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***Submitted Electronically***

The Honorable Ali Khawar
Acting Assistant Secretary
U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Ave NW
Washington, DC 20210

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

Dear Assistant Secretary Khawar:

On behalf of a group of the firm's retirement services industry clients (the "Group"), we are submitting comments on the above referenced proposal (the "Proposed Rule") to amend the *Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications* (the "Exemption Procedures Regulation").

## 1. Introduction

The Proposed Rule would create new barriers to the process of requesting an exemption at a time when the Department already limits grants of exemptions. While we appreciate the Department's goal of increasing transparency by amending the Exemption Procedures Regulation to reflect the requirements an applicant would need to meet, we do not believe the Proposed Rule reflects a workable framework for the processing of exemptions. The Group respectfully requests that the Department withdraw the Proposed Rule. Following withdrawal, the Department should issue a request for information seeking input on how the exemption process might be re-structured to one that reflects Congress' intent by restoring reasonable access. A workable framework would permit plan fiduciaries and service providers to use the administrative exemption process, in partnership with the Department, to solve problems facing the employee benefits community to the benefit of plan participants and beneficiaries.

Congress included an administrative process for obtaining prohibited transaction exemption relief in section 408(a) of ERISA to avoid the unduly harsh results that would otherwise arise from the application of ERISA's prohibited transaction restrictions. Administrative exemptions were to be granted by the Department as a means of allowing plans to engage in ordinary business transactions that serve the interests of participants and beneficiaries, subject to conditions that are administratively feasible and appropriately protective of those interests. The Proposed Rule does not appear to further Congress's goals, and it may effectively preclude the availability of administrative relief from the prohibited transaction rules.

Statistical evidence demonstrates a dramatic downward trend in the Department's willingness to entertain or grant requests for prohibited transaction relief. For decades following ERISA's enactment, dozens of individual administrative exemptions were granted annually. Regrettably, that former practice has come to a halt. Since 2015, the Department has granted fewer than ten individual exemptions per year. In 2021, three individual exemptions were granted. A single individual exemption was granted in 2020.

With individual prohibited transaction exemption relief already reduced to a large degree under the existing Exemption Procedures Regulation, the Department now proposes to make changes to the exemption procedures that are more restrictive. But at the time of ERISA's enactment, Congress recognized the statutory prohibited transaction exemptions of section 408 of the statute were insufficient, in and of themselves, to cover a myriad of ordinary business practices. Congress indicated an expectation that the Secretaries of Labor and the Treasury would exercise their authority to grant administrative exemptions to cover ordinary business practices not covered by a statutory exemption. That expectation is reflected in the language of the House Conference Report, which included the following passage –

> [t]he conferees recognize that some transactions which are prohibited (*and for which there are no statutory exemptions) nevertheless should be allowed in order not to disrupt the established business practices of financial institutions* which often perform[ ] fiduciary functions in connection with these plans consistent with adequate safeguards to protect employee benefit plans. For example, while brokerage houses generally would be prohibited from providing, either directly or through affiliates, both discretionary investment management and brokerage services to the same plan, *the conferees expect that the Secretary of Labor and the Secretary of the Treasury would grant a variance with respect to these services (and other services traditionally rendered by such institutions), provided that they can show that such a variance will be administratively feasible and that the type of transaction for which an exemption is sought is in the interest of and protective of the rights of plan participants and beneficiaries.*

H.R.Conf.Rep. No. 1280, 93d Cong., 2nd Sess., reprinted in 1974 U.S.Code Cong. & Admin.News 4639, 5038, 5089–90. (emph. added)

The preamble to the Proposed Rule includes an acknowledgment that the *statutory exemptions* to ERISA's prohibited transaction rules were "enacted by Congress to prevent the disruption of a number of customary business practices involving employee benefit plans, parties in interest and fiduciaries." But it does not extend the same recognition to the *administrative exemption* relief process. 87 Fed. Reg. 14722, 14722–23 (Mar. 15, 2022). The failure to reference access to administrative exemptions as a means of avoiding customary business practice disruption inaccurately implies a lack of concern by Congress as to the necessity of a workable administrative exemption process. The Department's intent to deny access to administrative exemptive relief is further reflected in the Proposed Rule's paragraph (a)(5) requirement that future applicants furnish detailed descriptions of possible alternatives to a transaction in need of exemptive relief. *Id*. at 14728. In support of this new requirement, the Department observes that "[s]tructuring a transaction in a manner that is prohibited by ERISA and requires an exemption should not be the applicant's default approach." *Id.* But that observation starkly contrasts with the legislative record.

