PENSION RIGHTS CENTER
PROTECTING AND PROMOTING RETIREMENT SECURITY
1050 30th Street NW | Washington, DC 20007
P: 202-296-3776 | F: 202-833-2472 | www.pensionrights.org

January 11, 2021

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: Response to SPARK Institute letter seeking electronic disclosure guidance

Dear Ms. Weiser and Ms. Levy:

It was recently reported in the trade press[1] that the SPARK Institute (SPARK) had written to the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS)[2] seeking guidance that would permit retirement plan administrators complying with recently authorized Department of Labor (DOL) "notice-and-access" electronic disclosure regulations to be deemed in compliance with Treasury/IRS electronic disclosure requirements. The Pension Rights Center is a nonprofit consumer organization that works to protect and promote the retirement security of workers, retirees, and their families. We write to urge the Treasury and IRS to reject SPARK's request.

Introduction

On May 27, 2020, the Labor Department published final regulations providing for two new safe harbors related to electronic delivery of retirement plan disclosures, notices, and elections: 1) "notice-and-access," where plans need only send consumers an electronic notice that a required disclosure is available on a website,[3] or 2) "direct delivery," where plans send the actual disclosure to the consumer in the body of or as an attachment to an email.[4] As a practical matter, the vast majority of plans will likely use the notice-and-access safe harbor because it imposes fewer responsibilities on plan administrators, saves them the most money, and minimizes plan liability by reducing participants' ability to access and retain important documents. Thus, although we have some concerns with the "direct delivery" disclosure option, this letter focuses on the notice-and-access (NA) safe harbor.

The SPARK letter urges that compliance with DOL's NA safe harbor should be considered compliance with Treasury's 2006 regulations on electronic delivery.[5] If Treasury/IRS cannot grant blanket approval, SPARK requests that Treasury/IRS identify the the circumstances and added steps

---

[1] "SPARK Letter to IRS Requesting Guidance on Electronic Delivery Standards (PDF)," *BenefitsLink.com Retirement Newsletter* (Dec. 14, 2020), *available at* https://benefitslink.com/newsletters/2020/2020_12_14_retirement.html.
[2] Letter from Tim Rouse, SPARK Institute, to Carol Weiser, U.S. Dept. of the Treasury, & Rachel Leiser Levy, IRS (Dec. 9, 2020), *available at* https://www.sparkinstitute.org/wp-content/uploads/2020/12/E-Delivery-Letter-from-SPARK-12.9.20.pdf.
[3] 85 Fed. Reg. 31884, 31922-31924 (May 27, 2020) (to be codified at 29 C.F.R. § 2520.104b–31(a)-(l)) [hereinafter *NA Regulations*].
[4] *Id.*, at 31924 (to be codified at 29 C.F.R. § 2520.104b–31(k)).
[5] Treas. Reg. § 1401(a)–21, *available at* https://www.law.cornell.edu/cfr/text/26/1.401(a)-21 [hereinafter *2006 Regulations*].

needed for approval to utilize NA for notices and elections under Treasury/IRS jurisdiction.[6] For the reasons below, we recommend that you reject *all* of SPARK's requests.

I. DOL Standards under NA Are a Significant Departure from, and Do Not Satisfy, Treasury/IRS Regulatory Standards for Applicable Notices

As a threshold matter, SPARK does not even address the provisions of the Treasury 2006 regulations applicable to the "consent method" for notices[7] or to the provisions applicable to handing participant elections,[8] because those mandates and conditions so clearly conflict with the lack of protections in the DOL NA regulations. Instead, SPARK's letter focuses on the "alternative method"[9] for providing electronic notices included in Treasury/IRS 2006 regulations, notably its core requirement that consumers must have the "effective ability to access" the electronic notice. The letter essentially argues that deemed compliance is called for because the alternative method is so closely aligned with the NA regime that they are legally equivalent. They are not.

