May 21, 2024

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

Re: Request for Information—SECURE 2.0 Section 319—Effectiveness of Reporting and Disclosure Requirements (RIN 1210-AC09)

Dear Sir or Madam:

On behalf of the SPARK Institute, Inc., we are writing in response to the request for information ("RFI") regarding the effectiveness of reporting and disclosure requirements that was jointly published by the Department of the Treasury ("Treasury"), Internal Revenue Service ("IRS), Department of Labor ("DOL"), and Pension Benefit Guaranty Corporation ("PBGC") (collectively "the Agencies") on January 23, 2024.

The SPARK Institute represents retirement plan recordkeepers, mutual fund companies, brokerage firms, insurance companies, banks, consultants, trade clearing firms, and investment managers. Collectively, our member firms administer the retirement plans for over 110 million American workers. The SPARK Institute is uniquely positioned to provide comments on the reporting and disclosure requirements imposed on retirement plans through the Employee Retirement Income Security Act ("ERISA") and Internal Revenue Code ("Code") as many of SPARK's members, on behalf of their clients, prepare these reports and disclosures, distribute disclosures to plan participants, and receive and process participant responses.

From SPARK's perspective, the effectiveness of retirement plan disclosures would be most improved by: (1) focusing participant disclosures on the information that is most relevant to decisions that are within a participant's control; and (2) continuing to support the expanded use of default electronic delivery.

I. SIMPLIFY, CONSOLIDATE, AND STREAMLINE DISCLOSURES TO FOCUS ON INFORMATION THAT IS MOST RELEVANT TO DECISIONS THAT ARE WITHIN A PARTICIPANT'S CONTROL

Combatting Disclosure Fatigue. In recent decades, the amount of disclosures that retirement plan participants receive has significantly increased and contributed to disclosure fatigue.

Participants have become numb to overly detailed disclosures and it is too difficult for participants to identify and understand the information that is most relevant to them. As the ERISA Advisory Council summarized in its 2017 report on enhancing the effectiveness of retirement plan disclosures, "Contrary to the intended purpose of the disclosures to inform participants about the plan(s) and to facilitate the monitoring of plan operations, the overwhelming number and content of the disclosures being provided defeat the stated purpose."[1]

The steady increase in the volume and complexity of participant disclosures has resulted from: (a) regulatory initiatives that have increased the length and complexity of disclosures; and (b) new plan options that, by statute, prescribe a minimum set of participant disclosures. As these new requirements have been incorporated into existing participant disclosures, older and less relevant information has not been removed or paired back. While retirement plan recordkeepers would welcome the opportunity to streamline and trim participant disclosures to focus participants on information that is most impactful to the decisions and actions that are within their control, the statutory and regulatory disclosure requirements have generally not been updated to permit this. Moreover, due to litigation and enforcement risks, an exhaustive and legalistic approach to disclosure is often pursued, instead of an approach that prioritizes participant outcomes.

For example, as plans have become more complex and their enforcement and litigation risks have increased, the summary plan description ("SPD") has become significantly longer and more detailed.[2] As another example, the special tax notice envisioned by Code section 402(f) has substantially grown to provide exhaustive details on the potential tax treatment of plan distributions. While we greatly appreciate the safe harbor models published by Treasury and IRS to help plan administrators fulfill their disclosure obligations under Code section 402(f), these lengthy models – which provide many details on the exceptions to the 10% early withdrawal penalty, the required minimum distribution rules, and the impact of after-tax contributions – do not clearly focus participants' attention on the primary reason for providing the disclosure. That is, they do not clearly focus participants on the negative consequences that can result if a participant chooses not to rollover an otherwise eligible rollover distribution.

In order to overcome and avoid disclosure fatigue, the SPARK Institute believes that participant disclosures should be simplified, consolidated, and streamlined to focus participants' attention on the information that is most relevant to the decisions that are within their control. While we believe that the number of disclosures is too high, this is not simply a matter of consolidating the disclosures envisioned by independent statutory and regulatory requirements into a single document. Rather, this is a matter of limiting the information that is sent directly to participants, by default, to those pieces of information that are most relevant to participant decisions and emphasizing the details that are most germane to those decisions. Upon receiving more tailored

[1] ERISA Advisory Council: Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors (November 2017) ("2017 EAC Report"), at 11.

[2] 2017 EAC Report, at 14 ("Numerous witnesses testified that the SPD has developed into a behemoth document that does not serve participant interests because it is so detailed that it discourages participants from reading it at all.").

communications, participants who wish to obtain additional information should be permitted to do so upon request.

