



December 9, 2020

Carol Weiser
Benefits Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Rachel Leiser Levy
Associate Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Guidance on Electronic Delivery Standards

Dear Ms. Weiser and Ms. Levy:

On behalf of the SPARK Institute Inc., we are writing to assist the Treasury Department (“Treasury”) and Internal Revenue Service (“IRS”) as your respective agencies work to implement the new project on the priority guidance plan (“PGP”) related to regulations updating the electronic delivery rules for providing applicable notices and making participant elections.

According to the preamble of the Department of Labor’s (“DOL’s”) finalized electronic delivery safe harbors, Treasury and IRS “intend to issue additional guidance relating to the use of electronic delivery for participant notices.”¹ Additionally, DOL’s 2020 electronic delivery standards include an important placeholder for Treasury and IRS to designate additional documents that can be delivered electronically through DOL’s new notice and access safe harbor after such documents have appeared on a combined notice of internet availability.² We were extremely pleased to see, on the 2020-2021 PGP, a project listed as “[r]egulations updating electronic delivery rules for providing applicable notices and making participant elections.” To assist Treasury and IRS in developing this intended guidance, our letter identifies the ways in which Treasury and IRS can most effectively issue guidance that promotes more efficient, more useful, and less costly participant disclosures.

Specifically, the SPARK Institute urges Treasury and IRS to issue guidance indicating that a retirement plan administrator will satisfy its obligations to deliver notices under the Internal Revenue Code (“Code”), or any interpretive guidance from Treasury or IRS, if the administrator delivers such notices in accordance with the electronic delivery safe harbors described in Labor Regulation section 2520.104b-31.

In the alternative, to the extent that Treasury and IRS believe that such guidance cannot be reconciled with the existing conditions described in Treasury Regulation section 1.401(a)-21, we request that Treasury and IRS expressly identify the circumstances under which disclosures

¹ 85 Fed. Reg. 31884, 31886 (May 27, 2020).

² Labor Regulation section 2520.104b-31(i)(4).

delivered to a “covered individual” in accordance with Labor Regulation section 2520.104b-31 will also be delivered in accordance with Treasury Regulation section 1.401(a)-21. Our letter provides specific examples of when we believe this harmonization exists. Moreover, to the extent that a plan administrator may implement a delivery method identified in the DOL safe harbors and not satisfy the standards described in Treasury Regulation section 1.401(a)-21, we request that Treasury and IRS: (a) identify any additional steps that a plan administrator must take to deliver the relevant document in accordance with Treasury Regulation section 1.401(a)-21; and (b) until IRS issues guidance, not take enforcement action against any plan administrator that has implemented the DOL’s safe harbors in good faith. Finally, as discussed further below, the SPARK Institute urges Treasury and IRS to designate certain Code-required notices as being eligible for electronic delivery through DOL’s new notice and access safe harbor after such documents have appeared on a combined notice of internet availability.

SPARK members are currently designing and implementing delivery systems that will satisfy DOL’s new safe harbors for electronically delivering documents required by the Employee Retirement Income Security Act of 1974 (“ERISA”). However, until Treasury and IRS release additional guidance, it will be challenging for plan sponsors and their recordkeepers to commit to a single, comprehensive, and long-term solution for furnishing all retirement plan notices and disclosure required by ERISA and the Code. Accordingly, the SPARK Institute encourages Treasury and IRS to publish their intended guidance without delay.

I. REGULATORY BACKGROUND

A. Treasury and IRS Delivery Standards for Retirement Plans

Under regulations that were issued by Treasury and IRS in 2006 (“the 2006 E-Delivery Regulations”), retirement plans can electronically deliver notices and disclosures (“Applicable Notices”) to retirement plan participants and beneficiaries if: (a) the recipient has affirmatively consented to electronic delivery; or (b) the Applicable Notice is delivered under an alternative method described in the regulations (the “Alternative Method”).³

The Alternative Method outlined in the 2006 E-Delivery Regulations generally requires five conditions to be satisfied:⁴

1. All otherwise applicable requirements, including any applicable timing and content rules, must be satisfied;

³ For Applicable Notices that are required to be in writing or written form under the Code, Treasury Regulations, or other guidance issued by the IRS Commissioner, the conditions of the 2006 E-Delivery Regulations must be satisfied in order to provide an Applicable Notice electronically. For Applicable Notices that are not required to be in writing or written form, the 2006 E-Delivery Regulations provide a safe harbor method for using an electronic medium to provide the Applicable Notices.

⁴ The 2006 E-Delivery Regulations also clarify that if an electronic record of an Applicable Notice or a participant election is not maintained in a form that is capable of being retained and accurately reproduced for later reference, then the legal effect, validity, or enforceability of such electronic record may be denied.