A. Notice-and-Access Does Not Require *Effective* Access

The core requirement of the "alternative method" for providing electronic notices under the 2006 regulations is the recipient's *effective ability to access* the notice via electronic means. However, the NA regulations do not require elements that would ensure the effective ability to access the documents contemplated under the Treasury regulations. Under the Labor Department's NA safe harbor, participants or other "covered individuals" are presumed to have adequate access to electronic disclosures if either they supply an "electronic address," i.e., an email address or a cellphone number, to the employer, plan sponsor, or plan administrator, or they are assigned an email address for "employment-related" reasons.

1. Supplied electronic address

SPARK argues that supplying such an address – often a condition of employment and sometimes for participation in the plan – indicates effective access to the internet and to the documents there. This is not true.

a. Email

Simply because individuals can supply an email address does *not* mean that: 1) they know how to use email (some internet providers automatically provide an email address to the subscriber who has no

---

[6] It is easy for terminology to get conflated and confused here. In general, the "notices" in the Treasury 2006 regulations relate to the legally required documents themselves, they *are* the documents being provided. *See* Treas. Reg. § 1.401(a)–21(e)(1), *2006 Regulations*, *supra* n. 5. Under the DOL NA regime, a "notice" of internet availability (NOIA) is *not* the legally required disclosure or document itself; it is an email or text message letting the consumer know that the legally required document is available on a website, and they can come find it. Thus, "notices" under the two sets of regulations may be totally different things and should be treated differently. Also of note: perhaps in recognition of the fact that the 2006 regulations specify many concrete protections for consumers for participant *elections*, see Treas. Reg. § 1.401(a)–21(d), SPARK seems to be asking for "deeming" guidance only for "applicable notices" and not for elections, although that request is sometimes blurred in their letter, and the DOL NA regime applies to *all* disclosures, notices and elections.

[7] Treas. Reg. § 1.401(a)–21(a) & (b).

[8] Treas. Reg. § 1.401(a)–21(a) & (d).

[9] Treas. Reg. § 1.401(a)–21(a) & (c).

desire or know-how to use it); 2) they regularly view or use email (important emails could sit for weeks or months); or 3) they have internet access at home. Although industry proponents of making electronic delivery the default for retirement plan disclosures commonly tout high levels of internet use, and access to the internet has increased over time, several segments of the population still face a significant digital divide based on age, income, geography, education, race/ethnicity, and other factors.[10] Particularly relevant to plan participants, more than one-fourth of all adults age 65+ do not use the internet,[11] which means that a huge number of retired participants and beneficiaries do not have effective access. An estimated 15 million *retirement plan participants* age 55 and older do not regularly use the internet for email, shopping or other purposes.[12] Rather than addressing this digital divide, the Preamble to the DOL regulations says only:

> For participants without ready internet access, this final rule may create additional impediments to accessing critical plan information. Those who fail to opt out and request paper documents will have to leave home (e.g., visit a public library or the home of a friend or family member) to access plan information.[13]

"Additional impediments" and being told to go to a public library and use an insecure, public terminal to access, read, and print sensitive financial information is not effective access, with or without a pandemic.

b. Smartphones

Much of the increase in internet access is due to greater use of smartphones that have internet capability. In 2019, about one-fifth of the population, including one-fourth of Black and Latino adults, one-fourth of those who earn $30,000/year or less, and one-third who don't have a high school diploma depend on a smartphone for their *only* internet access.[14] Yet, simply because individuals have a cellphone number does not mean they can access the internet, and just because a smartphone has the capability to access internet does not mean the subscriber's *plan* allows it. Due to cost, many smartphone subscribers have plans that are just voice and text with no internet/data. In rural areas, subscribers may have to drive into town to get cell reception and use internet.

Even for those people who can access the internet on their smartphone, these devices are more suitable for checking sports scores, texting, and looking at a friend's Instagram page; they are *unsuitable* for reading complex documents, let alone printing and saving them. The first Apple iPhone was not released until 2007, the year after the Treasury regulations were promulgated. But it is difficult to fathom that Treasury/IRS would have considered a smartphone to be effective access for these purposes. Even today, internet access that is dependent on a small smartphone is not *effective* access for purposes of understanding retirement plan disclosures.