**2. The Proposed Changes Inappropriately Reserve Unbridled Discretion to the Department in Considering Exemption Requests**

The Proposed Rule would add a new paragraph to §2570.30(g) to the Exemption Procedures Regulation underscoring the Department's position that it exercises total discretion when considering applications for exemptive relief. The proposal would serve to formalize a practice already adopted by the Department. The Department's refusal to be guided by precedent or to make allowance for even-handed grants of exemptive relief effectively confers exclusive exemptions to a few while putting others who are similarly situated at a competitive disadvantage. Such inconsistent treatment of similarly situated applicants is inappropriate. The Department's grant of exclusive exemptions for a favored few depending on when the party submitted its application creates an uneven playing field for competitive business. The exemption process should seek to preserve broad plan access to products and services on conditions that appropriately protect participants and beneficiaries. A crucially important principle to optimizing the benefit delivery system is for all market participants to operate under predictable conditions and rules and to have fair and equal access to the same exemptions. A level playing field promotes competition, innovation, and in turn improves the benefit delivery model for American workers.

**3. The Proposed Rule Inappropriately Requires that All Exemption Applications Include the Impartial Conduct Standards or Include an Explanatory Statement on Inapplicability**

Proposed Rule section 2570.34 would add the Impartial Conduct Standards (i.e., the exemption conditions that the subject transaction will be in the best interest of the plan and its participants; that all compensation received by a party involved in the transaction not exceed reasonable compensation within the meaning of ERISA section 408(b)(2); and that all of the statements made to the Department, the plan, and qualified independent fiduciaries and appraisers concerning the exemption transaction and other relevant matters not be materially misleading at the time they are made) to the statement required of the applicant. The new Impartial Conduct Standards statement would supplement an existing requirement that the applicant address the statutory elements under ERISA section 408(a) requiring findings by the Department that a requested exemption is administratively feasible, and is in the interests of plans or beneficiaries and protective of plan and participants before it may be granted.

The new requirement places a burden on all applicants to either state that the Impartial Conduct Standards are met or persuade the Department that the Impartial Conduct Standards should not be applicable, effectively setting up a default presumption in favor of Impartial Conduct Standards' applicability to all future exemptions. The Department indicates, on an unsupported basis, that it views the Impartial Conduct Standards as "a baseline condition for approved exemptions." 87 Fed. Reg. 14728. In setting that baseline, the Department overlooks that exemptive applications are frequently sought by non-fiduciary parties in interest. Yet two of the Impartial Conduct Standards statements – those concluding that an exemption transaction is in the best interest of the plan and that the compensation paid by the plan is reasonable – may only appropriately be rendered by one who is exercising fiduciary judgment. Where a party in interest requires exemptive relief to offer a product or service to plans, some plans' fiduciaries may conclude that the arrangement is in the best interest of their plan and offered for reasonable compensation while others may reach different conclusions. The Department overlooks the marketplace reality that plans are free to choose and to arrive at different conclusions as to a given arrangement by insisting that all transactions covered by an exemption always satisfy the best interest and reasonable compensation conditions at all times. Such an unsupported and clearly unreasonable baseline should be withdrawn.

The third element of the Impartial Conduct Standards – requiring that *all* of the statements made to various parties by the applicant not be materially misleading at the time they are made – is unconditioned by any consideration of the materiality of the statement itself. A misleading statement as to the next day's weather forecast would be disqualifying, although otherwise irrelevant to the process. We urge the Department to modify this requirement by referencing written statements that are material to the terms and conditions of the exempted transaction as opposed to *all* statements, regardless of whether they are oral or written and irrespective of their materiality.

We also note that the "best interest" element of the Impartial Conduct Standards, which has sometimes been described by the Department as importing an ERISA section 404-like prudence and loyalty condition within PTE 2020-02 has no such statutory basis where a prohibited transaction exemption seeks relief for a non-Title I plan. Most IRAs and other similar arrangements subject to Code section 4975 but not to Title I of ERISA are not subject to the ERISA section 404-type duties of prudence and loyalty. The Fifth Circuit Court of Appeals has already held that the blanket imposition of these duties to IRAs is unreasonable and arbitrary and capricious. *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360, 384 (5th Cir. 2018). Thus, the Department's proposal of a baseline condition that would import standards not based in applicable statutes has no basis and should be withdrawn.

**4. Pre-submission Information as Public Record**

Proposed Rule section 2570.32 opens the administrative record to public inspection, pursuant to section 2570.51(a), from the date an applicant or pre-submission applicant provides any information or documentation to the Office of Exemption Determinations ("OED"). The proposal would include in the administrative record open to the public any *pre-application* information, including notes taken by the Department at a pre-submission conference.

We fully support the notion that the exemption process should be transparent and fair. Transparency necessarily includes an administrative record open for public inspection. In that regard, we support the Department's position that any part of the record necessary for the Department to make the statutory determinations precedent to granting an exemption are an appropriate part of the administrative record that should be open for public inspection. Applicants presently do (or should) understand and expect that any information presented in their formal application is part of the public record.