2. The electronic system for delivering Applicable Notices must be reasonably designed to provide the information in the notice to a recipient in a manner that is no less understandable to the recipient than a written paper document;
3. The electronic system for delivering Applicable Notices must be designed to alert the recipient, at the time an Applicable Notice is provided, to the significance of the information in the notice (including identification of the subject matter of the notice), and provide any instructions needed to access the notice, in a manner that is readily understandable;
4. The electronic medium used to provide an Applicable Notice must be a medium that the recipient has the effective ability to access; and
5. At the time the Applicable Notice is provided, the recipient must be advised that he or she may request and receive the applicable notice in writing on paper at no charge, and, upon request, that applicable notice must be provided to the recipient at no charge.

B. New DOL Delivery Standards for Retirement Plans

On May 21, 2020, DOL released a final regulation that offers two new safe harbors for retirement plans to furnish ERISA-required documents electronically by default: (1) a “notice and access” safe harbor; and (2) a direct email safe harbor. Subject to various conditions and safeguards, the “notice and access” safe harbor permits plan administrators to furnish ERISA-required documents to participants and beneficiaries by sending a notice of internet availability (“NOIA”) to a recipient’s electronic address and making the covered document accessible online. By comparison, the direct email safe harbor permits plan administrators to directly email covered documents to retirement plan participants and beneficiaries, subject to similar conditions and safeguards.

Under both safe harbors, covered documents must be made available no later than the date on which the documents must be furnished under ERISA and covered documents must be presented in a manner that is calculated to be understood by the average plan participant. Further, under both safe harbors, recipients must be alerted to the fact that the disclosure includes information about the recipient’s retirement plan (and the administrator must include the name and a description of the document if the name would not reasonably convey the nature of the document, unless the document is sent directly in the body of an email). If the covered document is not sent directly through email, the NOIA sent to the recipient must include a website address or hyperlink that is sufficiently specific to provide ready access to the covered document. Furthermore, every NOIA and every email sent pursuant to the final DOL rule must inform the recipient of the right to, free of charge, request and obtain a paper copy of any covered document. Similarly, those communications must inform the recipient of the right to, free of charge, globally opt out of electronic delivery and receive only paper versions of covered documents.

Beyond these rights, the final DOL safe harbors also includes other important consumer protections that are designed to ensure that recipients have the effective ability to access covered documents. These measures include:

- Covered documents may only be furnished electronically to certain “covered individuals” who have provided an employer, plan sponsor, or administrator with an electronic

address – e.g., an email address or smartphone number. Alternatively, this condition can be satisfied using an employer-assigned electronic address if that electronic address was assigned for employment-related purposes that include but are not limited to the delivery of covered documents.

- The safe harbors require plan administrators to furnish a one-time paper notice to anyone who will be receiving covered documents electronically. This notice must notify the recipient that covered documents will be furnished electronically, identify the electronic address that will be used, provide any instructions necessary to access covered documents, and inform recipients of their rights to receive documents in paper.
- The safe harbors require plans to implement systems that alert plan administrators of invalid or inoperable electronic addresses.
- The safe harbors require plans to implement systems that are reasonably calculated to ensure the continued accuracy and availability of electronic addresses when employees experience a severance from employment.

II. REQUESTS FOR GUIDANCE

Plan administrators are eager to implement the electronic delivery framework described in DOL’s new electronic delivery safe harbors. By expanding the use of electronic delivery for ERISA-required disclosures, SPARK believes that DOL’s new safe harbors will make retirement plan notices and disclosures more effective, more useful, and less costly for retirement savers. Ultimately, we believe that these changes will improve participant outcomes while also ensuring important consumer protections.

In support of these anticipated benefits, the SPARK Institute requests that Treasury and IRS issue guidance indicating that a retirement plan administrator will satisfy its obligations to deliver Applicable Notices under the Code, or any interpretive guidance from Treasury or IRS, if the administrator delivers such notices in accordance with the electronic delivery safe harbors described in Labor Regulation section 2520.104b-31.