---

[10] *See* Pew Research Center, *Internet/Broadband Fact Sheet*, Chart: Who Has Home Broadband (June 12, 2019), *at* https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.
[11] *Id.*, Chart: Who Uses the Internet.
[12] *See* A. Munnell, "This one change could undermine the retirement security of millions of Americans," *MarketWatch,* (July 14, 2020), *at* https://www.marketwatch.com/story/new-labor-department-rule-changes-default-retirement-plan-disclosure-from-paper-to-electronic-2020-06-29.
[13] *NA Regulations*, *supra* n.3, Preamble at 31915.
[14] Pew Research Center, *Mobile Fact Sheet*, Chart: Who Is Smartphone Dependent, *at* https://www.pewresearch.org/internet/fact-sheet/mobile/.

2. Employer-assigned email

The DOL NA safe harbor also allows plans to default to electronic addresses assigned by an employer to an employee for employment-related purposes. At first, DOL proposed allowing employers to make up addresses for employees solely for the purpose of sending them notices of internet availability (NOIAs). In the final regulations, DOL made a concession, specifying that the "employment-related purposes" could include but may not be limited to sending NOIAs. Still, this means that employers need identify only one more purpose for the email address in addition to the NOIA to assign an email address and comply with the regulation.

Because not everyone has desk jobs using computers, the prior DOL regime[15] on default electronic disclosures only allowed it for employees for whom use of a computer is integral to the employee's job duties. This "wired for work" requirement ensured that the employee was knowledgeable about using, and frequently used, computers.

By contrast, this employer-assigned address provision in the NA regulations permits plans to use default electronic delivery with employees who may have no or very infrequent/limited access to a computer. Only two purposes – NOIAs and one other, no matter how inconsequential – are needed to create and assign an email address to a worker. There is no such guarantee that employees have *effective* ability to access to a computer or the internet at work. "Employment-related" need not be meaningful, effective, or frequent. In addition, the NA regulations are silent as to how beneficiaries, who are entitled to certain notices and elections but who have never worked for the employer, are supposed to be communicated with or protected.

B. The Notice-and-Access Rules Do Not Provide Any "Additional Safeguards" Designed to Ensure Effective Access by Consumers

1. The "Inoperable Address" Requirement Is Ineffective

SPARK is correct that the NA regime requires plan administrators to have a system for detecting inoperable electronic addresses, and to cure them.[16] However, this system is so minimal that it does not ensure that NA provides effective access.

Under the NA regime, once a plan sends the consumer a text or email to let them know that documents are available on a website, and the email or text does not bounce back as undeliverable, the administrator's responsibilities have ended. This is insufficient to ensure effective access. For example, if an email went to a spam folder, or the text went to a cell number that has changed and has been reassigned to someone else, there would no bounceback, and neither the consumer nor the plan would ever know. (DOL provides no back-up plan for the situation of a cell number being reassigned to another individual.)

---

[15] 29 C.F.R. § 2520.104b–1, *available at* https://www.govinfo.gov/content/pkg/FR-2002-04-09/pdf/02-8499.pdf (Apr. 9, 2002) (2002 safe harbor); DOL, Technical Release 2011-03R, *Revised Interim Policy on Electronic Disclosure under 29 C.F.R. § 2550.404a–5* (Dec. 8, 2011) (fiduciary requirements re: disclosures in participant-directed plans), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/technical-releases/11-03r. The text accompanying this footnote is written in the past tense, because although this 2002 safe harbor remains on the books, the availability of the NA regime may render it a dead letter.

[16] *NA Regulations*, *supra* n.3, at § 2520.104b–31(f)(4).

Contrary to the Treasury/IRS approach, which centers on the *effective ability of the consumer to access* documents, the NA approach is totally focused on what minimal actions *effectively relieve the plan administrator from responsibility* or the need to take any further efforts to provide notice or election documents.

