Filed Electronically

June 1, 2011

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: **Electronic Disclosure by Employee Benefit Plans**

Ladies and Gentlemen:

The SPARK Institute, Inc.[1] appreciates this opportunity to respond to the Department of Labor's (the "Department") Request for Information ("RFI") regarding Electronic Disclosure by Employee Benefit Plans.[2] The SPARK Institute's members include retirement plan service providers and investment managers, including record keepers who will be primarily responsible for developing electronic communication solutions and facilitating electronic communications for the retirement plan community.

We commend the Department for addressing these important issues and issuing the RFI so that retirement plan industry stakeholders have an opportunity to share their collective expertise. We believe that the vast majority of service providers, plan sponsors and American workers prefer and would embrace greater use of electronic communication for retirement plan communications as they have for almost every other area of their daily lives. Greater use of electronic media will allow employees and plan participants to get information how and when they want, and provide quicker access to current information.

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1 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 sponsors, trade clearing firms and benefits consultants. Members include most of the largest firms that provide record keeping services to employer-sponsored retirement plans, ranging from one-participant programs to plans that cover tens of thousands of employees. The combined membership services approximately 70 million employer-sponsored plan participants.

2 76 Fed. Reg. 19285 (April 7, 2011).

It is our opinion that electronic communications are inherently better and a more powerful medium than paper materials sent through the mail. Electronic communications are also less costly and more environmentally friendly.

We urge the Department to act quickly to issue new rules that create a flexible principles based framework that (1) recognizes electronic communications as a standard means of communicating with participants and permits electronic disclosure of required materials, (2) is not technology or hardware dependent, and (3) is the same for all defined contribution plans, all materials and all recipients. As the Department knows, plan sponsors, with the help of their service providers, are working now to comply with the new participant disclosure rules which are effective for plan years beginning on November 1, 2011. The increased ability to use electronic communications and media to comply with the participant disclosure rules would aid in ensuring compliance and would benefit plan participants immensely.

We are concerned however, that any new safe harbor and other rules issued by the Department will not be available in time to assist plan sponsors and service providers comply with the new participant disclosure rules by the November effective date. Therefore, we urge the Department to extend the transitional guidance for benefit statements under the Field Assistance Bulletin No. 2006-03 to the participant disclosure regulations until such time as a new electronic communications safe harbor and other rules have been completed.

Our responses to the questions in the RFI are based on the collective input of our members, and are limited to issues related to defined contribution plans.

SECTION 1- ACCESS & USAGE QUESTIONS

Question 1

What percentage of people in this country has access to the Internet at work or home? Of this percentage, what percentage has access at work versus at home? Does access vary by demographic groups (e.g., age, socioeconomic, race, national origin, etc.)?

According to Forrester Research:[3]
78% of U.S. households have Internet access.
68% of U.S. households have broadband Internet access.
80% of U.S. individuals have a cell phone.
17% of U.S. individuals have a web capable smart phone. All of these phones have Internet access plans.

[3] Forrester Research: The State of Consumers and Technology: Benchmark 2010, U.S. (September 21, 2010).

Generally, Internet access varies by age and demographic groups, but it is fairly consistent up to age 65. For individuals over age 65, Internet access is lower, but those numbers are changing rapidly as many turn to the Internet to keep in touch with children and grandchildren. Although generational differences may exist, the data show that the gap is narrowing. The regulatory environment should provide enough flexibility for service providers and plan sponsors to meet the needs of all employees, participants and beneficiaries.

Question 2

What percentage of participants and beneficiaries covered by an ERISA plan has access to the Internet at work or home? Of this percentage, what percentage has access at work, at home, or both? Does access vary by demographic groups (e.g., age, socioeconomic, race, national origin, etc.)? What percentage of participants and beneficiaries uses the Internet to access private information such as personal bank accounts?

Our members report that plan participants have access to the Internet both at home and work and via smart phones. Because job roles and working hours vary, it is difficult to determine exactly where users access electronic communications and Web sites. We are unaware of any basis for concluding that access among plan participant and beneficiaries would vary from the data provided in our response to Question 1.

