(2)(x). Also, section 2202(c) of the CARES Act provides that any amendment to any plan or annuity contract made pursuant to section 2202 (or any regulations issued thereunder) "shall not fail to meet the requirements of section 411(d)(6)" by reason of such amendment if certain requirements are met (and except as provided by the Secretary of the Treasury (or the Secretary's delegate)).

[3] As described in the following paragraph, reamortizing the loan on the day following the end of the suspension period is the approach taken in the safe harbor that is provided in Notice 2005-92 with respect to KETRA.

who read the language as allowing normal payments to resume on January 1, 2021, and then reamortization to occur on January 1, 2022. But the bottom line is, due to the ambiguity and seeming internal inconsistencies within the statutory language, we believe that each of the approaches described above (and other, similar, approaches) represents a reasonable, good faith interpretation of the statute, and many of these approaches may have already been implemented by recordkeepers based on their own determination of how to best administer loan repayment delays consistent with the language of the CARES Act. In this regard, ***we urge IRS to permit plan administrators to implement the delay of loan repayment provision using any reasonable interpretation that is consistent with the general intent of the CARES Act***.

We note that section 2202(b)(2) of the CARES Act contains very similar language to that provided in section 103(b) of KETRA, albeit with a much shorter delay period.[4] Notice 2005-92 provides what the IRS called a "safe harbor" for plans to satisfy section 103(b) of KETRA. Notice 2005-92 included an example under which the outstanding loan balance would be reamortized at the end of the suspension period and the end date of the loan was extended. This approach would be relatively straightforward to administer with respect to the CARES Act; however, we would reiterate that plan administrators have already needed to make decisions with respect to their implementation of section 2202(b)(2), and they did so without having confirmation from the IRS with respect to whether the safe harbor method in Notice 2005-92 would be permitted in this case.

For the reasons stated above, we request that the Treasury Department and IRS permit plans to administer the suspension of loan repayment provision using any reasonable interpretation of the statute, including the use of a method that is consistent with the safe harbor provided in Notice 2005-92. Permission to use any reasonable interpretation should also extend to other related plan sponsor or administrator decisions associated with the delay of repayment under the CARES Act, including decisions with respect to loan defaults that occurred early in 2020 prior to enactment and loans that are in their cure period.

Interaction with Notice 2020-23. Notice 2020-23 (which references Revenue Procedure 2018-58) extends a number of deadlines that are otherwise due to be performed on or after April 1, 2020 and before July 15, 2020, until July 15, 2020, including the due dates for participants to make loan repayments under section 72(p)(2)(B) and (C). Thus, in addition to the extension for making repayments as provided by the CARES Act for qualified individuals, the regulatory notice provides a separate extension that is available for all participants (but only through July 15, 2020). Due to the potential for overlap between the delay of loan repayments under the CARES Act and Notice 2020-23, we would appreciate guidance that addresses how the two relief provisions interact with each other.

[4] There is an important reason why the example in Notice 2005-92 has caused confusion. The suspension period in the CARES Act is approximately nine months long, whereas the suspension period in KETRA was approximately 16 months long, which is longer than the amount of the delay (12 months) for any one loan payment. Depending on how the example in Notice 2005-92 could be similarly applied to the CARES Act provision, such application could result in a suspension period of less than one year (e.g., in the case that repayments resume again on January 1, 2021).

The delay in loan repayments under Notice 2020-23 raises many of the same issues that are described above with respect to section 2202(b)(2) of the CARES Act, including that recordkeepers have needed to implement the delays immediately and without guidance from the IRS. One interpretation of Notice 2020-23 is simply that any payment due (including by reason of a cure period) between April 1 and July 15 may be paid as late as July 15, but otherwise no changes to the loan occur. Thus, any further extension would need to occur pursuant to the CARES Act. Another interpretation is that, because the regulations under section 72(p) permit a cure period until the end of the calendar quarter after any payment is missed, Notice 2020-23 allows a delay in all loan payments until December 31, 2020. Under either of these scenarios, it would be reasonable to assume that the loan could be reamortized at the end of the suspension period. It would also be helpful if the suspension period could be added on to the term of the loan in order to minimize any increase in the amount of the participant's periodic loan payment.