Electronic systems today have the built-in capability to detect whether an email has been opened, and whether a consumer has logged in to a website and accessed the disclosure.[17] Yet, DOL expressly rejected these and other suggestions for ways that electronic technology could have been used to ensure actual receipt and improve protections for participants and beneficiaries.

2. Measures to Ensure Accuracy of Address after Employee Leaves Job

In only one situation does the NA regime require plan administrators to take measures reasonably calculated to ensure continued accuracy and availability of electronic addresses: when the employee had an employer-assigned electronic address. If the participant *supplied* an electronic address, for instance a personal email address or cell number, there is *no* continuing obligation for the plan administrator to take steps to ensure that the address is correct upon termination of employment or stays accurate following termination.[18] Consequently, an employee who leaves a job in her mid-40s and is a deferred vested participant may supply an email address or cell number at termination, but it is possible if not likely that those could change over the course of another 20+ years of work elsewhere. Post-employment changes of address can also occur with a paper and mail system, but at least those mailings must be sent in a way that is reasonably calculated to ensure *actual receipt*, and whereby return and forwarding postage is guaranteed and address correction is requested.[19]

3. DOL's One-Time Paper Notice Requirement Is Inadequate

The "alternative method" of satisfying Treasury/IRS's requirements to use an electronic medium to provide applicable notices also mandates that consumers be advised of their right to receive paper versions free of charge. SPARK points to the requirement under the NA safe harbor that plan administrators furnish a one-time paper notice[20] to participants before defaulting to electronic NOIAs, stating that it bolsters their case for "effective" access. These initial notices must also advise consumers of the electronic address that will be used, instructions for accessing electronic documents, their right to receive paper disclosures with a global opt-out or individually, and how to exercise those rights to paper. The initial notice must also warn consumers that the electronic documents may not remain available on the website after one year.

The initial disclosure does not help a consumer make an informed choice or help them exercise their rights to paper. The notice is not required to explain the significance or pros and cons of paper vs.

---

[17] Technological capability to ensure actual receipt should be a necessary component of any electronic delivery system but, by itself, would not have made the DOL regulations compatible with the Treasury regulations, nor would it be sufficient to adequately protect consumers.

[18] *NA Regulations*, *supra* n.3, at § 2520.104b–31(h).

[19] *Id.*, at § 2520.104b–1(b)(1).

[20] Even this inadequate initial paper disclosure requirement apparently has been waived, at least temporarily. In response to a question asked by an industry representative at a conference, the Acting Assistant Secretary of EBSA declared that, during the pandemic, plans could provide the initial notice electronically rather than on paper. *See* Ted Godbout, "EBSA's Wilson: E-Delivery Paper Notices Can Be Deferred Under COVID-19 Relief," (ASPPA News, July 22, 2020), *available at* https://www.asppa.org/news/ebsa's-wilson-e-delivery-paper-notices-can-be-deferred-under-covid-19-relief.

electronic delivery. It need not provide an opportunity to actually make the election to globally opt-out. It need not include a telephone number for contacting the plan administrator with questions or to act on a desire for paper.[21] It will be up to the consumer to research the question, take the initiative to contact the plan, obtain any paperwork, and find out how to make the election. Moreover, there is no requirement that the initial notice be supplied separately or conspicuously. Thus, the initial notice can be buried in a new employee packet where the consumer is less likely to see it.

With so many roadblocks in the way of making an informed choice about the right to paper, and in the way of exercising it, the NA regime's provisions for protecting consumers' right to paper are weak and ineffective.[22] For all of the above-discussed reasons, Treasury/IRS should reject SPARK's assertions of any equivalence between the NA safe harbor and the Treasury/IRS's requirement that consumers have the effective ability to access electronic documents, and deny SPARK's requests.