We strongly disagree, however, that communications between the Department and its stakeholders preceding a formal application are appropriately included as part of the administrative proceeding, and therefore included as part of the public record. The Department should facilitate and encourage informal communications with stakeholders seeking to understand the exemption process, whether an exemption is needed under their circumstances, the likelihood of an exemption being granted under their circumstances, and what information the Department expects to receive in an application for exemption. Such pre-application communications should not be public. No public interest is advanced by making pre-submission information public. Rather such a change would serve only to have a chilling effect and to unnecessarily discourage both discussions with the Department on potential compliance issues as well as exemption applications. Making requests for guidance on whether a new exemption is needed public would also discourage efforts to comply with the prohibited transaction rules. To the extent that a stakeholder (or, in the words of the proposal, a "pre-submission applicant") wishes to apply for an exemption, the Department should simply enforce the Exemption Procedures Regulation in its current form by requiring that all information needs to be submitted in writing coincident with, or following, filing the initial application. This establishes a bright line between when and what information becomes public.

A bright line between an administrative file commencing with the formal submission of an exemption application on one hand, and, on the other hand, compliance assistance and information exchanged before a formal application submission, is appropriate to facilitate a helpful and meaningful exchange between the Department and its stakeholders. The Department has the means to effectively enforce this line by limiting the number of pre-submission conferences and informal determinations with respect to any one party, particularly in the case of a party that seeks to blur the line between the pre-submission and application process. Hence, the Department may effectively prevent any party from seeking to informally file for an exemption under the guise of "pre-submission" without this provision in the proposal. Pre-submission activities should not be made part of the public record.

**5. Private Conferences with Independent Fiduciary or Appraiser**

Proposed Rule section 2570.40 provides that the Department may hold a conference with any party, including the qualified independent fiduciary or the qualified independent appraiser, regarding any matter related to an exemption request without the presence of the applicant or the other parties to the exemption transaction or their representatives. However, the Department's implication that an independent fiduciary or qualified independent appraiser "may provide additional insight…if the applicant is not present to influence the explanation…or limit the topics discussed" is concerning. The Department's statements might be appropriate in the context of a criminal investigation but are inappropriate here where there should be no presumption of lack of candor, dishonesty, or manipulation. We urge the Department to avoid imposing a requirement that would tend to foster unnecessarily adversarial relationships among applicant stakeholders.

**6. Additional Information to Be Reported by Applicants**

Proposed Rule section 2570.34 would require an applicant to provide significantly more information. The cumulative impact of the Proposed Rule's additional submission requirements would impose unnecessary and unreasonable costs on exemption applicants. In turn, these proposed requirements create a barrier to accessing exemption relief. Yet, in granting exclusive authority to the Department to grant exemptions in 1978, President Carter expressed an expectation that the Department would "cut red tape and paperwork . . . eliminate unnecessary reporting requirements, and . . . streamline forms whenever possible."[1] The Proposed Rule's barriers are also contrary to Executive Order 12866 stating that the "American people deserve a regulatory system that works for them, not against them." Each of these additional disclosures is discussed separately below.

**7. Descriptions of Material Benefits**

Proposed Rule section 2570.34(a)(4)(ii) would require a description of "[a]ny material benefit that may be received by a party involved in the exemption transaction as a result of the subject transaction (including the avoidance of any materially adverse outcome by a party as a result of engaging in the exemption transaction)." We agree that any benefit to a fiduciary should be disclosed to identify potential conflicts of interest under section 406(b) of ERISA. We do not agree that incidental monetary and non-monetary benefits are appropriate for disclosure, even if material, for any party "involved." In some cases, benefits may be non-monetary or speculative. Examples include disclosure of the amounts paid to the courier who delivers exemption application papers to the Department (his delivery pay may be material to him), the learning and experience service providers gain in connection with the transaction, the public disclosure on the Department's website as to the identities of qualified independent appraisers or

[1] Reorganization Plan No. 4 of 1978 (Introductory Statement of President Jimmy Carter, August 10, 1978).

qualified independent fiduciaries (providing public exposure of experience or service capabilities), or the payment for advisory or legal services with respect to the application. This information is irrelevant to the Department's considerations of whether a transaction is in the interests or protective of the plan and of its participants and beneficiaries. Yet the requirement would likely result in significant additional costs and burdens. The Department should clarify that this description includes only those benefits to the parties to the transaction that are foreseeable and quantifiable and arise directly from the transaction.

**8. Cost Benefit Analysis Requirement**

Proposed Rule section 2570.34(a)(4) would require the applicant to describe the "costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible." We agree that an applicant should provide information sufficient for the Department to make a determination that an exemption is in the interests of the plan and of its participants and beneficiaries. We do not agree that an applicant should be required to present an economic impact analysis of the type sufficient to support a regulation under Executive Order 12866. Many, if not most, applicants lack the internal resources to complete a cost/benefit analysis that is similar to a federal regulatory impact analysis. While the Group believes the Exemption Procedures Regulation is sufficiently protective in its current form, the Department could reword this requirement to state "discussion of the costs and benefits to the plan and its participants and beneficiaries."

