



**MEETING OF
THE ELECTRONIC TAX ADMINISTRATION ADVISORY COMMITTEE
MARCH 17, 2021**

Statement of Adam McMahon on behalf of the SPARK Institute, Inc.

Thank you for the opportunity to speak with the Electronic Tax Administration Advisory Committee (“the Committee”) today. My name is Adam McMahon and I am providing comments on behalf of the SPARK Institute, a member-driven trade association for the retirement savings industry. I am an attorney with the law firm of Davis & Harman, which serves as government relations counsel for the SPARK Institute.

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, SPARK Institute members serve approximately 95 million employer-sponsored plan participants.

In my comments before the Committee this afternoon, I will discuss two specific electronic tax issues that the Committee should pursue in an effort to help reduce the costs and administrative burdens that are associated with maintaining employer-sponsored retirement plans and individual retirement arrangements (“IRAs”). By utilizing existing electronic technologies in the ways that I will discuss, the SPARK Institute believes that future tax guidance on these matters would result in reduced costs for retirement savers and greater financial security for Americans.

1. UPDATED ELECTRONIC DELIVERY STANDARDS FOR NOTICES AND DISCLOSURES

The first electronic tax issue that I will discuss this afternoon is the need for updated electronic delivery standards for the various notices and disclosures that must be routinely furnished to retirement plan participants and IRA owners pursuant to the Internal Revenue Code (“Code”). For example, these disclosures include information about participants’ rights under their workplace 401(k) plans and routine tax reporting that must be furnished when participants receive taxable distributions from their plans. The SPARK Institute strongly supports the expanded use of electronic media to deliver these documents and we believe that the expanded use of electronic delivery would make these disclosures more effective, more useful, and less costly for retirement savers.

Existing regulations from the Department of the Treasury (“Treasury”) and Internal Revenue Service (“IRS”) permit these documents to be electronically delivered to retirement plan participants and IRA owners, instead of in paper, if certain regulatory conditions are satisfied. These regulations are commonly referred to as the “IRS E-Delivery Rules.” *See* Treasury

Regulation section 1.401(a)-21. These existing rules, which were issued shortly after the passage of the federal E-SIGN Act, worked well for many years, but they have not been updated since 2006. Since 2006, we have seen an explosion of the use of electronic media for financial transactions and a steady growth in the public's comfort with electronic media across all ages.

Far more recently, in 2020, the Department of Labor ("DOL") finalized regulations recognizing two new regulatory safe harbors for electronically delivering notices and disclosures that are required by the Employee Retirement Income Security Act ("ERISA") for many of these same retirement plan participants. These new safe harbors allow electronic delivery to be the default method for document delivery and appropriately recognize the increased use of, and access to, electronic media by Americans who participate in workplace retirement plans. Additionally, DOL's new rules include important safeguards to protect retirement savers who prefer to receive their disclosures in paper form. For example, the new DOL rules may only be used if the sender first furnishes a one-time paper notice to any individual who will receive documents electronically. At all times, participants must also be permitted to request all relevant documents in paper at no charge.

Many of the regulatory conditions included in DOL's new rules overlap, or closely align, with the regulatory conditions described in the IRS E-Delivery Rules. However, notwithstanding this substantial overlap, Treasury and IRS have not indicated the extent to which documents delivered in accordance with DOL's new standards will satisfy the conditions described in the IRS E-Delivery Rules.

The SPARK Institute was very pleased to see that, in connection with the new DOL rules, Treasury and IRS indicated that they intend to issue additional guidance relating to the use of electronic delivery for participant notices. We were also further pleased to see that, on their 2020-2021 priority guidance plan, the Treasury Department and IRS included a new project to update the electronic delivery rules that apply when Code-required notices are provided to retirement plan participants and IRA owners. We understand that this recently announced project is intended to follow-up on DOL's update of its own electronic delivery rules.

Recommendation #1: It is with this backdrop that the SPARK Institute makes the following recommendation to the Committee this afternoon.