C. Notice-and-Access Fails to Meet the Other Requirements Necessary to Qualify for the Alternative Method of Providing Applicable Notices

In addition to requiring that consumers have the effective ability to access electronic disclosures, the alternative method approach under the Treasury regulations also requires several additional conditions to be met in order to use it as a safe harbor. The NA regime falls short of meeting these additional requirements, reinforcing the argument against granting SPARK's requests.

1. Electronic Notice Must Be No Less Understandable

The 2006 Treasury regulations require that information provided electronically satisfy the otherwise applicable content and timing requirements, and that it be no less understandable than it would be in paper form. Though not discussed by SPARK, the DOL safe harbor requires only that the NOIA be written in a manner calculated to be understood by the average participant. (DOL expressly rejected its own original proposal that NOIAs meet established readability standards.)[23] There is no requirement for ensuring that electronic notices and elections are just as understandable as their paper counterparts.

2. Consumer Must Be Alerted to the Significance of the Notice

The 2006 Treasury regulations require both notices and elections to be designed to identify the subject matter of the notice, and to identify and alert the recipient to the significance of the information in the notice or election disclosure. The NOIAs provided under NA are too minimal to address the substance of this Treasury requirement. A NOIA need only contain a prominent statement such as this is a "disclosure about your retirement plan."[24] Also, the body of the NOIA must contain the statement, which need not be prominent, that "important information about your plan is now available."[25] The NOIA must also contain the name of the document that is being made

---

[21] NOIAs must contain a telephone number, but not the initial notice.
[22] Rather than using inertia to promote retirement security, like auto-enrollment does, this NA system counts on and uses inertia against adequate disclosure and retirement security for consumers: many participants won't find, read, and save the information they need to get benefits and watchdog their plan.
[23] *NA Regulations*, *supra* n.3, Preamble, at 31894-95.
[24] *Id.*, at § 2520.104b–31(d)(3)(A).
[25] *Id.*, at § 2520.104b–31(d)(3)(B).

available elsewhere, but no description of it is required unless the nature of the document is not reasonably conveyed from the name of the document.

The NOIA is *not* required to convey anything about the significance or meaning of the disclosure. It need not be identified or explained in such a way that the consumer is alerted about its import.[26] More important, the NOIA regarding a notice or election need not alert the consumer whether any action is required by them, or by when,[27] thus defeating one of the most important functions ensured by legal requirements for plans to provide disclosures.

3. Consumers Must Be Provided Readily Understandable Instructions for How to Access Documents

The 2006 Treasury regulations require electronic systems for providing notices and elections to provide instructions for accessing a document that are readily understandable. Under NA, no instructions are required, understandable or otherwise. The plan may but is not required to provide a hyperlink to the document. Instead, it can simply provide a URL address, which the recipient must copy and paste to find the website where the document resides (a procedure that can be cumbersome on a smartphone). Then, the consumer must log in and navigate the plan's website to find the documents.

4. Record Retention Is Necessary for Legal Effect

The 2006 Treasury regulations on providing electronic delivery of notices state that the alternative method is an exemption from E-SIGN section 101(c)'s requirements to obtain the consumer's *consent* to provide notices in electronic form.[28] However, this method is *not* exempt from E-SIGN section 101(e), which the 2006 regulations mirror, stating that if a statute requires a record to be in writing, the record's legal effect, validity, and enforceability may be denied if the electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.[29] SPARK acknowledges this Treasury requirement in footnote 4 of its letter, but does not address why it should no longer be a necessary condition for electronic notices.

The NA regime violates the recordkeeping requirements of the 2006 regulations and E-SIGN. Under NA, disclosures posted on the website are required only to be posted for one year or until

---

[26] In footnote 5 of its letter, SPARK attempts to justify the failure of NOIAs to be required to explain the significance of disclosures by relying on one of the NA provisions "generally prohibiting" plan administrators from including any content not required by the regulations. But, the regulatory provision cited by SPARK cross-references 2520.104b-31(d)(3), which permits the addition of descriptions of the document; by definition, descriptions likely necessitate an explanation of the significance of the document. Also, the NA regulations appear to permit plan administrators to include marketing pitches, as long as they are not inaccurate. *NA Regulations*, *supra* n.3, Preamble at 31894. SPARK's excuse for not meeting § 1401(a)–21(a)(5)(ii) of the Treasury regulations should not be given any credit.