**9. Defendants in Lawsuits or Criminal Actions**

Proposed Rule section 2570.35(a)(5) requires an applicant to disclose whether it or any parties involved in the exemption transaction are currently, or have been within the last five years, defendants in any lawsuits or criminal actions concerning their conduct as a fiduciary or a party in interest with respect to any plan (other than lawsuits with respect to a routine claim for benefits) and a description of the circumstances of the lawsuits or criminal actions. We note the limiting language "conduct as a fiduciary or a party in interest with respect to any plan" and strongly agree that a concreate nexus should be required to plan operations if this requirement is kept in the final rule. However, we strongly disagree with any implication that a lawsuit or criminal action, which did not result in a judgment or conviction, is relevant to whether an exemption is protective of the rights of participants and beneficiaries of a plan. A mere accusation is not enough to create a presumption of a noncompliance. Nor should a party be required to remind the public of unproven accusations to which it has mounted a meritorious and successful defense. This disclosure requirement should be removed.

**10. Criminal Convictions**

Proposed Rule section 2570.35(a)(6) requires the applicant to disclose any of a number of various listed convictions, no matter how unrelated or inconsequential to the exemption request or no matter how distant from the operations contemplated by the exemption request. If this disclosure is retained, it should be limited to transactions in connection with an employee benefit plan. Congress, the states, and the judicial system have imposed adequate remedies for judgments in lawsuits and consequences for criminal convictions which each have deemed to serve as adequate curbs on noncompliant behavior (including, in some cases, a bar to certain relationships with any ERISA plan as provided under ERISA section 411). The Department overreaches when it attempts to overlay its own consequences to final judgments and convictions which are not provided in the statute and which do not have any real and demonstrable connection to protecting the rights of participants and beneficiaries in the exemption context. This condition should be deleted.

**11. Prior Transaction Disclosures**

Proposed Rule section 2570.35(a)(20) requires the applicant to disclose any prior transaction between the plan and the plan sponsor and any "party involved in the exemption transaction," which includes any party in interest as defined in section 3(14) of ERISA. 87 Fed. Reg. at 14740, 14745. This requirement is overbroad and overly burdensome because it would require the reporting of a virtually unlimited array of transactions that have no nexus to an exemption transaction, with regard to both the timing and subject matter of the transaction. For example, applicants would be required, under a straightforward reading of the provision, to report any transaction between a plan sponsor and an affiliate of the plan sponsor that has occurred since the formation of the plan sponsor. Further, this provision would require reporting of every transaction that has ever occurred between a plan and each of the plan's service providers, even if the service provider does not provide any services that relate to the exemption. However, many plan service providers, including plan recordkeepers and custodians, process numerous transactions on behalf of plans on a daily basis. Reporting all of these transactions is not workable. This provision illustrates why, as elsewhere described in this letter, the definition of a "party involved in the exemption transaction" is unworkably broad and should be significantly narrowed. The Department should also clarify that in the event of longstanding relationships, such as the plan sponsor and a plan's service provider, a description of the relationship suffices here.

**12. Changes in Material Facts**

Proposed Rule section 2570.37(a) provides that, in the event of a change in any material fact or representation (or if anything occurs that may affect the accuracy of any material fact or representation) during the Department's consideration of an exemption request, the applicant must promptly notify the Department. Similarly, in the event an applicant learns, during the application process, that a material fact or representation is inaccurate, the applicant must promptly notify the Department of the inaccuracy. These provisions are appropriate, as the Department's determination is necessarily dependent upon the accuracy of representations as to material facts.

## 13. Reporting Following the Grant of an Exemption

Proposed Rule section 2570.37(a) provides that, in the event of a change in any material fact or representation (or if anything occurs that may affect the accuracy of any material fact or representation) following the grant of an exemption request, the applicant must promptly notify the Department. Similarly, in the event an applicant learns, following the grant of an individual exemption, that a material fact or representation upon which the Department's determination was made, was inaccurate, the applicant must promptly notify the Department of the inaccuracy. The exemption determination should be conditioned upon the accuracy of material facts and representations that were the basis of the exemption. This is the Department's present practice.

While the opportunity to have the exemption reaffirmed upon a material change in fact may be welcomed in some cases, the obligation to report insignificant changes is overly burdensome. For example, the preamble cites a change in the independent fiduciary as triggering the obligation to report to the Department. Any change in independent fiduciary is already subject to prudence obligations of the appointing fiduciary. Reporting this change to the Department should not be required. Further, the proposal is unclear as to whether an independent fiduciary who served under an individual exemption granted in the past (for example, 1980) and whose corporate form may have changed multiple times since the grant, triggers this reporting retroactively. Overall, because whether a change in facts is "material" is left to the Department's sole discretion, a grantee of an exemption would be inclined to report more rather than less changes in facts to avoid the risk of violating the reporting requirement.