Another issue involving the interaction of the CARES Act and Notice 2020-23 relates to loans that are currently in the cure period. Revenue Procedure 2018-58 makes clear that the extension of loan due dates includes a due date as a result of a cure period granted pursuant to Treas. Reg. section 1.72(p)-1, Q&A-10(a). The CARES Act, however, does not reference the cure period. Accordingly, it is not clear if a loan for which a payment was missed prior to enactment of the CARES Act is eligible for solely the extension under Notice 2020-23 or also the extension under the CARES Act.

Reasonable interpretations of the Notice will inevitably lead to different implementation approaches by plans and their providers. For these reasons, we similarly urge the IRS to clarify that plans may use any good faith interpretation of the delay in loan repayment deadlines under Notice 2020-23.

<u>Spousal Consent "Physical Presence" Requirement</u>

Treasury regulation section 1.401(a)-21(d)(6) requires that, in the case of a participant election that must be witnessed by a plan representative or notary public, including spousal consents, the signature of the individual making the election must be "witnessed in the physical presence" of the representative or notary. As we noted in our letter of March 23, 2020, in which we requested guidance on a broad range of COVID-19-related issues (prior to passage of the CARES Act), past disaster relief for retirement plans has not included relief from the "physical presence" requirement of the regulation, including when spousal consent to a distribution is required. It is important to point out that this "physical presence" requirement is not contained in the Code or ERISA. Code section 417(a)(2)(A)(i) and ERISA section 205(c)(2)(A)(i) solely provide that the spouse's consent be "witnessed" by a plan representative or notary public. And the regulations already give IRS the authority to publish guidance in the Internal Revenue Bulletin providing that the use of procedures under an electronic system is deemed to satisfy the physical presence requirement.[5]

[5] Treas. Reg. section 1.401(a)-21(d)(6)(iii).

Because of social distancing, it may not be possible for spousal consent to be witnessed in front of a plan representative or notary. As the uncertainty and restrictions on ordinary activities due to COVID-19 continue without a definite end in sight, we reiterate our prior request for you to consider guidance allowing a plan to provide a distribution with a spousal signature if the spouse provides verbal verification over the phone that he or she consents, or by allowing the spouse to appear via other electronic and/or video conferencing technologies.

We note that the Thrift Savings Plan has released an interim rule (published in the Federal Register on April 17, 2020) that temporarily waives the requirement to notarize a spouse's signature on withdrawal election forms in light of the COVID-19-related emergency stay-at-home and shelter-in-place orders across the country. To be clear, we are not requesting that the IRS waive the spousal consent process or the important verification process that a plan representative or notary provides, only that such process be adapted to accommodate electronic and/or virtual means of performing such verification.

A number of states have taken emergency action in recent weeks to allow for remote notarization for various purposes in response to the COVID-19 pandemic. At a minimum, we encourage the IRS to consider allowing spousal consents to be provided via remote notarization during the COVID-19 pandemic in those states that have set forth procedures and requirements for remote notarization, provided that any such procedures and requirements are followed.

<u>Additional Eligibility Factors for CRDs and Loan Relief</u>

The CARES Act provides that an individual is eligible for a CRD and loan relief under section 2202 if he or she:

- is diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 by a test approved by the Centers for Disease Control and Prevention ("CDC");
- has a spouse or dependent who is diagnosed with such virus or disease by a CDC-approved test; or
- "experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, *or other factors as determined by the Secretary of the Treasury (or the Secretary's delegate)*" (emphasis added).[6]

With respect to the third eligibility criterion listed above, SPARK members have identified a number of situations where an individual could experience an adverse financial consequence related to COVID-19 that is similar to the list of events provided by the statute but that is not explicitly covered. Some of these more common situations include the following:

[6] CARES Act section 2202(a)(4)(A)(ii).