[27] *NA Regulations*, *supra* n.3, Preamble at 31893 ("A NOIA … may (but is not required to) contain a statement as to whether action by the covered individual is invited or required in response to the covered document or how to take such action....").

[28] Section 1.401(a)–21(c)(1).

[29] *Id.*, at § 1.401(a)–21(a)(3)(ii). The IRS also has a fact sheet on its website that states that records relating to benefits should be kept "until the trust or IRA has paid all benefits and enough time has passed that the plan won't be audited." *Maintaining Your Retirement Plan Records*, *at* https://www.irs.gov/retirement-plans/maintaining-your-retirement-plan-records.

superseded by a newer version, whichever is later.[30] Plans are not required to store documents indefinitely until the benefits are paid out, nor are they required to maintain the documents in a form that is capable of being accurately reproduced for later reference, or easily accessed by the parties. In the experience of the Pension Rights Center and the pension counseling projects across the country, when documents disappear, retirees' rights to their benefits can also disappear. At the time a disclosure is provided, it may not be obvious to workers that they should have requested paper copies or printed out copies of digital documents.[31] However, decades later at retirement, or years after that when a widow seeks survivor benefits, plan participants and beneficiaries will often need paper copies of documents in order to prove their entitlement to earned benefits. One of the possible benefits of having documents in digital form is that they can be easily stored in the "cloud" so that consumers can check on past benefit statements, determine the plan rules in effect when they terminated employment, or check the calculation of their benefits at retirement. However, DOL did not include a requirement that plans retain records and make them available to participants and beneficiaries.[32]

In summary, the NA regime does not provide consumers with the effective ability to access required disclosures, nor does it meet the additional, basic requirements specified in the 2006 regulations that are necessary to adequately protect plan participants and beneficiaries. As a result, Treasury/IRS should not deem compliance with the NA safe harbor as in compliance with the safe harbor outlined in the 2006 regulations.

II. Piecemeal Exemptions from Treasury/IRS Requirements Is Unjustified

Perhaps because SPARK recognizes that the NA regulations are not at all equivalent to the 2006 Treasury regulations and that they do not ensure effective access, in the alternative SPARK requests that Treasury/IRS provide piecemeal exemptions from compliance with the 2006 regulations. Its letter requests that the agencies: 1) identify the specific circumstances/factors under which the IRS requirements could be met, and to determine the additional steps needed to meet them; 2) while the agencies are doing that, they should excuse plans from compliance with Treasury/IRS mandates, as long as plans comply with the inadequate standards of NA "in good faith;" and 3) identify which Treasury or IRS notices might be eligible for inclusion in the new "combined notices" under NA.[33] SPARK implies that it needs Treasury/IRS to harmonize the regulatory requirements and to do so as soon as possible, because service providers are ready to go with NA and can't proceed without unified standards. Just as Treasury/IRS should reject SPARK's plea for blanket exoneration from compliance with the 2006 regulations, it should similarly reject SPARK's request for piecemeal absolution.

---

[30] *NA Regulations*, *supra* n.3, at § 2520.104b–31(e)(2)(ii).

[31] Besides giving short shrift to concerns over whether consumers have adequate access to suitable computing devices and the internet, the NA regulations also fail to address concerns over whether consumers have access to a printer (especially at home) to enable them to print out and preserve digital documents on paper for safe-keeping. Digital documents on a hard drive are easily lost if the hard drive dies or if changes in computer software prevent being able to access the digital document.

[32] *NA Regulations*, *supra* n.3, Preamble, at 31896.

[33] The Pension Rights Center also has substantial concerns with the "combined notice" provision of the NA regulations too numerous to discuss here. However, we urge Treasury/IRS to decline SPARK's invitation to identify notices that would be included in that procedure.