Further, the requirement to continually report changes following the grant of an exemption raises issues of administrative feasibility under section 408(a)(1) of ERISA. Throughout the years, the Department has determined that exemptions are administratively feasible specifically because they do not require continued monitoring by the Department.[2] But here, the Department is taking the position that it must continually monitor every new exemption. This unexplained inconsistency is arbitrary and capricious. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (citing *F.C.C. v. Fox TV Stations, Inc.*, 556 U.S. 502, 515–16 (2009)). The Group would respectfully note that the Department's exemption process has become increasingly cumbersome, and the time the Department takes to process an exemption has risen over the past years. We would also note that the unilateral authority that was granted to the Department over the exemption process in 1978 was largely premised on both the Executive's and Congress's belief that the Department must provide an efficient, streamlined exemption process that "dramatically cut the time required to process applications for exemptions from prohibited transactions…" to help reduce the "unduly burdensome"

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[2] *See, e.g.*, Proposed PTE 2016-06, 81 Fed. Reg. 29709 (May 12, 2016); Proposed PTE 2013-06, 77 Fed. Reg. 76783 (Dec. 28, 2012); Proposed PTE 2004-05, 68 Fed. Reg. 64648 (Nov. 11, 2003); Proposed PTE 2001-33, 66 Fed. Reg. 30014 (June 4, 2001); Proposed PTE 81-52, 46 Fed. Reg. 18409 (Mar. 24, 1981).

administration of ERISA.[3] The Proposed Rule's call for continuing reporting establishes a presumption of oversight in OED, adding to OED's activities overseeing compliance audit reports submitted by individual QPAM disqualification exemptions, another relatively new development in OED's history. These enforcement activities, carried out within the arm of OED, appear to divert OED's attention from advancing exemption applications. They increase the administrative burdens to OED, an office with an effectively shrinking budget and staff. As a result, the Group is concerned that the new requirement would add even more delays to the exemption process.

Finally, the requirement to continually report changes in facts following the grant of an exemption is an information collection request. However, the significant costs of complying with this requirement are not accounted for in the Proposed Rule's regulatory impact analysis. The Department should remove this requirement.

**14. Denial of Exemption without a Tentative Denial Letter and a Conference with to Respond**

Proposed Rule section 2570.41 would provide that the Department may issue a final denial letter without the issuance of a prior tentative denial letter or without conducting a hearing on the exemption in certain circumstances. These circumstances include a prior conference "during which the Department and the applicant addressed the reasons for the denial that otherwise would have been set forth in a tentative denial letter." This provision should be removed. To address a topic orally in a conference without an advance opportunity to prepare a reasoned response supported by available pertinent evidence is not sufficient opportunity to supplement the record in response to a denial. Pre-denial conferences do not suffice to provide a full and fair opportunity for a complete and well-reasoned response. Nor do they necessarily provide the applicant an opportunity to gather evidence supporting the response.

**15. The Proposed Rule's Prohibition on Plans Bearing Costs Associated with Exemption Transactions Is Overbroad and Arbitrary and Capricious**

The Proposed Rule would prohibit plans from bearing commissions, fees, or costs associated with the exemption transaction, and any related transaction, unless the Department determines, at its sole discretion, that a compelling circumstance exists that necessitates the payment of these expenses by the plan. 87 Fed. Reg. at 14745. This prohibition appears to announce a new policy by which the Department would generally not issue new exemptions that permit a plan's payment of reasonable compensation. This new interpretation, however, cannot be reconciled with section 408(b) of ERISA, which contains numerous statutory exemptions that permit the payment of reasonable compensation. For example, section 408(b)(2) of ERISA permits "the costs associated with the exemption transaction" (i.e., the provision of services to a

[3] Reorganization Plan No. 4 of 1978 (Introductory Statement of President Jimmy Carter, August 10, 1978).

plan) to be borne by plans. The Proposed Rule could be read to prohibit service providers from relying on section 408(b)(2) of ERISA to the extent they provide services that are "associated with" or "relate to" an exemption the Department grants in the future. The Group does not believe the Department has this authority.

The Group disagrees with the Department's presumption that an exemption would not be in the interest of a plan if the plan bears any bears any fees or costs associated with or related to the exemption transaction. There are some cases in which a plan's payment of fees could be in its interest. For instance, under some circumstances, a plan's payment of fees to an independent fiduciary could be a factor providing assurance that the independent fiduciaries acts solely in the interest of the plan.

**16. The Proposed Rule's New Independent Fiduciary and Independent Appraiser Requirements are Unnecessary and Would Render Experienced Firms Unavailable**

The Proposed Rule would narrow the "qualified independent fiduciary" and "qualified independent appraiser" definitions under the Exemption Procedures Regulation and impose numerous new compliance requirements on persons acting as such. These changes are unnecessary to protect the interests of participants and beneficiaries in connection with prohibited transaction exemptions. Moreover, by imposing the new requirements, the Proposed Rule would in many instances result in the unavailability of independent fiduciary and independent appraisal services plans rely upon to function. Comments on specific aspects of these changes are included below.