- the individual experiences a reduction in or deferment of pay (without a reduction in *hours*);
- the individual experiences the symptoms of COVID-19, but is unable to obtain testing before symptoms improve;
- the individual is not "laid off" but rather must voluntarily terminate employment, for example, to take care of a sick relative that is not a spouse or dependent;[7] or
- the individual's spouse or dependent (or another individual contributing to household expenses) experiences a reduction in income, but the individual does not.

We anticipate the occurrence of additional situations such as those listed above to be unfortunately common among plan participants, IRA owners, and beneficiaries. Because of this, we encourage the IRS to exercise its authority under the CARES Act to set forth additional factors resulting in adverse financial consequences that would make an individual eligible for a CRD or loan relief as provided in section 2202 of the CARES Act. We recommend, at a minimum, that the four scenarios identified above be included in any such guidance. Should the IRS wish to consider even broader relief, we suggest providing that an individual is eligible for a CRD or loan relief if he or she experiences a decrease in household income as a result of the COVID-19 pandemic.

<u>Time Period During Which CRDs are Available</u>

Section 2202(a)(4)(A) of the CARES Act defines CRDs in part as any distribution made "on or after January 1, 2020, and *before* December 31, 2020" (emphasis added). Providing for CRDs through December 30, 2020 (as opposed to through December 31, 2020) is an unusual time period and one that we suspect may not have been intended by Congress. Regardless, we are concerned that an end date of December 30 for making a CRD could cause significant confusion for participants hurrying to complete certain actions by the end of the year, likely under the assumption that they have until December 31 as with the many other year-end deadlines. It would be very helpful in this regard to have guidance allowing distributions made on December 31, 2020 to be eligible for treatment as a CRD (assuming the distribution otherwise meets the definition of a CRD). If the IRS is not comfortable providing such guidance in light of the statutory language, then we believe that the IRS could exercise its authority under Code section 7508A to extend the period by one day.

<u>Form 1099-R Coding of CRDs</u>

As you know, distributions from retirement plans are generally required to be reported on Form 1099-R. In this regard, we request clarification that payors may use either code 1 (early distribution, no known exception), code 2 (early distribution, exception applies), or code 7 (normal distribution) in Box 7 of Form 1099-R (2020) to report CRDs. Under this approach, payors would generally use code 7 to report distributions paid to participants over age 59½, and they would use either code 1 or code 2 to report distributions paid to participants under age 59½.

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[7] Although a terminated employee would generally be eligible to take an early distribution from a plan regardless, the tax relief provided by a CRD would be more advantageous for the individual.

This flexibility with respect to which codes may be used in Box 7 is important for payors who may not have access to certain information outside of their control that is necessary in order to determine whether a distribution qualifies as a CRD, particularly for those participants who are under age 59½. Code 1 is generally used for a distribution before age 59½, even if the payor may have some reason to believe that an exception from the 10% penalty may apply. The use of code 1, as payors may find appropriate, could help minimize reporting errors and would be consistent with the instructions for qualified birth and adoption distributions. Payors may in some cases be uncomfortable with a requirement to use code 2. For example, payors may lack information necessary to make an accurate determination as to CRD qualification for a number of reasons, including the fact that individuals are allowed to self-certify as to their eligibility for a CRD, and because distributions taken prior to the enactment of the CARES Act (i.e., before plans were tracking CRDs) may be eligible as a CRD. Furthermore, payors will often have no knowledge of whether an individual took distributions in excess of $100,000 from other plans or IRAs. For these reasons, SPARK members urge the IRS to permit payors to use code 1 for a distribution prior to age 59½, and code 7 if after age 59½, for distributions in 2020 that might meet the definition of a CRD. This would be consistent with the rules for qualified reservist distributions and qualified birth or adoption distributions.