Question 3

What percentage of pension benefit plans covered by ERISA currently furnish some or all disclosures required by ERISA electronically to some or all participants and beneficiaries covered under these plans? Please be specific regarding types of plans (e.g., single-employer plans versus multiemployer plans, defined benefit pension plans versus defined contribution pension plans, etc.), types of participants and beneficiaries (e.g., active, retired, deferred vested participants) and types of disclosures (e.g., all required title I disclosures versus select disclosures).

Although we do not have specific data to report, a significant majority of our members reported to us that they do not provide required plan materials to plan participants and beneficiaries electronically without affirmative consent. Two of our members have reported to us that on average approximately 25% of participants have elected to receive all plan materials electronically.

Question 4

No Response.

Question 5

What are the most common methods of furnishing information electronically (e.g., e-mail with attachments, continuous access Web site, etc.)?

The most common methods of communicating and furnishing information to participants are by email and continuous access to a Web site. Each of these methods has variations in how they are used. The most common and preferred method for using email is to provide a notice to participants that information is available on a Web site and include a link to a secure Web site or directions on how to access the information online. Alternatively, an email can include an attachment with the information that is being furnished. Email with a secure link to a Web site or directions on how to access the information online is preferred for several reasons including that it helps maintain the confidentiality and privacy of information because the information itself is not transmitted. The recipient must login to the Web site using their personal username and confidential pass code to view confidential information. Additionally, some attachments can be very large files that could potentially be harder for participants to receive and view. Large attachments can also create system capacity issues, increase the possibility that the sender will be incorrectly blocked as a sender of “spam” or “junk” mail or the attachment may be stripped from the email before it is delivered.

Although email with a link back to a Web site or directions for online access is the preferred approach, a mix of approaches may be used depending on the type and size of the communication and information involved. For example, a required disclosure that includes confidential information is more likely to be furnished through email with a link back to a secure web site. In contrast, general educational information that is required may be attached to an email or the email could include a link to an open Web site.

Other channels of communication, including text messaging and social media (e.g., Twitter, Facebook, and LinkedIn) are available but may be used on a more limited basis. For example, text messaging may be used to remind employees and participants to come to an enrollment or educational meeting. Additionally, some communications are furnished via recorded media (e.g., CD or DVD) that are distributed. Printed notices (e.g. postcard, letter, etc.) containing a Web site address where documents can be obtained are also used.

Question 6

What are the most significant impediments to increasing the use of electronic media (e.g., regulatory impediments, lack of interest by participants, lack of interest by plan sponsors, access issues, technological illiteracy, privacy concerns, etc.)? What steps can be taken by employers, and others, to overcome these impediments?

Our members unanimously agree that the single most significant impediment to increasing the use of electronic media for retirement plan communications is the current regulations. Specifically, the existing safe harbor requirements that allow electronic delivery to (1) participants who can access documents over the employer's electronic system that is an integral part of their duties and (2) participants who affirmatively consent to receive documents electronically, severely limit the plan sponsor's (and consequently the service provider's) ability to use electronic communications in an efficient and cost effective way. These current limitations are cumbersome, difficult to comply with and inherently inconsistent with some of the major advantages of electronic communication such as cost efficiency and immediate delivery. Participant inertia is a related impediment that is significant and difficult to overcome because of the safe harbor limitations.

Based on information provided to us by our members, plan sponsors' interest and willingness to make greater use of electronic communication is high. Plan sponsors view this as a way to help maintain or reduce plan costs, provide more timely and effective communications, and to be more environmentally friendly by using less paper, and reducing the need to send mail and pay postage.

Participants are also interested and willing to receive plan communications electronically but may be receiving paper materials not because it is their preference, but because they have failed to take the time to make their preferences known. One of our record keeper members has reported that voluntary elections by participants to receive electronic communications increased from 10% two years ago to 25% currently. We view this as evidence of the success and interest in electronic communications despite the impediments and inconvenience of an opt in system. Given the complexities of daily life and the demands of work and personal activities, identifying a delivery choice for benefits information is not likely to be a priority for most participants. Our record keeper members also report receiving hundreds of calls into their phone centers each year from participants following the delivery of printed required notices asking why they are "wasting" money on creating and delivering the materials via the U.S. Mail. Based on discussions with our members, it is our opinion that participant inertia continues to perpetuate a delivery environment that fails to acknowledge today's technology and does not reflect participants' true preferences. Finally, for employees, participants and beneficiaries who prefer electronic media, increased use and availability of electronic disclosure could increase the likelihood that they review plan materials and participate in a plan.