For example, while we appreciate the ability to consolidate into a single document (i) the qualified default investment alternative ("QDIA") notice; (ii) safe harbor notice; (iii) auto enrollment safe harbor notice; and (iv) permissive withdrawal notice, the model consolidated notice published by DOL and IRS is still four full pages of dense prose. We believe that the information conveyed in these notices would be more effective if it could be limited to a one-page document calling out the most critical information that is relevant to participant decisions that relate to a plan's automatic enrollment feature. If participants wish to receive additional details, including all of the information that is currently included in the model automatic enrollment notice, they should be furnished with that additional information upon request. As an alternative approach to providing all of this required information in a combined automatic enrollment notice, we also encourage the Agencies to consider guidance clarifying that plans are permitted to communicate the information required for these notices by cross-referencing other disclosures, such as the SPD.

Additional Disclosures Are No Substitute for Financial Education and Assistance. In DOL's reporting and disclosure RFI from last fall, DOL asked questions about whether additional information or presentations should be added to the participant fee disclosures that are required by Labor Regulation section 2550.404a-5. Given the current RFI's consideration of ways to improve the effectiveness of participant disclosures, with regard to that prior inquiry, we must reiterate that additional information and/or additional presentations should not be added to the DOL's existing participant fee disclosures (or other disclosures) as a substitute for financial education and assistance.

More information, more measurements, and more presentations would only serve to further overwhelm participants when attempting to choose among available options. This is concerning because participants who are overwhelmed by complex disclosures will be less likely to participate in a plan or otherwise engage with the plan in ways that are beneficial to them. In this regard, additional disclosures are no substitute for meaningful financial education and assistance that can help participants connect all of the disclosures they receive to their own goals, risks tolerances, and options.

Furthermore, in considering the appropriateness of additional disclosures on the 404a-5 disclosure and other disclosures, the SPARK Institute urges the Agencies to fully consider how any new disclosures are likely to increase plan fees for participants. For example, a potential recommendation for individualized fee reporting would require substantial system changes, the cost of which would ultimately be borne by plan participants through higher fees. These increased costs must be weighed against the marginal benefits that additional fee disclosures may create for participants.

Additional Disclosures Should Not Increase Litigation Risks. The purpose of disclosures should be to inform participants about their rights under the plan so that they can exercise those rights, as appropriate, and take actions that promote the best retirement outcomes. The purpose of disclosures is not to make it easier for the plaintiffs' bar to collect information to pursue costly

and wasteful lawsuits against plan sponsors and service providers. In recent years, there has been an explosion in class action lawsuits brought against plan sponsors and service providers. This litigation has created a drain on the retirement system and additional disclosures should not contribute to this harmful litigation.

II. REGULATORS SHOULD CONTINUE TO SUPPORT THE EXPANDED USE OF ELECTRONIC DELIVERY

Electronic Delivery Lowers Costs and Improves Participant Outcomes. The current reporting and disclosure RFI asks about ways to lower the costs of disclosure and improve participant engagement. As the SPARK Institute has expressed on many prior occasions, we strongly believe that the expanded use of electronic delivery advances both of these objectives.

For many years, the SPARK Institute has advocated for legislative and regulatory changes that promote the use of e-delivery. This advocacy is rooted in our belief that e-delivery makes retirement notices and disclosures more effective, more useful, and less costly for retirement savers. For example, a 2019 study conducted by Quantria Strategies estimated that $250 to $450 million in savings would annually accrue directly to participants by permitting plan administrators to deliver notices and disclosures electronically by default, which DOL eventually permitted in 2020.[3] That same study estimated that these cost savings could increase a participant's 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 regulatory documents.[4] According to DOL's own study accompanying its 2020 electronic delivery rules, DOL expects that the new electronic delivery safe harbors will save $349 million per year.[5]

Research also shows that electronic delivery improves participant outcomes in terms of savings rates and participant engagement, independent of any cost savings directly attributable to reduced printing, mailing, and storage costs.[6] This is because participants who access plan disclosures electronically can more easily be directed to online tools and other resources that help them: (i) understand the adequacy of their savings; (ii) plan to make improvements; and (3) immediately take action in pursuit of their goals. Other advantages that electronic delivery has over paper delivery include the ability for participants to access information regarding their accounts in real time, the ability to reduce missing participant issues by providing participants uninterrupted access to their documents when they change physical addresses, and additional levels of cybersecurity for participants who register their accounts and enable multi-factor authentication. Ultimately, the many benefits of e-delivery have improved outcomes for millions of Americans who work hard to save for a financially secure retirement.

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

[4] *Id.*

[5] 85 Fed. Reg. 31884, 31888 (May 27, 2020).

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

In 2002, as part of a government-wide effort to modernize rules to reflect advances in technology, DOL published two e-delivery safe harbors – the "affirmative consent" and "wired at work" safe harbors. For more than two decades, these two safe harbors have worked well, in part, because they include regulatory safeguards that require plan administrators to implement measures reasonably calculated to ensure the actual receipt of electronically delivered documents, in addition to always honoring any participant's preference for paper delivery.