Loan Offsets as CRDs

The CARES Act defines “coronavirus-related distribution” to mean “any distribution” from an eligible retirement plan meeting certain requirements. We expect that many Americans with an outstanding loan will be laid off because of the COVID-19 pandemic. Most plans provide that a loan is due and payable upon termination of employment, and if the loan is not repaid, it becomes a taxable loan offset.[8] It would be extremely helpful to individuals in this situation to be able to treat the loan offset as a CRD, because that would waive the 10% early withdrawal penalty, allow the individual to spread the income generated over three years, and provide additional time to repay the loan offset into an IRA. Because a loan offset is otherwise treated as a distribution, we think this is allowed. But we would urge you to clarify that individuals may treat a loan offset as a CRD if the requirements are met.[9]

[8] Most SPARK members read the CARES Act as not allowing for a delay in the due date to repay the loan in the case of termination of employment, because this due date is not as a result of Code section 72(p) but rather is specified under the terms of the loan. Other members believe that the delay would be available, at least with respect to extending the grace period. Consistent with our general comment regarding reasonable interpretations, we recommend providing guidance that makes it clear either interpretation is appropriate. Of course, some plans already allow for loans to continue to be repaid by a former employee, but this is a minority of plans.

[9] We have also considered whether a “deemed” distribution of a loan under Code section 72(p) might be eligible for treatment as a CRD. We would expect that many participants affected by the COVID-19 pandemic will avoid a deemed distribution during 2020 because of the permitted delay in loan repayment due dates under the CARES Act. But we anticipate that there will be some deemed distributions. Since the CARES Act would allow an in-service CRD in most plans, we would think that a deemed distribution could be treated as a CRD, but we would also appreciate clarification on this point.

A related point is that SPARK members have reported a variety of approaches being taken by plan sponsors and providers regarding the extent of the application of the CARES Act extension to terminated employees whose loans would normally become due and payable, and the interaction with the grace period and qualified loan offset rules. In this regard, we urge you to confirm that any reasonable good faith interpretation of the CARES Act in this situation is acceptable.

Treatment of Recontributions (Including Roth Amounts)

Section 2202(a)(3) of the CARES Act provides that any recipient of a CRD may repay the CRD (in whole or in part) to an eligible retirement plan "of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made."[10] Such repayments may only be made during the three-year period beginning on the day after the date the CRD was received. To the extent that a CRD is repaid, the distribution is treated as having been transferred to an eligible retirement plan within 60 days of distribution.[11]

Treasury and the IRS have never provided guidance on the extent to which a plan must accept recontributions of disaster-related distributions and, if so, how such recontributions should be treated. This did not matter very much in the past because it was fairly rare for disaster distributions to be repaid, particularly to a plan. But we are hopeful that CRDs will be used solely as temporary income and then be repaid if possible.

Plans should have flexibility in determining the particular situations under which a plan will accept a rollover into the plan, including with respect to recontributions of CRDs. For example, plans should retain their ability to choose whether to accept recontributions of CRDs from only active employees, or to only accept recontributions of CRDs that were originally distributed from the same plan, or to only accept recontributions of pre-tax amounts. That being said, for plans that choose to accept rollovers of CRDs, SPARK members would find it helpful if the IRS would clarify the appropriate treatment of such recontributions in common situations. For example, guidance addressing whether the recontribution of after-tax and Roth contributions to a plan is permissible, and, if so, an example of how to treat recontributions of after-tax or Roth amounts, would be helpful for those plans that choose to accept rollovers of such amounts. An example that illustrates the recontribution of after-tax amounts would be especially helpful because after-tax contributions generally may not be indirectly rolled over, and the CARES Act's reference to the 60-day rollover period, which is not relevant in a direct transfer, is confusing in this regard.[12] Also, guidance is needed with respect to tracking the cost basis of such amounts, and the five-year period for Roth amounts. For example, would a participant's representation of

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[10] Thus, for example, periodic payments from a plan or RMDs from a plan or IRA that qualify as a CRD may not be repaid.

[11] We note that the statutory language of section 2202(a)(3)(B) and (C) is contradictory in that it refers to a direct trustee-to-trustee transfer being made within 60 days of distribution (a time frame applicable to indirect rollovers but not direct transfers). We would appreciate guidance from the IRS regarding its view of this statutory language.

[12] See note 11.

these items be acceptable, or must a participant provide documentation from the distributing plan or IRA provider?