Question 7

No response.

Question 8

Are there any new or evolving technologies that might impact electronic disclosure in the foreseeable future?

Yes. New technologies and capabilities are always being developed and adopted. There is plenty of available evidence that Americans want (in fact are demanding), new technologies that they quickly adapt to their daily lives. Some technologies and accompanying applications that were widely used several years ago are considered outdated today (e.g., MySpace), and have been replaced by newer options that few people could have anticipated (e.g., Facebook). Mobile communication and/or smart phones are quickly becoming the primary means of communication. Other emerging media include tablet computers, such as iPads, and virtual environments. These developments have made it easier and more cost effective to provide immediate access to important information. The fact is that nobody can predict the exact course that technology will take in the future. What is undeniable is its constant march.

The Department's new rules should consider these realities and provide adequate flexibility so that service providers, plan sponsors and participants can evolve and adapt to changes in technology and hardware as needed. We encourage the Department to develop new rules that are not technology or hardware dependent.

SECTION 2- GENERAL QUESTIONS

Question 9

Should the Department's current electronic disclosure safe harbor be revised? If so, why? If not, why not?

The SPARK Institute urges the Department to revise its current electronic disclosure safe harbor regulations. When a safe harbor is available, plan sponsors uniformly prefer using the safe harbor and avoid taking actions that may be inconsistent with its requirements. The use of electronic communications in accordance with the safe harbor has been very low, which indicates that it is not meeting the needs of the retirement plan community. The current rules are inconsistent with current realities regarding availability, ease of access and level of utilization of electronic technology. Additionally, the current safe harbor is inconsistent with the requirements for electronic delivery dictated by other statutes and regulations including the current E-SIGN standards used by the IRS, SEC and other government agencies.

<u>Question 10</u>

If the safe harbor should be revised, how should it be revised? Please be specific.

We urge the Department to issue new rules that create a flexible principles based framework that (1) recognizes electronic communications as a standard means of communicating with participants and permits electronic disclosure of required materials, (2) is not technology or hardware dependent, and (3) is the same for all defined contribution plans, all materials and all recipients. Such a framework will promote rather than inhibit the increased adoption and usage of electronic communications. Additionally, it will allow for everyone affected to adapt how they use electronic media as technology evolves, and reduce the chances that the rules will become outdated quickly. Based on the forgoing principles, The SPARK Institute, together with our members, developed a basic "notice/access/opt out" framework. Following the description of the framework are our recommendations for changes to the safe harbor.

<u>Availability of information</u> - All current disclosures, information and notices that are required to be provided to participants (including eligible non-participating employees) and beneficiaries can be maintained and kept available on a continuous basis on a secure Web site. Materials that do not include confidential information can be made available on an open Web site.

<u>Notices to employees and participants about accessing information</u> - Plan service providers would identify, as part of their product and services features, their preferred electronic approach or medium for communicating with employees and plan participants. As discussed in our response to Question 5, the method currently preferred by most service providers is to send an email notice to participants that required information and disclosures are available and include a link to a secure Web site or provide directions for online access to where the information is maintained.

We recommend the following changes to the safe harbor:

1. Replace the affirmative consent to use of electronic delivery requirement, i.e., the opt in requirement, with the opt out approach that is described below in Section 3. Although we request that the affirmative consent requirement be eliminated as a condition to any safe harbor, plans should be allowed to send required plan materials to any participant who provides or has already provided consent.

2. Eliminate the requirement that participants must be able to access documents over the employer's electronic system as an integral part of their duties.

