The SPARK Institute, Inc.
SHAPING AMERICA'S RETIREMENT

May 31, 2022

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Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN 1210-AC05, Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

Dear Sir or Madam:

On behalf of the SPARK Institute, Inc., we are writing to express our concerns with the amendments proposed by the Department of Labor (the "Department") to its procedures for accepting and processing prohibited transaction exemption ("PTE") applications.[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 administrators, trade clearing firms, and benefits consultants. Collectively, our members serve approximately 100 million employer-sponsored plan participants.

While these changes may be well intentioned, the SPARK Institute is concerned that the Department's proposed PTE procedures will permanently harm the cooperative working relationship that the Department has had since the passage of the Employee Retirement Income Security Act of 1974 ("ERISA") with all the parties that deal with ERISA's prohibited transaction rules: plan sponsors, fiduciaries, investment providers, life and health insurers, IRA owners, and many others. For decades after ERISA was enacted, the Department has worked with the industry to craft exemptions that promote and protect plans and participants.

In short, as drafted, these changes to the procedures could prevent the Department from reviewing and granting individual and class PTE applications, even when the relevant exemption transactions satisfy the statutory conditions for granting an exemption, as outlined in ERISA. ERISA authorizes the Department to grant administrative exemptions from the prohibited transaction rules when such relief is: (1) administratively feasible; (2) in the interests of the plan and its participants and beneficiaries; and (3) protective of the rights of participants and

[1] 87 Fed. Reg. 14722 (March 15, 2022).

beneficiaries of such plans. Since the enactment of ERISA, administrative exemptions satisfying these criteria have, without additional action from Congress, allowed the marketplace to develop a wide range of products and services that are necessary for and beneficial to the operation of retirement plans, even as the retirement landscaped has evolved. In the case of exemption transactions that satisfy ERISA's statutory criteria, the Department should not unnecessarily limit new applications, as the proposal would do.

I. The Proposal Will Create Greater Uncertainty for the Regulated Community

ERISA's fiduciary and prohibited transaction rules are complex, require fact-specific inquiries, and have significantly evolved over time. Simultaneously, ERISA's statutory PTEs are succinct and, in many instances, fail to clearly define critical terminology, such as "reasonable," "adequate," and "independent." Collectively, this environment means that retirement industry service providers are faced with many uncertainties about how to apply and comply with ERISA's fiduciary and prohibited transaction rules, while also facing substantial penalties and other consequences for miscalculations. This uncertainty has only been exacerbated in recent years by the Department's willingness to regulate fiduciary issues through informal guidance and in the preambles to its more formal rulemakings.

SPARK members and their counsel have been able to mitigate some of this uncertainty by engaging with the Department's Office of Exemption Determinations and requesting PTEs, when necessary. In light of the many benefits that have flowed from this engagement, we are concerned about the ways in which the proposed procedures would operate to limit beneficial conversations between the Department and the public. The proposed changes that are creating the most concerns in this regard are the changes that would: (1) prohibit anonymous conversations between the Office of Exemption Determinations and the regulated community; and (2) automatically make informal discussions and inquiries about ERISA's fiduciary and prohibited transaction rules open to public inspection.

By pairing down the opportunities for the public to engage with the Department and obtain administrative exemptions, we are concerned that the Department's proposed changes will make it harder for regulated entities to design effective compliance programs and develop innovative products and services that would otherwise benefit retirement savers. Moreover, we are concerned that the Department, whether or not this is its intention, is isolating itself from sources of information that the Department has historically found critical to promulgating consistent guidance to the regulated community. Over time, this increased uncertainty is likely to result in higher costs for retirement savers and less competition. This is concerning; the Department should revise its proposal to eliminate those provisions that will limit dialogue between the Department and the public, especially those changes that would eliminate conversations that are made anonymously by ERISA practitioners on behalf of their clients.

II. The Proposal Will Discourage Applications

The SPARK Institute believes that the proposal, whether intentionally or not, will be viewed as signaling the Department's desire to discourage PTE applications, notwithstanding the important role that administrative exemptions play in ERISA's prohibited transaction regime.[2] Some of the most concerning examples are the provisions in the proposal that would: (a) expressly clarify that the Department's grant of a prior exemption is not determinative of whether it will grant a future exemption; (b) expand the universe of parties in interest and transactions that are ineligible for an exemption, whether or not otherwise in the plan's interests; (c) significantly increase the amount of information that applicants must provide in support of an exemption; (d) increase the liabilities of parties involved in exemption transactions; and (e) limit the steps that parties involved in exemption transactions can take to limit their liability. We strongly recommend that the Department reconsider all of these changes.