It would also be helpful for the IRS to clarify what distribution restrictions would apply to a recontributed CRD. Due to the complexity that would be involved in treating recontributed CRDs as being subject to the same distribution restrictions that applied prior to the CRD distribution, we encourage the IRS to clarify that recontributions may be treated as a rollover, consistent with the statutory language. Further we believe this treatment should apply whether the distribution was originally a special in-service distribution (i.e., prior to age 59½) allowed solely because of the CARES Act or a regular distribution that is otherwise normally allowed and that receives treatment as a CRD.

In addition, we request guidance stating that recontributions of CRDs will not be treated as a rollover contribution for purposes of the one-rollover-per-year limitation under Code section 408(d)(3)(B).[13]

Timing of Availability of Increased Loan Amount

Section 2202(b)(1) of the CARES Act provides for increased plan loan amounts in the case of a loan from a qualified employer plan to a qualified individual that is "made during the 180-day period beginning on the date of the enactment of [the CARES Act]." Some administrators have already moved forward with their communications and systems programming based on the assumption that the 180-day period ends on September 23, 2020 (as opposed to September 22, 2020). Based on case law interpreting similar statutory language,[14] we believe that increased loan amounts should thus be permitted as late as September 23. Confirmation on this point would be appreciated.

Relief from Department of Labor Regulations Regarding Increase in Allowable Loan Amount

The CARES Act increases the allowable loan amount for eligible participants in the same manner as section 103 of KETRA, that is, the aggregate limit on plan loans is increased to $100,000 or 100% of the vested accrued benefit. Department of Labor ("DOL") regulations, however, generally require that plan loans be secured by no more than half of the participant's account balance.[15] In this regard, Notice 2005-92, which provides guidance on the plan loan provision in KETRA, includes a footnote stating:

[13] Such guidance was provided in section 4.C of Notice 2005-92 with respect to the recontribution of "Katrina distributions" under KETRA.

[14] *See, e.g., Waddell v. Edison Chouest Offshore*, 93 F. Supp. 3d 714, 719 (S.D. Tex. 2015) ("The amendment expressly applies only to actions commenced on or after expiration of the 30-day period beginning on the date of enactment (December 7, 2011), i.e., it expired on January 6, 2012.").

[15] 29 C.F.R. 2550.408b-1(f)(2)(i).

> The Department of Labor has advised the Department of the Treasury and the Service that it will not treat any person as having violated the provisions of Title I of the Employee Retirement Income Security Act (ERISA), including the adequate security and reasonably equivalent basis requirements in ERISA section 408(b)(1) and 29 CFR 2550.408b-1, solely because the person made a plan loan to a qualified individual in compliance with KETRA section 103, Code § 72(p), and the provisions of this notice.

SPARK members would find it helpful to have a similar such statement from DOL with respect to the increased loan amount provision in section 2202(b) of the CARES Act. To be very clear, however, even in the absence of a specific statement to that effect, SPARK members have taken the quite reasonable position that Congress would not have allowed an increase in loan amounts that would be a prohibited transaction.

Self-Certification for Loan Relief

Section 2202(a)(4)(B) of the CARES Act states that plan administrators "may rely on an employee's certification" that the employee satisfies the eligibility criteria for purposes of determining whether a distribution is a CRD. Although the same eligibility criteria apply for purposes of determining whether an individual is eligible for the loan relief provided under section 2202(b), the statute does not explicitly state that plan administrators may rely on an employee's certification for purposes of the loan relief. We therefore ask the IRS to issue guidance providing that employer plans may rely on an employee's certification in connection with the loan relief. Such guidance could be similar to that provided in Notice 2005-02 with respect to KETRA, where the guidance stated:

> A qualified employer plan is permitted to rely on a participant's reasonable representations that such participant is a qualified individual and therefore qualifies for the special treatment for loans under section 103 of KETRA, unless the plan administrator (or other responsible person) with respect to the qualified employer plan has actual knowledge to the contrary.

We think it unlikely that you will come to a different conclusion. But any requirement for something other than self-certification would need to be applied prospectively and would take many months to implement. As such, any new requirements might not even be possible to implement by the end of the limited time period during which the CARES Act loan relief is available.

