



October 28, 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 supplement our May 31, 2022 comment letter expressing 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 comments below: (1) explain why the Department’s subsequent release of its proposed changes to the qualified professional asset manager (“QPAM”) exemption exacerbate the need for an efficient and workable exemption process; and (2) respond to questions from Department officials during the September 15 hearing about the provisions in the PTE application proposal that would prohibit anonymous pre-submission conversations between the Office of Exemption Determinations and the regulated community.

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.

I. The QPAM Proposal Exacerbates the Need for an Efficient and Workable Exemption Process

The SPARK Institute submitted its original letter responding to the Department’s proposed amendments to its PTE application procedures in May 2022. Our letter emphasized the importance of administrative exemptions and the critical role that they play in facilitating the development of products and services that are necessary for and beneficial to the operation of retirement plans. Accordingly, our May 2022 letter discouraged the Department from adding new conditions to its PTE application procedures that would make it more difficult to obtain an

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

exemption or less likely for parties to seek an exemption when the proposed transaction would otherwise meet ERISA's statutory requirements for granting an exemption.

After we submitted our May 2022 letter, the Department released a regulatory proposal in July that would amend its existing QPAM exemption in ways that would: (1) limit the types of transactions that are eligible to rely on the QPAM exemption; and (2) make it more likely that asset managers will be ineligible for relief under the QPAM exemption.

If the Department proceeds with its QPAM changes, as proposed, this will exacerbate the need for an efficient and workable program for requesting PTEs. For example, if the Department's QPAM changes are adopted as proposed, certain beneficial transactions that are planned, negotiated, or initiated by a party in interest and presented to an investment manager for approval will no longer be eligible for relief under the QPAM exemption. Thus, in order to fill any gaps that will be created in plan investment strategies by this new condition, we believe that investment managers and counterparties will be much more likely to approach the Department for individual and/or class relief as a means to address their needs. As another example, we believe that the new Written Ineligibility Notice procedures included in the Department's QPAM proposal, especially as they relate to non-prosecution and deferred prosecution agreements, will make it much more likely that investment managers approach the Department for individual relief. We anticipate that this would be similar to the individual exemption requests that the Department currently receives when a QPAM becomes ineligible because of its own criminal conviction or the conviction of an affiliate.

The point of this discussion is to emphasize that, if the Department is proposing to restrict the use and usefulness of the QPAM exemption and also proposing to limit the ability of affected parties to request new exemptions, the combined impacts of these regulatory changes will create new challenges for investment managers attempting to design and implement strategies that maximize returns and appropriately manage risk. Accordingly, the SPARK Institute strongly encourages the Department to consider how both of its current exemption proposals will interact with each other and impact the ability of investment managers to continue serving the needs of their clients.

II. Anonymous Off the Record Conversations

In our May 2022 comments, the SPARK Institute expressed concerns with how the proposed PTE application procedures 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. As we previously explained, the SPARK Institute believes that the regulated community and the Department have benefited over the years from the informal, anonymous, and off the record conversations that parties considering exemption applications have been able to have with the Department.

During the Department's September 15 hearing on its proposed PTE application procedures, Department officials asked witnesses whether they thought it would be appropriate

for the Department to: (1) continue engaging in informal, anonymous, and off the record conversations with parties before they officially submit a PTE application; and (2) make clear that any information submitted in support of an application that has actually been filed must identify the parties requesting relief and be available for public inspection. The SPARK Institute generally believes that this approach would be appropriate as it would continue to permit parties exploring exemption transactions to better understand the Department's views on a given transaction and do so on an anonymous basis. Additionally, we understand that there is a public interest in having information that is considered by the Department as part of a filed exemption request open for public inspection. The only caveat that we would add to this response is that, although many aspects of an exemption request will typically be appropriate for public inspection, it is still important for the Department to recognize and honor requests for certain information to be kept confidential when it includes trade secrets and other confidential or privileged commercial or financial information, or other information that is exempt from disclosure under the Freedom of Information Act ("FOIA").

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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