**a. Revenue Test for Independence**

Under the Exemption Procedures Regulation currently in place, a fiduciary or appraiser is presumed independent if less than 2% of its revenue is derived from parties in interest engaging in the exemption transaction, but the fiduciary or appraiser may nonetheless be independent if the revenue is less than 5%. 29 C.F.R. § 2570.31(i); (j). The Proposed Rule would tighten these quantitative measures of independence to an unreasonable degree by providing that a fiduciary or appraiser will not be treated as independent if the revenues it receives or is projected to receive from parties involved in the exemption exceeds 2%, unless the Department decides in its sole discretion otherwise. 87 Fed. Reg. at 14740. The Department offers no explanation as to why the current test is insufficient to protect the interests of participants and beneficiaries.

Under a 2001 advisory opinion issued to SunAmerica Retirement Markets, Inc., the Department concluded that an entity may be considered independent of another entity if the amount of revenue it receives in connection with the other entity is 5% or less. DOL Adv. Op. 2001-09A (Dec. 14, 2001). Recent exemptions proposed by the Department still reflect a SunAmerica-style 5% test of independence. *See, e.g., Proposed Exemption involving Retirement System of the American National Red Cross*, 86 Fed. Reg. 64691 (Nov. 18, 2021) (independent fiduciary's revenue "that is derived from any party in interest or its affiliates involved in the

Transaction is less than five percent (5%) of its previous year's annual revenue from all sources"). The SunAmerica advisory opinion is widely relied upon and is the basis upon which numerous retirement plan advice programs are structured. The implications of the Proposed Rule threaten the future viability of those programs. We cannot ascertain any principled reason for the Department's proposal to reduce the revenue threshold from 5% to 2%.

This change would exclude otherwise independent and qualified fiduciaries and appraisers from eligibility to serve. Even if a firm were to charge a uniform or standard "flat" fee for providing its fiduciary or appraisal services to plans, it would need to support a minimum of 25 engagements for unrelated parties each year to potentially meet the definition of "independent" in the current Exemption Procedures Regulation. However, under the Proposed Rule, the number of discrete engagements taken on by the same firm would need to be *doubled* to at least 50 in a year. This type of growth is difficult to achieve for any business. Moreover, since the complexity, time, internal resources and difficulty associated with independent fiduciary engagements varies considerably, we are unaware of any firm that does business on a uniform, flat dollar fee basis. We anticipate that if the Department's proposed change were adopted, only a small handful of firms with the largest number of engagements could potentially meet the definition of "independent" under the Proposed Rule. Such a concentration of responsibility seems ill-advised and unlikely to advance the interests of employee benefit plans and the participants they serve.

**b. Expansion of Entities from whom a Fiduciary or Appraiser Must Be Independent**

Under the Exemption Procedures Regulation that is in place today, a fiduciary or appraiser must be independent from "any party in interest engaging in the exemption transaction and its affiliates." 29 C.F.R. § 2570.31(i); (j). The Proposed Rule would expand the field of entities the fiduciary and appraiser must be independent from to include all parties in interest and all entities providing services to the parties in interest with respect to the exemption transaction. 87 Fed. Reg. at 14740. Further, the Proposed Rule would require the independent fiduciary to be independent from the independent appraiser, thereby prohibiting the independent fiduciary from performing the appraisal.

The requirement that the fiduciary or appraiser be independent from all parties in interest (and all entities providing services to parties in interest) is unreasonably overbroad, without basis, and impracticable. The definition of a "party in interest" under ERISA includes any service provider to the plan. ERISA § 3(14). Therefore, under the Proposed Rule, the fiduciary or appraiser would be required to be independent from all of the plan's service providers, including directed trustees, custodians, and recordkeepers, even if these service providers do not act as a fiduciary in connection with the exemption transaction or play a role in assisting the development of the exemption application. The Group does not believe that a fiduciary's relationship with such a service provider would raise an issue as to its independence. We note, for example, that PTE 2020-02 requires that the employer, named fiduciary, or administrator with respect to a plan be independent from the financial institution providing investment advice and its affiliates, but does not go further, as the Proposed Rule would, by requiring that the financial institution be independent from all of the plan's service providers. PTE 2020-02 § I(c)(1). There is simply no basis for requiring an independent fiduciary or independent appraiser to be independent from all of the plan's service providers. Expanding the independence requirement to include all plan service providers would result in fewer skilled independent fiduciary and independent appraisal firms being available.

The Group believes the Exemption Procedures Regulation is sufficiently protective in its current form. However, if the Department believes that the independent fiduciary and independent appraiser should be independent from parties providing assistance in the development of the exemption transaction, then the definition of "party involved in the exemption" should be revised to state this as follows:

(l) party involved in the exemption transaction includes:

(1) **the applicant (other than a plan), or an affiliate of the applicant** ~~party in interest (as defined in paragraph (f) of this section)~~;

(2) Any party that is engaged in the exemption transaction or an affiliate of the party that is engaged in the exemption transaction;

(3) Any party providing services to ~~either the plan or~~ a party described in paragraph (1)(1) or (2) of this section with respect to the **development of the** exemption transaction or its affiliates.