In an effort to promote harmonization across regulatory regimes, lower plan administration costs, and improve overall efficiency, the SPARK Institute asks that the Committee include in its next report a recommendation for Treasury and IRS to: (1) without delay, proceed with their recently announced project to update the electronic delivery rules for retirement-related disclosures; and (2) issue guidance indicating that notices and disclosures delivered in accordance with DOL's recently finalized safe harbors will satisfy the IRS's electronic delivery standards for furnishing notices and disclosures to retirement plan participants and IRA owners.

2. PERMANENTLY PERMIT REMOTE NOTARIZATION

The second electronic tax issue that I will discuss this afternoon is the need for a permanent extension of the temporary rules that have already been provided by the IRS with regard to the electronic notarization rules that apply when participants make certain elections under their retirement plans. Before discussing the specific guidance that we are seeking, please let me briefly explain the issue.

The Internal Revenue Code plays an essential role in encouraging Americans, and their employers, to build private retirement savings. Most significantly, if certain conditions are satisfied, the Code offers tax preferences to retirement savings plans and their participants.

One of these conditions is an important protection for the spouses of certain retirement plan participants. These are commonly known as the “spousal consent rules.” *See* Code section 417. Under these rules, before a married retirement plan participant is permitted to make certain elections with respect to his or her retirement benefits, the participant must first obtain the written consent of his or her spouse, and that consent must be witnessed by a notary public or plan representative. This type of spousal consent is needed, for example: (1) when a married participant changes his or her beneficiary to someone other than a spouse; and (2) when a married participant requests a distribution of retirement benefits from a pension plan in any form other than as a joint and survivor annuity.

Under existing IRS regulations, a spouse can provide this type of consent electronically and a notary can provide electronic notarization. However, when electronic media is used for these purposes, current IRS regulations require any spousal consent to be “witnessed in the physical presence of a plan representative or a notary.” *See* Treasury Regulation section 1.401(a)-21(d)(6). In 2006, when the rules were promulgated, it was not common for states to allow for “remote” notarization, although this is much more common today as technology has advanced. Remote notarization became critical during the pandemic for a variety of situations in which a notarization is required. For the administration of retirement plans, over the past year, the “physical presence” requirement has become impractical because the ongoing pandemic has created significant health risks for in-person transactions.

In response to these challenges, through IRS Notice 2020-42, the IRS granted temporary relief from the “physical presence” requirement for spousal consents that are witnessed through a video and audio communication system that satisfies a series of safeguards prescribed by the IRS, including relief for any remote notarization that is treated as valid under state law. This relief does not remove the general requirements for spousal consent and third-party witnessing. Instead, it merely provides relief from the “physical presence” requirement when a remote notarization process provides a reasonable substitute. At the end of 2020, the IRS provided an extension of this temporary relief through June 30, 2021.

Nearly all states currently allow for remote notarization in some form and we expect most states will make this procedure permanently available after the pandemic ends. Remote notarization procedures for spousal consents have been widely adopted by retirement plan sponsors and their service providers. They offer a more convenient and efficient alternative to physical witnessing

and offer spouses the same level of protection that is granted when elections are witnessed in the physical presence of a notary or plan representative.

Recommendation #2: In order to build on the successful implementation of the remote notarization systems developed in 2020, the SPARK Institute asks that the Committee include in its next report a recommendation for Treasury and IRS to publish guidance that would make permanent the remote notarization rules described in Notice 2020-42, as subsequently extended by Notice 2021-03. These systems are already in place, have worked well during the pandemic, and should be available as an alternative indefinitely. Furthermore, permanent relief from the physical presence requirement would not require a regulatory amendment. Instead, according to the current IRS regulations controlling electronic notarizations, the IRS can provide relief from the physical presence requirement by announcing substitute procedures in the Internal Revenue Bulletin. See Treasury Regulations section 1.401(a)-21(d)(6)(iii).

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If the Committee has any questions or would like additional information, please feel free to contact me at armcmahon@davis-harman.com.