In the alternative, to the extent Treasury and IRS do not believe that such guidance can be reconciled with the existing conditions described in Treasury Regulation section 1.401(a)-21, we request that Treasury and IRS clearly identify the circumstances under which disclosures delivered to a “covered individual” in accordance with Labor Regulation section 2520.104b-31 will be delivered in accordance with Treasury Regulation section 1.401(a)-21. We believe that this can largely be accomplished by confirming that any document delivered in accordance with the DOL safe harbors is delivered through “a medium that the recipient has the effective ability to access.” Furthermore, to the extent that a plan administrator may implement a delivery method identified in the DOL safe harbor and not satisfy the standards described in Treasury Regulation section 1.401(a)-21, we request that Treasury and IRS: (a) identify any additional steps that a plan administrator must take to deliver Applicable Notices in accordance with Treasury Regulation section 1.401(a)-21; and (b) until IRS issues guidance, not take enforcement action against any plan administrator that has implemented the DOL’s safe harbors in good faith. Finally, the SPARK Institute urges Treasury and IRS to designate any Applicable Notices that must be delivered annually, rather than upon the occurrence of a particular event, as being

eligible for electronic delivery though DOL's new notice and access safe harbor after such documents have appeared on a combined NOIA.

A. A Medium that the Recipient has the Effective Ability to Access

The Alternative Method described in the 2006 E-Delivery Regulations requires Applicable Notices to be provided through "a medium that the recipient has the effective ability to access." Although the 2006 E-Delivery Regulations include examples of the types of media and circumstances that can satisfy this standard, the 2006 E-Delivery Regulations do not clearly indicate whether an Applicable Notice delivered in accordance with DOL's "notice and access" or "direct email" safe harbors would result in such notice being provided through "a medium that the recipient has the effective ability to access."

SPARK strongly believes that an Applicable Notice delivered to a covered individual in accordance with DOL's recently finalized safe harbors should result in such notice being delivered through a medium that the recipient has the effective ability to access. DOL's new safe harbors require recipients to receive NOIAs or emailed documents through an electronic address that has either been provided by the recipient or assigned by an employer to an employee for employment-related purposes that include but are not limited to the delivery of covered documents. By incorporating these requirements into the definition of "covered individual," DOL's rule ensures that recipients have the effective ability to access documents that are sent to them. If a covered individual provides an electronic address to the plan, this indicates that the individual has the effective ability to access any information that is either: (a) sent directly to the electronic address; or (b) made available through a website address or hyperlink that is sent to the electronic address. This is similarly the case for any employee that is assigned an electronic address by an employer for employment-related purposes that include but are not limited to the delivery of covered documents. The fact that the recipient will be assigned an electronic address for employment-related purposes indicates that the recipient will have the effective ability to access any disclosures through a medium that will be accessed as part of the employee's job responsibilities.

DOL's new safe harbors also include important safeguards that are designed to ensure that recipients have the effective ability to access any notices or disclosures. These safeguards operate at the time electronic delivery commences and on an ongoing basis. For example, the new DOL safe harbors condition relief upon plan administrators furnishing a one-time paper notice to any covered individuals who will be receiving documents electronically. As explained above, this paper notice must inform the recipient that covered documents will be furnished electronically, identify the electronic address that will be used, provide any instructions necessary to access covered documents, and inform recipients of their rights to receive documents in paper. Additionally, the new safe harbors require plans to implement systems that alert administrators of invalid email addresses and to take additional measures to ensure the continued accuracy and availability of electronic addresses when employees leave their employers.

In addition to DOL's regulatory conditions that will ensure covered individuals have the effective ability to access documents that are furnished to them electronically, technological

advancements over the past two decades have virtually ensured that all Americans have the effective ability to access documents online. This is especially true in the context of retirement plan participants. For example, according to a 2015 telephone survey conducted by Greenwald & Associates, 99 percent of retirement plan participants reported having internet access at home or at work, and 88 percent of respondents reported accessing the internet on a daily basis. Additionally, over the past decade, the proliferation of smartphones that can connect to the internet has made access to online media more accessible than ever.

When considering the procedural safeguards included in DOL's new safe harbors together with these technological advancements, SPARK strongly believes that an Applicable Notice delivered to a covered individual in accordance with DOL's recently finalized safe harbors should result in such notice being delivered through a medium that the recipient has the effective ability to access. Accordingly, we request that Treasury and IRS expressly confirm this fact. Further, based on the above, as it is reasonable for a plan administrator to conclude that Applicable Notices delivered in accordance with DOL's safe harbors are delivered through a medium that the recipient has the effective ability to access, we request that Treasury and IRS not take enforcement action against any plan administrator that has utilized DOL's safe harbors to deliver Applicable Notices to the extent that Treasury and IRS determine that additional steps are necessary to satisfy their electronic delivery rules and the administrator has acted in good faith.