3. Plans should be allowed to elect to use electronic communications as the default method of providing required plan materials to all employees, participants and beneficiaries, provided that the following conditions are met:

a. Employees are notified when they become eligible to participate in the plan and on an annual basis thereafter that the plan will provide required information electronically, unless the employee affirmatively elects to receive paper materials.

b. Anyone who does not want to receive required communications electronically may elect to receive paper materials at no direct cost to them. Additionally, anyone who receives required materials electronically must be permitted to request that they be provided with a paper copy of such materials at no direct cost to them. Our approach contemplates that the individual participant will not incur a direct charge for paper materials, but as noted in our response to Questions 17 and 26, the plan's administration and compliance costs associated with fulfilling the requests may be allocated among all of the participants in the plan as the plan elects.

c. The required materials are made available in a printer friendly format.

d. Electronic notices about required materials include a link to a secure Web site where the information is available or includes directions on how to access the information online, unless the information is otherwise included with the notice.

4. Plans should be permitted to provide the initial and annual notices described under Section 3 through any combination of electronic and paper communications that are reasonably designed by the plan sponsor to ensure receipt by the intended recipient. Under this approach the plan sponsor can determine whether it has a viable means of communicating with employees electronically or whether paper communications are needed. Additionally, the plan sponsor should be permitted to rely on any electronic contact information provided by the employee or participant (e.g., telephone and text numbers, and work or personal email address), and send notices through any electronic channel using the contact information provided by the intended recipient. Unless the plan sponsor knows that the electronic contact information it has for the employee is invalid, electronic communications should be given the same presumption of delivery as U.S. Mail. When a plan sponsor has reason to know that electronic communications are not being delivered, it should take reasonable steps to locate the intended recipient and re-establish communications to the same extent that it would if it received returned undeliverable U.S. Mail. In such instances sending a paper notice to the last known address provided by the intended recipient should be deemed reasonable.

5. Plans should not be required to provide the annual "reminder" notice described under Section 3 to anyone who affirmatively consents or elects to receive electronic communications. Anyone who consents or makes an affirmative election has expressly made their preferences known and should not have to be reminded that plan materials will be provided to them electronically.

We urge the Department not to impose stricter standards for confirming receipt of electronic materials than those that apply to materials sent through the U.S. Mail. More specifically, if the plan has an electronic means to contact a recipient (e.g., email provided by the employer or the intended recipient, or any other electronic medium identified by the recipient), and a reasonable means to identify failed delivery, absent actual knowledge of a failed delivery, there should be a presumption of receipt.

Question 11

Should a revised safe harbor have different rules or conditions for different types of employee benefit plans (e.g., pension versus welfare plans)? If so, why and what differences?

Although our response is focused on defined contribution plans, The SPARK Institute believes that any new rules for electronic communication of required materials should be the same for all types of plans, all required materials, and potential recipients. As we have discussed in our responses to other questions, any new rules should be flexible and allow plans, participants and service providers to adapt as technology evolves. Different standards for different types of plans and required materials will add complexity and confusion, and could drastically reduce the efficiencies and benefits of electronic communications. We believe that the principles based framework outlined in our response to Question 10 will reasonably accommodate all plans, materials and recipients.

Question 12

Should a revised safe harbor have different rules or conditions for different types of disclosures (e.g., annual funding notice, quarterly benefit statement, COBRA election notice, etc.)? If so, why and what differences?

As discussed in our response to Question 11, The SPARK Institute believes that the safe harbor and any regulations for electronic communications of required materials should be the same for all types of plans, all required materials, and potential recipients. We believe that the framework outlined in our response to Question 10 will reasonably accommodate all plans, materials and recipients. We are concerned that different standards will add confusion. Moreover, we are concerned that in order for the Department to establish clear and precise rules for different types of disclosures it will likely have to write rules that are dependent on specific technologies. As we have stated in our responses to other questions, we urge the Department to avoid issuing rules that are technology or hardware dependent.

Any safe harbor or regulations should allow a plan to use different approaches for different materials and disclosures as it deems appropriate, provided that such communications meet the minimum standards under the rules. For example, a plan could elect to send notices about time-sensitive matters multiple times as reminders to the intended recipients. We note that because electronic communications are more timely and cost effective than paper communications sent by U.S. Mail it will be easier and more cost effective to send reminders about time sensitive information. We anticipate that over time, industry best practices will emerge and evolve to meet the needs of plans and plan participants. The new rules and safe harbor should not impede that progress.