Safe Harbor Plans

The provisions of the CARES Act are available to plans in the middle of 2020, which is exactly what Congress intended. Congress wanted plans to make these provisions available immediately to address the unprecedented need for help for affected Americans.

Safe harbor plans generally must provide a notice to participants before the beginning of the plan year describing, among other things, the plan's withdrawal provisions. Notice 2016-16 provides guidance on mid-year changes to safe harbor plans, and addresses plan changes that "[alter] the plan's required safe harbor notice content." The Notice states that an updated safe harbor notice that describes the mid-year change and its effective date must be provided to each employee within a reasonable period before the effective date of the change. The Notice goes on to state that, if it is not practicable for the updated safe harbor notice to be provided before the effective date of the change, the notice is treated as provided timely if it is provided as soon as practicable, but not later than 30 days after the date the change is adopted.

It is arguable that no updated safe harbor notice is required simply because a plan offers CRDs or increased loan limits mid-year. After all, the purpose of disclosing the plan's withdrawal restrictions in the safe harbor notice is to allow participants to make informed choices about their elective deferrals. These temporary CARES Act provisions, which provide additional access to contributions, are unlikely to have any effect on participants' contribution elections. Further, the CARES Act makes clear that no plan amendment to reflect the operation of the plan is due until the end of the 2022 plan year.

Even if the IRS concludes that notice is required, we think that under the circumstances, ***a safe harbor plan should be allowed to meet these requirements by informing employees that CRDs, or the increased loan limit, have been adopted by the plan, within a reasonable period after the plan informs its provider these provisions will be adopted.*** We also think it is much more helpful that this notice not be part of an updated complete safe harbor notice, as the change would likely be lost in the overall notice.

Waiver of 2020 RMDs

Section 2203 of the CARES Act temporarily waives the RMD requirement for 2020 for defined contribution 401(a), 403(a), 403(b), and governmental 457(b) plans and IRAs. The waiver includes RMDs that would have otherwise been required in 2020 by reason of an individual's required beginning date (1) occurring in 2020 or (2) occurring in 2019 where the individual had not yet taken his or her first RMD prior to January 1, 2020. SPARK members have the following requests for guidance regarding this 2020 RMD waiver.

Additional time for rollover. Following the CARES Act, amounts received as a distribution of 2020 or 2019 RMDs in 2020 are eligible for rollover within 60 days. For individuals whose 60-day period ends on or after April 1, 2020 and before July 15, 2020, Notice 2020-23 automatically extends the rollover deadline to July 15, 2020. However, this relief does not extend to participants and IRA owners who took an RMD at the beginning of 2020 and for whom the 60-day period ended prior to April 1, 2020. These individuals obviously had no knowledge that the CARES Act, which did not become law until March 27, 2020, would waive their 2020 RMD requirements. As such, we encourage the IRS to exercise its authority under Code section 402(c)(3)(B) to extend the 60-day rollover period for any RMD taken in 2020 so that it ends no earlier than December 31, 2020. Such relief would be similar to that provided in

Notice 2009-82, which provided that the rollover period for 2009 RMDs ended no earlier than November 30, 2009.[16]

Required beginning date of April 1, 2020. If an individual attained age 70½ in 2019 (or retired in 2019 after having previously attained age 70½) and thus had a required beginning date ("RBD") of April 1, 2020, the CARES Act does not affect the individual's RBD even though the waiver of 2020 RMDs would apply if the individual did not take a distribution of his or her 2019 RMD prior to January 1, 2020. In such case where the waiver applies (i.e., the 2019 RMD was not taken prior to January 1, 2020), it appears to us that the individual would then have one RMD due in 2021 (based on the December 31, 2020 account balance), to be paid by December 31, 2021. However, if the individual dies after April 1, 2020, the individual is still treated as having died after his or her RBD. Confirmation regarding this point would be appreciated.