The proposed requirement that the independent fiduciary and independent appraiser be independent from one another is equally unfounded. In the preamble to the Proposed Rule, the Department stated it was concerned that an independent fiduciary could exhibit undue influence on the independent appraiser, but the other terms of the Exemption Procedures Regulation, including the requirement that the independent fiduciary itself be independent, address this risk. ERISA does not prohibit a fiduciary from engaging an appraiser. Importantly, the purpose of the appraiser is to assist the fiduciary in making a valuation determination—not to independently determine fair market value. Where an independent fiduciary has the internal resources to perform a valuation and can meet the requirements imposed on independent appraisers, requiring that an additional company perform the appraisal would only serve to add needless costs to the process of seeking an exemption.

**c. Interest in Future Transactions of the Same Nature or Type**

The Proposed Rule would provide that the Department will consider whether the independent fiduciary will have an interest in "future transactions of the same nature or type" when determining whether the fiduciary is independent. 87 Fed. Reg. at 14740. In the preamble, the Department stated that a "fiduciary may not be independent if it has a business interest in promoting the exemption transaction." 87 Fed. Reg. at 14726. This formulation of when a fiduciary may have a conflict of interest in a transaction is overbroad and unworkably vague. For example, because the Exemption Procedures Regulation identifies "experience" as a factor in determining an independent fiduciary's qualifications, accepting an engagement, gaining the experience working on the engagement, and allowing its name to be part of the public record if listed on the Department's website, would all "promote" the fiduciary's business interests. 29 C.F.R. § 2570.31(j). The Proposed Rule could therefore be read to disqualify any independent fiduciary who intends, as part of its business, to work on more than one engagement.

**d. Contractual Provisions**

The Proposed Rule would prohibit the independent fiduciary or independent appraiser's contract or engagement letter from containing terms providing for direct or indirect indemnification for breach of contract or violations of applicable law, or a waiver of the plan's claims under applicable law, including ERISA. 87 Fed. Reg. at 14742, 14743. Section 410 of ERISA already prohibits indemnification and limitation of liability provisions that relieve a fiduciary from liability under part 4 of Title I of ERISA. *See* DOL Adv. Op. 2003-08 (June 26, 2003). Further, the insertion of the term "indirect" without further explanation is also troubling, and it is not clear whether or not such common practices (e.g., the advancement of legal fees to qualified independent fiduciaries to defend claims) is "indirect" indemnification for these purposes. The new contractual requirements unreasonably deny the availability of traditional indemnification protections that are permissible under ERISA section 410. This unreasonable denial contradicts the Department's stated position that:

> The Department does not believe that, in and of themselves, most limitation of liability and indemnification provisions in a service provider contract are either per se imprudent under ERISA section 404(a)(1)(B) or per se unreasonable under ERISA section 408(b)(2). The Department believes, however, that provisions that purport to apply to fraud or willful misconduct by the service provider are void as against public policy and that it would not be prudent or reasonable to agree to such provisions. Other limitations of liability and indemnification provisions, applying to negligence and unintentional malpractice, may be consistent with sections 404(a)(1) and 408(b)(2) of ERISA when considered in connection with the reasonableness of the arrangement as a whole and the potential risks to participants and beneficiaries.
>
> DOL Adv. Op. 2002-08 (Aug. 20, 2002).

The Group agrees with the Department's statement that indemnification and limitation of liability provisions are not per se imprudent where they do not contravene section 410 of ERISA and do not apply to fraud or willful misconduct. Indemnification and limitation of liability provisions on such commercially reasonable terms are essential. In their absence, a service provider could expose itself to risk of insolvency as a result of accepting even a small engagement even though it had breached no duty to the plan. Many experienced firms are likely to cease accepting fiduciary and appraisal engagements if this provision in the Proposed Rule is not removed.

**e. Fiduciary Liability Insurance**

The Proposed Rule would require an independent fiduciary to maintain fiduciary liability insurance in an amount sufficient to indemnify the plan for damages resulting from a breach by the independent fiduciary of either (a) ERISA, the Internal Revenue Code ("Code"), or any other Federal or state law; or (b) its agreement with the plan. The Group disagrees with the blanket approach of requiring that fiduciary liability insurance be obtained by every independent fiduciary. Section 408(a) of ERISA does not require that plans be insured against losses arising from a fiduciary breach in any transaction – irrespective of whether the transaction requires or does not require exemptive relief. The implication of the requirement is that exempted transactions are somehow more susceptible to fiduciary breaches and therefore necessitate an insurance coverage requirement. Such a result is unfounded and without basis. Moreover, the costs of maintaining such insurance may be prohibitive for all but large firms. The Department failed to consider these costs in its regulatory impact analysis. Finally, depending on the size of the transaction at issue, it may not be possible in any event to obtain coverage large enough to meet this requirement.