Question 13

Should a revised safe harbor have different rules or conditions for different recipients entitled to disclosures (active employees, retirees, COBRA Qualified Beneficiaries, etc.)? If yes, why, and how should the rules or conditions differ?

No. For the same reasons noted in our responses above, The SPARK Institute believes that the safe harbor and any regulations for electronic communications of required materials should be the same for all types of plans, all required materials, and potential recipients. We believe that the principles based framework outlined in our response to Question 10 will reasonably accommodate all plans, materials and recipients. Different standards for different types of plans and required materials will add complexity and confusion, and could drastically reduce the efficiencies and benefits of electronic communications. However, any safe harbor or regulations should allow plan sponsors to use different approaches for different materials and disclosures, provided that such communications meet the minimum standards under the rules.

Question 14

To what extent should the Department encourage or require pension and welfare benefit plans to furnish some or all disclosures required under title I of ERISA through a continuous access Web site(s)? In responding to this question, please address whether and how frequently participants and beneficiaries should be notified of their ability to access benefit information at the Web site(s) and the most appropriate means to provide such notice. For example, should participants and beneficiaries receive a monthly notification of their ability to access benefit information or should they receive a notification only when an ERISA-required disclosure is added to the Web site? How should such notifications be furnished (e.g., paper, e-mail, etc.)? Please also address what steps would be needed to ensure that participants and beneficiaries understand how to request and receive paper copies of the disclosures provided on the Web site(s).

The SPARK Institute urges the Department to encourage and enable greater use of electronic communications and media by issuing new regulations that are consistent with the approach set forth in our response to Question 10. Electronic-friendly rules and regulations will by themselves facilitate greater adoption by plan sponsors, participants and service providers based on their overall preferences and comfort levels. Additionally, the framework in our response to Question 10 addresses the other parts of this Question 14. We urge the Department to avoid mandating the use of any specific technology or hardware for delivery and access to notices and materials. We reiterate that flexibility that allows plans and participants to choose how they want to receive information is crucial to facilitating and encouraging greater adoption by everyone involved.

Question 15

Who, as between plan sponsors and participants, should decide whether disclosures are furnished electronically? For example, should participants have to opt into or out of electronic disclosures? See Question 26.

The plan sponsor should be allowed to elect to use electronic communications as the default method of providing required plan materials to all intended recipients, provided that the intended recipients are allowed to opt out. These concepts and safeguards to ensure effective access are included in the framework set forth in Question 10. This will allow the plan sponsor to choose the approach that best suits its plan and employees and save on plan administration and compliance costs. Additionally, if a plan does not elect electronic communications as the default approach, participants should continue to have the ability to opt in and request electronic communications if that is their preferred method of delivery.

Question 16

No Response.

SECTION 3- TECHNICAL QUESTIONS

Question 17

If a plan furnishes disclosures through electronic media, under what circumstances should participants and beneficiaries have a right to opt out and receive only paper disclosures?

Participants and beneficiaries should be permitted to opt out of electronic communications and make reasonable requests for paper materials, provided that the plan sponsor can take corresponding steps to reduce the overall administrative and compliance costs of the plan in the best interests of the plan and its participants as a whole. For example, reducing the overall administrative and compliance costs of the plan should be a reasonable basis for requiring recipients to opt out on an annual basis. The plan should be permitted to allocate the cost of providing printed materials among all plan participants as an administrative expense. We assume that participants will have to be informed about these charges under the new participant disclosure regulations.[4] Such

[4] Section 2550.404a-5(c)(2).

disclosures and their impact on the costs to the plan may discourage excessive opt outs and requests for delivery of printed copies of materials that are otherwise available electronically and can be printed on demand.

Question 18

The Department's current regulation has provisions pertaining to hardware and software requirements for accessing and retaining electronically furnished information. In light of changes in technology, are these provisions adequate to ensure that participants and beneficiaries, especially former employees with rights to benefits under the plan, have compatible hardware and software for receiving the documents distributed to their non-work e-mail accounts?