For example, under the proposal, the qualified independent fiduciaries that have been central to many of the Department's previously granted exemptions would be prohibited from including contract terms that require a plan or any other party to indemnify or reimburse them for any failure to adhere to a contractual obligation or any state or federal law applicable to the independent fiduciary's work. Given the complexity and nature of the transactions that have traditionally used a qualified independent fiduciary to secure relief, this provision could significantly impact the ability of independent fiduciaries to limit their litigation expenses, even when they are not liable for any wrongdoing – e.g., if it is interpreted as prohibiting an independent fiduciary from contractually requiring plans to advance legal fees while litigation is pending as a form of "indirect" indemnification. While we share the Department's belief that parties involved in exemption transactions, including independent fiduciaries, should be accountable for their failures, we are concerned that this provision, as drafted, could unnecessarily increase the costs associated with performing services as an independent fiduciary and further limit the universe of firms who will be willing to serve as an independent fiduciary with the necessary qualifications and experience to protect plans, participants and beneficiaries.

The SPARK Institute is very concerned about the collective impact of all of the changes listed above given the important role that administrative exemptions play in ERISA's fiduciary and prohibited transaction regime, and how the exemption process can be used to make beneficial and necessary products available to retirement plans and participants. Without sharing a better sense of the problems or harms that the Department is trying to solve for, the Department should not be adding new conditions that would arbitrarily make it more difficult to obtain an exemption or less likely for parties to participate in an exemption transaction when such transaction otherwise meets the statutory requirements for granting an exemption.

III. The Proposal Will Unnecessarily Limit Transactions Eligible for Relief

The SPARK Institute is concerned about the proposed changes that will unnecessarily limit the types of transactions that will be eligible to receive an exemption, including with respect to the parties who may participate in an exemption transaction.

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[2] The number of exemptions granted by the Department in recent years has declined precipitously. In 2000, for example, the Department granted nearly 70 individual prohibited transaction exemptions, as indicated on its website; in 2020, the Department granted one.

The SPARK Institute is, for example, concerned about the proposed condition that would generally prevent the Department from considering an exemption application if the transaction involves a party in interest who is the subject of an investigation or a defendant in an action brought by any regulatory entity under any state or federal law. This prohibition is overly broad and unnecessary to ensure that an exemption is administratively feasible, in the interests of the plan and its participants, and protective of the rights of participants and beneficiaries of such plans. Furthermore, if interpreted broadly, these limitations could make it very difficult to find experienced and sophisticated service providers that can serve as a party in interest to an exemption transaction. Many of the experienced service providers who are parties in interest to exemption transactions are very large and heavily regulated entities that are subject to the jurisdictions of many state and federal regulators. It is not uncommon for some of these entities to continually be under some form of examination by a regulatory body at the state or local level. These routine examinations, which could be viewed as investigations, should not disqualify their participation in an exemption transaction.[3] Additionally, even in cases in which these firms are the subject of an actual enforcement action, the SPARK Institute does not believe that such actions should make a party ineligible to participate in an exemption transaction when the underlying action does not involve a violation of ERISA or any other statute or regulation that reflects the party's ability to be involved with the operation of employee benefit plans.

The SPARK Institute is also concerned about the provision in the proposal that would require qualified independent appraisers to be independent of qualified independent fiduciaries, and the provision that would require qualified independent fiduciaries to be independent of any other party involved in the development of the exemption request. In considering this independence, the proposal indicates that the Department will consider whether the fiduciary has an interest in the subject transaction or *future transactions of the same nature or type*. This is concerning because parties to an exemption will often look to hire fiduciaries that are experienced with the subject matter, have a fiduciary process that withstands scrutiny, and has worked with the Department in the past. Many practitioners review, among other sources, the Department's own website disclosing the identity of independent fiduciaries previously involved with published exemptions to help determine who might be suitable. This preference for experience is appropriate and consistent with a plan fiduciary's responsibilities when retaining parties on behalf of the plan. While we appreciate the Department's interest in ensuring that independent fiduciaries are, in fact, sufficiently independent, we are concerned that these new conditions penalize the most experienced entities without necessarily identifying the particular harm that their experience brings. We feel this would inappropriately value independence over the expertise and experience of the parties who are qualified, eligible, and interested in participating in exemption transactions. Additionally, we are concerned that these new