Required beginning date of April 1, 2021. A participant who attained age 70½ prior to 2020 and retires in 2020 would be required to take a distribution of his or her first RMD for 2020 but would have until April 1, 2021 to do so. It appears to us that the CARES Act waiver of 2020 RMDs would apply in this case, and the description of the CARES Act released by the Joint Committee on Taxation comes to the same conclusion. In other words, we believe that what would ordinarily be the participant's first RMD with a deadline of April 1, 2021 would be waived, and thus an RMD would not be required to be distributed until December 31, 2021 (based on the December 31, 2020 account balance). Clarification on this point would be appreciated.

Substantially equal periodic payments. Notice 2009-82 allows for the rollover of one or more payments in a series of substantially equal distributions (that include the RMDs waived for 2009) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant's designated beneficiary, or for a period of at least 10 years. We would request similar relief for 2020.[17]

Application of waiver period to 10-year rule. The CARES Act provides that the five-year period described in Code section 401(a)(9)(B)(ii) is determined without regard to calendar year 2020. That is, if the entire interest of an employee who died before required distributions began in accordance with Code section 401(a)(9)(A)(ii) is required to be distributed within a five-year period that includes the year 2020, the CARES Act provides that an extra (i.e., sixth) year may be taken.

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[16] Notice 2009-82 provided guidance under the Worker, Retiree, and Employer Recovery Act of 2008, which was enacted on December 23, 2008, and waived RMD requirements for 2009. Here, because the CARES Act was not enacted until March 27, 2020, nearly three months into the same year for which it waived RMDs, we believe that extending the 60-day rollover period for amounts that were taken as an RMD in 2020 to December 31, 2020 (or the end of the 60-day period, if later) is warranted.

[17] We believe that periodic payments over a period of less than 10 years are already otherwise eligible for rollover.

As you know, the SECURE Act added subparagraph 401(a)(9)(H) to the Code, which substitutes a 10-year period for the five-year period in Code section 401(a)(9)(B)(ii) in certain cases involving an employee or IRA owner who dies after December 31, 2019. Because the new SECURE Act rules apply to an individual who died in 2020 (or later), the first year of the 10-year period is 2021, which is not affected by the CARES Act. Thus, we think there is no impact on the 10-year period. But because SPARK members have received this question a number of times from clients, confirmation would be helpful.

Extension of Deadline to Remove Excess Deferrals under Notice 2020-23

As noted above, Notice 2020-23 extends a number of deadlines that are otherwise due to be performed on or after April 1, 2020 and before July 15, 2020, until July 15, 2020. One of the deadlines extended by Notice 2020-23 is the April 15 deadline for the distribution of excess deferrals (plus income attributable to the excess) under Code section 402(g). Although not included as part of the CARES Act, this extension raises questions for plan administrators that are similar in nature to those discussed elsewhere in this letter with respect to sections 2202 and 2203 of the CARES Act.

As you know, many plans have provisions that require excess deferrals to be distributed by April 15 under the terms of the plan document. In light of Notice 2020-23, we believe that a plan is permitted to delay the distribution of excess deferrals with respect to 2019 until July 15, 2020, notwithstanding any plan language that provides for an April 15 deadline. Nevertheless, we would appreciate confirmation on this point, and we note that many SPARK members have already taken action based on this assumption. Additionally, we would appreciate guidance addressing whether a plan amendment would be required for the 2020 plan year in order for a plan to extend its 402(g) deadline pursuant to Notice 2020-23. If a plan amendment would be required, we assume that it could be done as part of the remedial amendment period as described in the CARES Act.

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Again, thank you for your tremendous efforts to issue much-needed guidance under extraordinary circumstances. If you feel a call would be helpful, please contact the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP, at mlhadley@davis-harman.com with any questions (email is best during this period).

Sincerely,

Tim Rouse
Executive Director

Cc: The Honorable Preston Rutledge, Assistant Secretary of Labor, Employee Benefits Security Administration

Jeanne Klinefelter Wilson, Principal Deputy Assistant Secretary, Employee Benefits Security Administration, Department of Labor

Joe Canary, Director, Office of Regulations and Interpretations, Employee Benefits Security Administration, Department of Labor

Stephen Tackney, Deputy Associate Chief Counsel, Internal Revenue Service