The SPARK Institute urges the Department to issue new rules and regulations that are not dependent upon specific technology or hardware. As discussed in our responses to other questions, technology evolves too rapidly and user preferences change as new technology becomes available. Effective regulations must provide flexibility within a principles based framework as outlined in our response to Question 10.

Computers and mobile devices generally come with pre-installed software that users need to access information in a multitude of common formats. Additional software can generally be downloaded for free. Moreover, service providers and plan sponsors have an incentive to make electronic materials available in widely available common formats so that they are accessible to the broadest possible audience.

Question 19

Some have indicated that the affirmative consent requirement in the Department's current electronic disclosure safe harbor is an impediment to plans that otherwise would elect to use electronic media. How specifically is this requirement an impediment? Should this requirement be eliminated? Is the affirmative consent requirement a substantial burden on electronic commerce? If yes, how? Would eliminating the requirement increase a material risk of harm to participants and beneficiaries? If yes, how? See section 104(d)(1) of E-SIGN.

The affirmative consent requirement is an impediment to the use of electronic communications and media and should be eliminated. Our members have informed us that many plan sponsors do not use electronic communications because obtaining participant consent, tracking and maintaining responses, and following-up with non-responders is time consuming and expensive. The affirmative consent process is counter-productive to the intended efficiencies and advantages of an electronic communications approach. The required effort discourages plan sponsors' adoption. Given the low affirmative opt in rate and the challenges of obtaining the consent, plan sponsors have focused their resources elsewhere.

The impact of participant inertia in regards to making affirmative decisions about enrollment, investment elections, contribution rates, and other decisions is well established in the substantial literature on behavioral finance. Affirmative consent to electronic delivery is yet one more area where participants are unlikely to take affirmative action, even when the affected individuals would prefer to get their information that way. An opt out approach allows the plan to leverage employee and participant inertia while still enabling the intended recipients to elect to receive paper communications if they so prefer.

The principles based framework outlined in our response to Question 10 that eliminates the affirmative consent requirements includes safeguards to ensure reasonable access by intended recipients and should not increase a material risk of harm to participants and beneficiaries. The framework includes requirements that are substantially similar to those imposed on non-electronic disclosures and protect the ability of participants to opt out of electronic delivery.

Question 20

No Response.

Question 21

No Response.

Question 22

Do spam filters and similar measures used by non-workplace (personal) e-mail accounts, pose particular problems that should be taken into consideration?

Spam filters do need to be considered, but have not posed a significant problem in the past. Many personal email services have very user-friendly spam features that allow the recipient to identify specific senders as safe. Materials from senders that are not identified as safe are still delivered through spam filters and are typically stored in a separate email folder so that the recipient can still view it. Potential spam filter issues are easily resolvable by informing recipients about the possibility and importance of checking their spam folders and identifying the sender of plan communications as safe. In the event that a spam filter rejects a message and sends a delivery failure message to the sender, the sender can take steps to contact the recipient and resolve the delivery failure.

Question 23

What is the current practice for confirming that a participant received a time sensitive notice that requires a participant response?

There are no requirements that a plan confirm actual receipt of paper materials sent to participants and beneficiaries by U.S. Mail whether or not they are time-sensitive or require action. Sending material by U.S. Mail is generally sufficient to prove that it was provided to the intended recipient. It is cost prohibitive for plans to confirm actual receipt of notices and materials that are sent through the mail. Where mail is returned as undeliverable, plan service providers work with the plan sponsor to try to obtain a new physical mail address. Ultimately, the plan service provider relies on the most current information provided to it by the plan or the plan participant.

By contrast, electronic communications and media are generally better able to track whether a communication was delivered or viewed, and provide a delivery confirmation. Therefore, confirming delivery and receipt of electronic communications can be more reliable. Despite these capabilities, The SPARK Institute opposes any regulatory requirements or conditions to a safe harbor that would mandate confirming actual receipt of electronic materials. The greater ability to confirm delivery of electronic communications should not be a basis for subjecting such communications to a stricter delivery confirmation standard than the U.S. Mail. Such a mandate would create new impediments to the greater adoption of electronic communications and technology enhancements by service providers.