[3] Government audits and investigations and lawsuits are a fact of any large modern institution. The Department itself is under regular audit from the Office of the Inspector General, which routinely determines that the Department did not meet statutory requirements. *See, e.g.,* OIG Report, ETA's Management of Workforce Development Grants: Key Concerns (March 31, 2022) ("We concluded ETA awarded millions of dollars to applicants where the proposals did not fully meet the solicitation's objectives."); OIG Report, EBSA Can Provide Greater Oversight of the Thrift Savings Plan By Strengthening its Audit Program (Oct. 11, 2018) ("EBSA did not conduct effective oversight of the TSP for several reasons."). We assume the Department does not believe that these audit findings disqualify it from administering ERISA going forward.

conditions will increase the costs associated with exemption transactions and limit innovation in the exemption space.

IV. Reliance is Critical and Must Be Clearly Defined

The types of arrangements that are designed to rely on administrative exemptions often require businesses to engage in significant planning and to make long-term investments in their production. Thus, it is crucial for businesses to be able to reasonably expect that they may continue to rely on any exemption once granted by the Department. In light of these circumstances, the SPARK Institute is concerned with how the proposed amendments would expand the opportunities for the Department to revoke or modify a previously granted exemption without clear standards. For example, under the proposal, if a qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the applicant must notify the Department within 30 days, in which case the Department may, *at its sole discretion*, take steps to revoke or modify the exemption. We request that the Department eliminate this notice requirement and amend its proposal in ways that will provide clear standards for when the Department may revoke an existing exemption after it is granted.

V. 2% Presumption for Fiduciary Independence

The SPARK Institute is also concerned about the proposal's new 2% presumption for qualified independent fiduciaries. Under the proposal, for purpose of determining whether a qualified independent fiduciary or qualified independent appraiser is "independent," the proposed regulations would presume that the fiduciary or appraiser is not independent if its revenues from the parties involved in an exemption transaction exceed 2% of its revenues, "unless, in its sole discretion, the Department determines otherwise." This standard differs from the current regulatory standard that presumes a fiduciary is independent if its revenues from any party in interest are not more than 2% of its total revenues, and allows a fiduciary to be independent if its revenues from any party in interest involved in the exemption transaction are not more than 5% of its total revenues. The SPARK Institute has concerns about the direct and indirect impacts of this change.

First, we are concerned about the direct impact that this change will have on the entities who will be eligible to serve as qualified independent fiduciaries and the size of the clients that they may serve. By lowering the permissible revenue ceiling by 3%, the proposed change could eliminate the ability of some qualified independent fiduciaries to serve very large clients that would cause them to exceed the 2% threshold. In a similar regard, we are also concerned about how the proposal could block out smaller fiduciaries (including new entities) that might be able to satisfy the current 5% ceiling but will not be able to satisfy the proposed 2% ceiling. It is this latter concern that could create a barrier to entry for smaller, yet qualified, firms to serve as a qualified independent fiduciary, thereby limiting the choice available to plans that might otherwise need an independent fiduciary.

Second, we are concerned about how this proposed change could indirectly impact broader fiduciary and prohibited transaction issues that are unrelated to the exemption application process. That is, we are concerned that the Department's proposed changes to the independence standard for purposes of the PTE application procedures could be interpreted as applying to all cases in which fiduciaries are subject to independence standards. This would be an inappropriate extension of the proposal's independence standard and call into question longstanding guidance from the Department that uses a threshold of greater than 2%.[4] To address these concerns, we request that the Department expressly clarify that the PTE application procedures should not be used to draw inferences about ERISA's fiduciary and prohibited transaction rules that are unrelated to the exemption application process.

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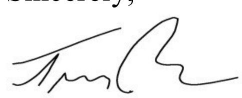
The SPARK Institute appreciates the opportunity to provide these comments to the Department. If the Department has any questions or would like more information regarding our comments, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com).

Sincerely,



Tim Rouse
Executive Director

[4] *See e.g.*, Advisory Opinion 2001-09A (assuming that a financial expert will be independent provided that it does not receive more than 5 percent of its revenues from the party selecting it).