B. Identify the Circumstances Under Which Documents Delivered in Accordance with DOL's Safe Harbors will Satisfy Treasury and IRS Delivery Standards

In order to satisfy the Alternative Method described in the 2006 E-Delivery Regulations, a plan administrator must, *at the time an Applicable Notice is provided*: (a) alert the recipient to the significance of the information in the notice (including identification of the subject matter of the notice); (b) provide any instructions needed to access the notice; and (c) advise the recipient that he or she may request and receive the applicable notice in writing on paper at no charge. As we understand the IRS and DOL electronic delivery standards, a plan administrator that satisfies the new DOL safe harbors can, consistent with the 2006 E-Delivery Regulations, satisfy these disclosure obligations. Accordingly, we request that Treasury and IRS expressly identify the circumstances under which documents delivered in accordance with DOL's new safe harbors will satisfy the Treasury and IRS delivery standards.

For example, if a plan administrator, in accordance with DOL's new safe harbors, sends a NOIA to a covered individual immediately prior to posting a covered document (or Applicable Notice) online, the NOIA will, *at the time that the Applicable Notice is being provided*: (a) include a statement that reads "Important information about your retirement plan is now available" and provide other information to identify the covered document; (b) include a website address or hyperlink to provide ready access to the document or a login page that provides access to the document; and (c) include a statement of the right to request and obtain a paper version of the covered document, free of charge. These elements closely align with the disclosures required by the 2006 E-Delivery Regulations. Accordingly, in this context, we believe that the NOIA content requirements should, by themselves, satisfy the disclosure obligations required by the

2006 E-Delivery Regulation.⁵ This analysis applies in a similar fashion to an Applicable Notice that is being delivered in accordance with DOL's direct email safe harbor.

Consistent with this analysis, we request that Treasury and IRS expressly confirm that a plan administrator will satisfy the Treasury and IRS document delivery standards by using the DOL safe harbor in this way. Additionally, if there are alternative circumstances in which a plan administrator could implement a delivery method identified in the DOL safe harbor and not satisfy the standards described in Treasury Regulation section 1.401(a)-21, we request that Treasury and IRS: (a) specifically identify the additional steps that a plan administrator must take in order to deliver Applicable Notices in accordance with Treasury Regulation section 1.401(a)-21; and (b) until IRS issues guidance, not take enforcement action against any plan administrator that has implemented the DOL's safe harbors in good faith.

C. Designate Documents for Use on a Combined NOIA

As an alternative to sending a NOIA every time a plan administrator posts a covered document online, DOL's new electronic delivery rules also allow plan administrators to send a combined NOIA on an annual basis. Under this alternative, rather than sending a NOIA every time a document is posted online, certain documents can be timely posted online without a disclosure-by-disclosure NOIA. In the case of a plan that sends a combined NOIA to rely on DOL's new electronic delivery safe harbors, the combined NOIA must be sent annually and contain all of the content fields that are required for a disclosure-by-disclosure NOIA.

According to the new DOL regulations, this alternative method can be used to deliver "any applicable notice required by the Internal Revenue Code if authorized in writing by the Secretary of the Treasury." Although not expressly stated in the regulation or its accompanying preamble, this suggests that Treasury and IRS intend to build on the notice and access model described in DOL's recently finalized safe harbors.

In order to promote efficiencies and lower costs, the SPARK Institute urges Treasury and IRS to designate, for this purpose, any Applicable Notices that must be delivered annually, rather than upon the occurrence of a particular event. This guidance should expressly cover: (1) the annual disclosure requirements that apply to plans that rely on one of the Code's nondiscrimination safe harbors; and (2) the annual disclosure requirements that apply to plans

⁵ If Treasury and IRS do not agree that the NOIA and email disclosures included in DOL's final safe harbors will, at the time that an Applicable Notice is provided, result in a recipient being alerted to the significance of the notice or receiving instructions needed to access the notice, this will create challenges for plan administrators that are attempting to create delivery systems that satisfy the DOL and IRS delivery standards. This is because Labor Regulation section 2520.104b-31(d)(4)(ii) generally prohibits a plan administrator from including any content in a NOIA that is not required by the regulation. Thus, for example, if Treasury and IRS do not believe that the notice and access framework and NOIA content requirements provide the necessary instructions for recipients to access an Applicable Notice, plan administrators will not be able to satisfy the IRS delivery standards by simply adding instructions to the NOIA. Further instructions could, however, appear on the website where the recipient actually views the notice.

that automatically enroll participants.⁶ Express references to these documents will be particularly helpful because they are typically furnished with annual notices and disclosures required by ERISA – e.g., the disclosure required by ERISA’s qualified default investment alternative (“QDIA”) rules. To the extent that Treasury and IRS believe a regulatory amendment is necessary to facilitate this harmonization, we urge Treasury and IRS to issue a proposed regulation without delay and permit plan administrators to rely on such proposed rules prior to their finalization.

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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

⁶ This includes the notice requirements described in Code sections 401(k)(11)(B)(iii)(II), 401(k)(12)(D), 401(k)(13)(E), and 414(w)(4).