Question 24

What are current practices for ensuring that the e-mail address on file for the participant is the most current email address? For example, what are the current practices for obtaining and updating e-mail addresses of participants who lose their work e-mail address upon cessation of employment or transfer to a job position that does not provide access to an employer provided computer?

As noted in our responses to other questions, any new regulations should not be technology specific. Email is only one of many electronic ways to communicate with employees and participants. Any regulations or safe harbor should establish a flexible principles based framework, instead of specifying requirements for maintaining current email addresses. The rules should not mandate the use of a work based email address. Alternate or personal email addresses are more portable and likely to be more permanent than work based addresses. Under our proposed framework in the response to Question 10, we believe that emails and text messaging would primarily be used to inform the recipient that required materials are available or new materials were posted online. Even if the contact information that the sender has for a recipient is outdated, the individual will have ongoing access to the Web site, and can update his or her contact information as needed. Ultimately, the plan sponsor and service provider must depend on the plan participant to provide it with and maintain current contact information, regardless of whether it is electronic contact information or a physical address.

Regardless of the forgoing, the following is a brief summary of how some plans and service providers maintain current electronic contact information. For materials that are sent through email a sender can investigate mail that is bounced back or returned as undeliverable. The investigation may include sending notice to the intended recipient through an alternate electronic channel (e.g., another available email address), a phone call, or a paper follow-up through the U.S. Mail.

SECTION 4 - ECONOMIC ANALYSIS, PAPERWORK REDUCTION ACT, AND REGULATORY FLEXIBILITY ACT

Question 25

What costs and benefits are associated with expanding electronic distribution of required plan disclosures? Do costs and benefits vary across different types of participants, sponsors, plans, or disclosures? Are the printing costs being transferred from plans to plan participants and beneficiaries when information is furnished electronically?

The benefits of electronic communications are noted throughout this response. In fact, it is our opinion that electronic communications are inherently better than sending paper through the U.S. Mail. The following is a brief summary of many of the benefits.

1. Participants and beneficiaries will be able to get plan information how and when they want it. For example, participants can access their electronic materials wherever they have Internet access, e.g., while not at their primary address where paper materials would be mailed or stored.
2. Information can be provided more quickly and can be easily updated. Electronic materials can be delivered immediately. Delivery of paper materials can take one to four days.
3. Documents are easily searchable making it easier for participants to find what they need.
4. Electronic media can be designed in more user friendly ways making them more appealing to participants and beneficiaries.
5. Electronic communications are more secure than paper communications because they can be password protected. Paper materials that are delivered to a mailbox can be opened by anyone, or can be stolen or lost.
6. Sent materials can be tracked to confirm delivery, receipt and whether the recipient viewed them.
7. As discussed more fully below, electronic communications are less costly because of the saved printing and postage costs. Printing and postage costs are ultimately paid by the plan and transferred to plan participants.
8. Electronic materials can be sent more frequently.

9. Electronic materials are able to provide immediate opportunities for participants to learn more about the subject of the communication and take required actions through online information and Web links.
10. Electronic materials can increase the response rate when participant action is required. Links to transaction pages can encourage participants to take immediate action. In contrast, participants may be slower to respond or not respond at all when the required action involves getting or printing paper forms, completing them manually, and submitting them by U.S. Mail, internal office mail, fax, or other means of physical delivery.
11. Participants can easily save and retrieve electronic materials or print them on demand if they so choose.
12. Electronic materials are more environmentally friendly.

There will likely be costs to service providers to transition to a more robust electronic communication framework. Although, we are not able to quantify the costs at this time, our members believe that the long term benefits for the entire retirement plan community outweigh such costs. One of our members has reported to us an estimated cost of approximately $2 per participant to mail paper copies of quarterly benefit statements (including the costs of paper, envelopes, imaging and postage). Their total cost to mail benefit statements in 2010 was approximately $8 million. We note that this large service provider most likely can leverage economies of scale and that per participant costs at other companies are likely as much if not more than the estimate they provided. The costs for providing printed materials are transferred to participants as part of the overall plan record keeping, administration, and compliance costs, whether or not there is an explicit charge to the plan for the materials and associated services.