Building on its 2002 "affirmative-consent" and "wired-at-work" safe harbors, in 2020, DOL finalized a pair of new e-delivery safe harbors – the "notice-and-access" and "direct email" safe harbors. These new safe harbors appropriately expanded the universe of participants who may receive electronically delivered documents by default and were intended to promote the many benefits of e-delivery, while also incorporating a series of regulatory safeguards to ensure that plans are delivering documents in accordance with participant preferences. The 2020 safe harbors were adopted in large part due to the public's increased comfort with conducting financial transactions online and the progress that has been made since 2002 in terms of improved internet access, especially among retirement plan participants.[7]

The regulatory safeguards incorporated into the 2020 safe harbors operate at the time electronic delivery commences and on an ongoing basis. For example, DOL's 2020 safe harbors condition relief upon plan administrators furnishing a one-time paper notice to any covered individuals who will be receiving documents electronically. 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 free of charge. Similar notices are also sent electronically to participants each time that documents are posted online. All of these notices and safeguards empower participants to monitor and manage their delivery preferences. Additionally, the 2020 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 terminate employment.

The point of all of this is to say that DOL's existing e-delivery framework has struck the right balance by fostering the use of e-delivery and all of its associated benefits, while also incorporating regulatory safeguards that ensure participants can access their documents, are given the right to request paper, and are given timely notices about how to exercise that right. Accordingly, in an effort to reduce the costs of disclosure, increase participant engagement, and improve participant understanding of the information conveyed in disclosure, we encourage the Agencies to continue supporting the expanded use of electronic delivery.

[7] A 2015 telephone survey conducted by Greenwald & Associates for the SPARK Institute found that 99 percent of retirement plan participants reported having internet access at home or work and 88 percent of respondents reported accessing the internet on a daily basis. That study also found that 84 percent of plan participants find it acceptable to make electronic delivery the default option, with the option to opt out at no cost to the participant.

Regulatory Coordination is Needed to Harmonize DOL and IRS Standards. One specific step that the Agencies, particularly Treasury and IRS, can take to support the expanded use of electronic delivery would be to issue guidance expressly indicating that a retirement plan administrator will satisfy its obligations to deliver 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 (i.e., the 2020 e-delivery safe harbors issued by DOL).

In the alternative, to the extent Treasury and IRS do not believe that such guidance can be reconciled with the existing conditions described in its own e-delivery guidance – i.e., 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.

Designate Code-Required Documents for Use on a Combined NOIA. Under DOL's 2020 notice-and-access safe harbor, when a plan administrator posts a covered document online, it must also send a notice of internet availability ("NOIA") to the individual who is entitled to receive the document. However, as an alternative to sending a NOIA every time a plan administrator posts a covered document online, the notice-and-access safe harbor 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 notice-and-access safe harbor, this alternative method can be used to deliver "any applicable notice required by the 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 2020 safe harbors. Treasury and IRS, however, have yet to issue guidance exercising the authority reserved to them in DOL's notice-and-access safe harbor.

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 that automatically enroll participants.[8] 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 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.

Permit Combined NOIAs for Lineup Changes & Other Events. Another step that DOL can take to promote consolidation and simplification through its electronic delivery rules would be to permit plans that use the notice-and-access safe harbor to send a *single* NOIA for multiple notices that are associated with changes to a plan's menu of designated investment alternatives. When an employer changes or replaces a designated investment alternative, ERISA may require the employer to send different notices to alert participants of the change. For example, the employer may be required to send an updated QDIA notice, mapping notice, blackout notice, and/or updated 404a-5 disclosures.[9] According to Labor Reg. section 2520.104b-31(d), the plan administrator must send a separate NOIA for each of these disclosures, even though participants will typically review these disclosures together in relation to the same event. To eliminate duplication and to simplify this process, the SPARK Institute requests that DOL permit plan administrators to send a single NOIA identifying each of the disclosures required for fund lineup changes. Additionally, we also encourage DOL to consider other events for which it would be appropriate to permit plans to send a single NOIA for multiple disclosures that are related to a single event.

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The SPARK Institute appreciates the opportunity to provide these comments to the Agencies. If you have any questions or would like more information regarding this letter, please contact the SPARK Institute's outside counsel, Michael Hadley (mlhadley@davis-harman.com) or Adam McMahon (armcmahon@davis-harman.com), Davis & Harman LLP.

Sincerely,

Tim Rouse
Executive Director

[8] 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).

[9] *See* ERISA § 404(c)(4); Labor Reg. § 2550.404c-5; Labor Reg. § 2550.404a-5; Labor Reg. § 2520.101-3.