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## **Submitted Electronically**

Mr. Ali Khawar  
Acting Assistant Secretary  
Employee Benefits Security Administration  
United States Department of Labor  
200 Constitution Ave NW  
Washington, DC 20210

### **Re: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications (RIN 1210-ACO5)**

Dear Acting Assistant Secretary Khawar:

We write on behalf of the American Society of Appraisers (“ASA”) to request an extension of time from 30 to 60 days to comment on the Department of Labor’s proposed rulemaking on “Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications” (“Propose Rule”). 87 Fed. Reg. 14722 (March 15, 2022). The Proposed Rule contains substantive provisions that raise novel legal and policy issues that require more time to evaluate than the current comment period allows. Given the impact these substantive provisions will likely have on the regulated community and retirement savers, we also request that the Department reconsider its conclusion that the Proposed Rule is not “significant” under Executive Order 12866.

To begin with, we are aware of no statutory or other deadline requiring such a short comment period. Moreover, when the Department last proposed changes to the exemption application process in 2010, it provided a 45-day comment period. The changes proposed in 2010 were far narrower and more limited than the Proposed Rule, so a longer comment period is justified.

If promulgated, the Proposed Rule would profoundly affect the appraisal of assets held by plans governed by the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and the Internal Revenue Code of 1986, as amended. As you know, plan assets must be valued at fair market value. Fair market value is defined as “the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts.” Rev. Rul. 59-60. Thus, in determining an asset’s fair market value, appraisers must remain impartial, independent, and free from bias.

The Proposed Rule purports to “ensure that the appraiser [is] independent and that [its] valuations . . . are reliable and valid.” 87 Fed. Reg. 14722, 14725. But it is likely to have the

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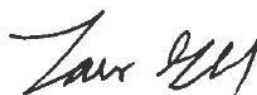
opposite effect. For example, the Proposed Rule would redefine the term “qualified independent appraiser” to provide that an appraiser is not independent if it receives more than two percent of its annual revenue from parties involved in the exemption transaction. Assuming an appraiser charged \$50,000 per engagement and took on 50 engagements a year (an aggressive workload for all but the largest firms), its annual revenue would be \$2,500,000. To satisfy the two-percent revenue requirement, that appraiser could *never* accept more than one assignment per client each year—for if it did, the appraiser’s revenue from that client would total \$100,000, or 4% of the appraiser’s \$2,500,000 annual revenue. For smaller appraisers for whom each client represents a larger proportion of annual revenue, satisfying the two-percent revenue requirement would prove especially difficult.

At the same time, large appraisers would likely respond to the Proposed Rule by exiting the business of valuing ERISA plans’ assets. The Proposed Rule prohibits an appraiser’s engagement from providing indemnification by the plan for which the appraisal is prepared. In the appraisal of high-value assets, for which plans most often engage large appraisal firms, this would expose appraisers to hundreds of millions of dollars of liability that would dwarf any fees associated with the assignment. Given this high-risk, low-reward calculus, large appraisers would shift their resources to providing financial advisory services to non-ERISA plan clients. Lacking a diverse client base and unequipped to provide an array of financial services, smaller appraisers would be left as the sole providers of appraisal services to ERISA plans.

The Proposed Rule thus has the real prospect of significantly affecting the appraisal of ERISA plan assets by simultaneously making it harder for smaller appraisers to qualify as “qualified independent appraisers” while also hastening large appraisers’ exit from the marketplace. It thus should be clear that the Proposed Rule constitutes “significant rulemaking,” which Executive Order 12866 defines as an action likely to raise “raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the EO 12866.” Because of the dynamic described above, which are only some of the Proposed Rule’s likely effect, there is a significant chance that the Proposed Rule would lead to valuations of lesser reliability and validity—the precise opposite of the Proposed Rule’s purported aim. The Department appears to have conducted no analysis of the impact the Proposed Rule would likely have on the regulated community or retirement savers, further requiring more time for comment.

We appreciate your attention to this issue and urge you to extend the comment period.

Sincerely,



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