Question 26

If electronic disclosure were the default method for distributing required plan disclosures, and assuming "opting out" were an option, what percentage of participants would likely "opt-out" of electronic disclosure in order to receive paper disclosures? Should participants be informed of increased plan costs, if any, attendant to furnishing paper disclosures at the time they are afforded the option to opt out or into an electronic disclosure regime?

Although there is no scientific way of estimating the opt out rate, we believe it is reasonable to assume that it will be comparable to the automatic enrollment opt out rates, and average between 5-10% of employees and participants.

We believe that participants should be informed about the costs associated with paper communications so that they understand the impact on the administrative and compliance costs of the plan that are passed on to them. Additionally, this information, which we assume would be required to be disclosed under the participant disclosure regulations,[5]

[5] Id.

would motivate employees to help reduce requests for paper copies of materials that are otherwise available electronically and can be printed on demand. Even if plans are charged a fee for providing paper copies to employees and participants upon request, the overall cost savings to the plan that will result from being able to use electronic communications for everyone else should be greater.

Question 27

Do participants prefer receiving certain plan documents on paper rather than electronically (e.g., summary plan descriptions versus quarterly benefit statements), and what reasons are given for such preference? Would this preference change if participants were aware of the additional cost associated with paper disclosure?

Although preferences will vary among individuals, it is undeniable that the overwhelming trend is that people want to be able to access information where, when and how they want it. Additionally, they want the information to be current and delivered fast. Our proposed framework allows plans and service providers to meet those needs while maintaining participants' ability to print material on demand or request paper copies of the materials. As noted above in our response to Question 26, we anticipate that disclosing the costs associated with providing paper copies to participants will motivate them to minimize such requests in order to reduce plan administration and compliance costs.

We also note that some participants prefer to receive all notices and materials electronically because of the environmental benefits and reduced use of resources.

Question 28

What impact would expanding electronic disclosure have on small plans? Are there unique costs or benefits for small plans? What special considerations, if any, are required for small plans?

The costs of creating and delivering printed materials are generally expensive but become less expensive per piece and per capita for large employers who benefit from the economies of scale. Using paper and delivering paper materials are therefore more expensive on a per capita basis for small plans. Accordingly, the cost efficiencies and advantages of electronic communication are likely to result in greater cost savings for small plans on a relative basis. Additionally, small plans often do not have resources that are dedicated solely to plan administration tasks. Small plans are often administered by business owners or general office managers who have many other responsibilities. Thus it becomes even more important for small employers to use their time efficiently and to be able to take advantage of electronic communications.

Question 29

Is it more efficient to send an e-mail with the disclosure attached (e.g., as a PDF file) versus a link to a Web site? Which means of furnishing is more secure? Which means of furnishing would increase the likelihood that a worker will receive, read, retain and act upon the disclosure?

As noted in our responses to other questions, we urge the Department not to issue rules that are dependent on specific technologies and hardware. These matters should be decided by the plan sponsor, working with a service provider, based on the resources of the plan, the wants and needs of the employees, and the technology that is available. That said, as noted in our responses to other questions, an approach that includes sending an electronic notice with a link to a secure Web site or includes directions on how to access the information online, is the most efficient, secure, and likely to be acted upon approach.

Question 30

Employee benefit plans often are subject to more than one applicable disclosure law (e.g., ERISA, Internal Revenue Code) and regulatory agency. To what extent would such employee benefit plans benefit from a single electronic disclosure standard?

The SPARK Institute believes that employee benefit plans would benefit greatly from a single electronic disclosure standard that is flexible and is not dependent upon particular technology or hardware. We recognize that a single standard may not be achievable at this time for all employee benefit plans. However we urge the Department to adopt a single standard that applies to all defined contribution plans, and that is also the same for all materials and recipients.

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We thank you for the opportunity to comment on this very important effort and for your consideration of our views. The SPARK Institute is available to provide additional information and clarification regarding these matters. Please do not hesitate to contact us at (704) 987-0533.

Respectfully,

Larry H. Goldbrum
General Counsel