First, there is no legal or practical imperative to align the regulations or devise a unified approach. As both DOL and Treasury/IRS are always careful to state, they each have authority over different sets of notices and elections, and each agency's regulations do not apply to the other's set of disclosures. There are some instances in which DOL and Treasury/IRS have referred to the regulations of the other and have deemed compliance with one sufficient to establish compliance with the other.[34] However, their regulations related to electronic disclosures have significantly differed but peacefully coexisted over time. There is no legal conflict between the two sets of regulations, in that neither set mandates that plans take actions that would violate the other set of regulations. Both sets of regulations provide for *safe harbors*, which are *optional*, alternative regimes that provide an alternate path to compliance. It is entirely possible for plans to comply with both sets of regulations at the same time, and in fact this is what they have been doing for years. Prior to the adoption of NA, retirement plan consultants commonly observed that since the DOL safe harbor requirements for electronic disclosures were more restrictive than the Treasury/IRS safe harbor requirements, compliance with DOL requirements would generally mean Treasury/IRS requirements are satisfied.[35] If the plans want a unified approach, they can abide by the Treasury regulations.

Further, the issuance of the NA safe harbor regulations provides no basis for urgency for Treasury/IRS to act here or to take the actions SPARK requests. In fact, it would be premature for Treasury/IRS to race to harmonize its regulations with NA when we do not yet know whether the NA regime will even stand. This is not the time for Treasury/IRS to make a sudden pivot on major regulations. The Service has indicated its intent to revisit the issue of electronic technologies (and update its 2006 regulations) in its most recent Priority Guidance Project list. However, this project has not yet appeared in the Unified Regulatory Agenda, and the agency's usual, careful, deliberative approach is called for here. There is no rush to make changes, and no basis for suspension of enforcement actions.

Conclusion

There is absolutely nothing in the NA regime that better protects participants and beneficiaries than DOL's prior safe harbor defined by its 2002 regulations[36] and Technical Release in 2011.[37] Rather, the NA regime weakens protections. For Treasury/IRS to align its standards to NA and/or deem compliance with NA as compliance with its own standards as SPARK requests would hasten what has become a race to the bottom in consumer protections for retirement plan participants and beneficiaries. If anything, Treasury/IRS should *strengthen* the requirements in 2006 regulations to better protect participants and beneficiaries in this era of data overload and digital inequality to counterbalance the dramatic weakening of protections represented by DOL's new regime. To do

---

[34] *See e.g.* Field Assistance Bulletin No. 2006 – 03, at 4 Re: Periodic Pension Benefit Statements – Pension Protection Act of 2006 (Dec. 20, 2006) ("For purposes of section 105 of ERISA, the Department, pending further guidance and a review of the provisions of section 2520.104b–1(c), will view the furnishing of pension benefit statements in accordance with the provisions of section 1.401(a) –21, as good faith compliance with the requirement to furnish pension benefit statements to participants and beneficiaries.").

[35] *See e.g.*, *A Guide to Electronic Delivery of Participant Disclosure Materials*, 4, *available at* http://kbpensionservices.com/files/9513/7347/0030/A_Guide_to_Electronic_Delivery_of_Participant_Disclosure_Materials.pdf.

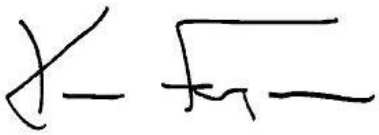
[36] 29 C.F.R. § 2520.104b-1(c).

[37] Technical Release 2011-03R, Re: Revised Interim Policy on Electronic Disclosure Under 29 C.F.R. § 2550.404a-5 (Dec. 8, 2011), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/technical-releases/11-03r.

otherwise would materially increase the risk of harm to consumers, and violate the agency's own conditions for exemption from the consent requirements for electronic delivery.

Thank you for your consideration of our views. If you have any questions or if a further conversation would be of assistance, please don't hesitate to contact us.

Sincerely,



Karen W. Ferguson
Director

Karen D. Friedman
Executive Vice President