**f. Certification under Penalty of Perjury**

The Exemption Procedure Regulation currently requires independent appraisers to submit a statement of consent acknowledging that their statements are being submitted to the Department as part of an application for an exemption. 29 C.F.R. § 2570.34(c). Under the Proposed Rule, an appraiser would be required to declare, under penalty of perjury, that to the best of its knowledge and belief, all of the representations made in its statement are true and correct. 87 Fed. Reg. at 14742. The Group does not believe that requiring that statements be made under penalty of perjury would be protective of plans. In 1990, the Department specifically considered and declined to impose this requirement on appraisers. 55 Fed. Reg. 32836, 32839–40 (Aug. 10, 1990). The Department offers no explanation as to why circumstances have changed in the intervening years. Moreover, ethics rules already prohibit appraisers from providing false statements. American Society of Appraisers, *Principals of Appraisal Practice and Code of Ethics*, § 3.3 (Nov. 18, 2020), *available at* https://www.appraisers.org/docs/default-source/3---governing-documents/asa_code_of_ethics_2020_11_18.pdf?sfvrsn=7dbe7384_3. Imposing this requirement would only serve to limit the number of skilled appraisers who otherwise be available to provide their services and would lead to significant additional levels of cost and expense.

**g. Increased Reporting on Independent Fiduciaries and Independent Appraisers**

The Proposed Rule would require that additional information be provided in an exemption application regarding independent fiduciaries and independent appraisers, including a statement describing the process leading to the selection of the fiduciary or appraiser, the due diligence performed, the potential independent candidates reviewed, and the references contacted. 87 Fed. Reg. at 14743. The Department stated in the preamble to the Proposed Rule that this requirement was added to provide the Department with "insight into the prudence of the hiring process." 87 Fed. Reg. at 14729. Elsewhere in the preamble, the Department acknowledges that it does not have statutory authority to determine whether fiduciaries acted prudently in connection with an exemption application. 87 Fed. Reg. 14723. Although lacking the necessary statutory authority to make prudence determinations, the Department nonetheless proposes to insert itself into that process through this new informational requirement. Requiring that applicants submit information relevant to the prudence of a hiring decision is clearly unnecessary and overly burdensome. Moreover, independent fiduciaries and independent appraisers are commonly subject to confidentiality obligations that restrict their ability to discuss past engagements with private parties and reveal their clients. Therefore, it may not be possible for an exemption applicant to contact an independent fiduciary or independent appraiser's references. Even where possible, it is very unlikely that references, for example, will be willing to provide feedback on candidates if their identity is required to be disclosed in the submission package for the exemption. Typically, that information is virtually never part of any public record, nor would entities typically permit their representatives to make such public disclosures on their behalf.

The Proposed Rule would also require that the applicant report any past engagements between an independent appraiser and any "party involved in the exemption," which includes all of a plan's service providers and their affiliates. This requirement is also unnecessary. For example, an applicant who is a plan sponsor would have no way of knowing whether an appraiser has provided appraisal services to an affiliate of the plan's recordkeeper or custodian, and this information would not be relevant to whether the exemption should be granted. This requirement also illustrates why, as described above, the definition of a "party involved in the exemption" is overly broad.

**h. Imposition of Requirements on Accountants and Auditors**

The Proposed Rule would impose some of the requirements applicable to appraisers upon accountants and auditors to the extent they provide a specialized statement in connection with an exemption application. 87 Fed. Reg. at 14729. However, these inclusions are unworkable and unnecessary. For example, the Proposed Rule would require that the auditor act "solely on behalf of the plan," but most exemptions that include an audit condition require that plan service providers (and not plans) be audited. *See, e.g.*, PTE 2020-01 § I(i). In these cases, while the auditor may review transactions involving numerous plans, the auditor is often engaged by the service provider, and the Group does not believe the auditor is a service provider to any particular plan. Further, to the extent that the conditions of an exemption require an auditor to report on compliance, the appropriate qualification would, instead, be for the auditor to be a certified public accountant performing agreed upon audit procedures and familiar with such matters. As a certified public accountant, an auditor is subject to stringent independence and competency rules that provide a measure of assurance. *See* AICPA Professional Standards, Code of Professional Conduct §§ 0.300.050–.060; 1.200 (Dec. 15, 2014). In that context, the proposal would render the obligation to act "solely on behalf of the plan" at best confusing, and at worst, it could undermine the independence of the audit. Additionally, accountant work product provided with an exemption application most often consists of the financial statements that are attached to a plan's Form 5500. 29 C.F.R. § 2570.35(b)(3) (requiring the inclusion of most recent financial statements of each plan affected by the requested exemption). However, the retention of an independent qualified public accountant for purposes of the examination and report required under section 103(a)(3)(C) of ERISA is typically conducted separately from (and far in advance of) an applicant's consideration of an exemption application. As a result, an applicant would not be able to anticipate at the time of the engagement of the accountant whether the requirements of the Proposed Rule would need to be met. Accordingly, to the extent it is necessary to impose conditions with respect to accountants and auditors, such conditions should be developed on a case-by-case basis.

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We appreciate the Department's consideration of the above comments. In the event the Department conducts a hearing on the proposal, we request an opportunity to testify at the hearing. Our testimony would expand upon the issues described in this letter. Please let us know if you have any questions related to the above or if we can be of assistance to the Department in this matter.

Very truly yours,

Thomas Roberts

Thomas Roberts