



October 14, 2010

Office of Exemption Determinations  
Employee Benefits Security Administration  
Room N-5700  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Attention: Prohibited Transaction Exemption Procedures  
(DOL Proposed Regulation Section 2570.30-2570.52)

Ladies and Gentlemen:

On behalf of the Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup>, I am pleased to submit comments on the proposed regulations regarding prohibited transaction exemption procedures under the Employee Retirement and Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code of 1986, amended (the “Code”)<sup>2</sup>. The regulation will redefine the procedures used by applicants for an individual prohibited transaction exemption under section 408 of ERISA and section 4975 of the Code. SIFMA is pleased that the Department of Labor (“Department”) has provided this opportunity for comments on the regulations prior to their final release.

We commend the Department for the clarity and completeness of the proposed regulation. Certain of the new provisions, however, raise concerns for our members, which we would highlight as follows:

The first is set forth in section 2570.30(b) which notes that “the Department may conditionally exempt any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by section 406 of ERISA and the corresponding restrictions of the Code and FERSA.” We believe that formulation is too narrow -- the Department has the authority to exempt any fiduciary or party in interest (or disqualified person for purposes of Code

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<sup>1</sup> The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit [www.sifma.org](http://www.sifma.org).

<sup>2</sup> 75 Fed. Reg. 53172 (August 30, 2010).

section 4975) – and think that this is an inadvertent oversight on the part of the Department that should be clarified.

Second, in the definition of affiliate, we think that section 2570.31(a)(4) (which includes any employee or officer of the person who is highly compensated or “[h]as direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets...”) should be clarified to refer to the plan assets involved in the transaction. As written, a person would be deemed to be an affiliate if he or she had responsibility with respect to any plan’s assets, without regard to whether the authority relates to the plan at issue or the plan assets at issue.

Third, both the definitions of “qualified independent appraiser” (under section 2570.31(i) and “qualified independent fiduciary (under section 2570.31(j)), reference someone who is “independent” of and unrelated to any party in interest engaging in the exemption transaction. We are concerned that these words are undefined, in a section that seeks to define independence, and have raised issues with the Department over the years about employees related to employees of the party in interest (spouses, children, in laws, etc.). We think these words only tend to make murkier the analysis and urge that they be eliminated. We are also very concerned with the proposed 1% de minimis limit on annual income for an independent appraiser or independent fiduciary. First, we believe the Department would be better served by using the term “revenues,” rather than income (which are, generally, revenues net of expenses), consistent with prior exemptions issued by the Department. The concepts are very different, and income can be defined as taxable income, which in many cases is nonexistent or minimal. More importantly, the proposed regulation reduces, by 400%, the affiliation rules typically used by the Department in the past. For smaller appraisers and independent fiduciaries, this limit effectively eliminates their being able to serve plans, and thus significantly limits the choices available to plans. We respectfully submit that this cannot be in participants’ interest. We urge the Department to use 5%, which is still de minimis and consistent with other provisions of federal law<sup>3</sup>. We would like to help the Department devise a formulation that makes more sense and is more compatible with the appraiser/independent fiduciary market.

We strongly urge the Department to consider protection for information regarding current investigations set forth in section 2570.35(a)(7) and section 2570.37(b). The Department’s investigations are confidential; the EBSA enforcement manual makes information about current enforcement proceedings subject to strict confidentiality, except with respect to other government agencies. Many exemption requests would not be filed (and the benefits of such exemption requests to participants and beneficiaries not realized) if every applicant believed that information regarding current investigations would be made public. This is especially true where routine investigations often take years to resolve and are often resolved without any finding of wrongdoing. The stigma of an investigation should not attach to every application for exemption.

We also believe that the new requirement that an applicant disclose all direct or indirect investments of a plan with the party in interest, regardless of whether such investment is exempt

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<sup>3</sup> See also Section 2(a)(3) of the Investment Company Act of 1940 (“affiliated person” for purposes of the Company Act is 5% or more).

under the terms of ERISA, is overbroad and extraordinary burdensome, as currently set forth in section 2570.35(a)(16). For a plan with \$10 billion in assets, there may literally be thousands of transactions with or through a party in interest that would be required to be listed, regardless of how irrelevant they are to the exemption process. We urge the Department to reconsider whether listing of all of these transactions (and the cost of doing so) is reasonably related to a more effective exemption process. We believe in the Department's current process of inquiring about other relationships and transactions where that information is helpful or relevant. As always, failure to answer those questions could result in denial of the exemption.

We urge the Department to reconsider the changes to section 2570.37(a) regarding material representations that become inaccurate “[w]hile an exemption application is pending final action with the Department...or if, during the pendency of the application” (which we read to mean during the period of time under which the application/exemption is in force). While we understand that this rule is appropriate while the exemption application is pending, facts change all the time after an exemption is granted – size of company, affiliates, lines of business, markets, etc. Exemptions are written to accommodate certain changes and the language in the exemption is a trap for the unwary. Moreover, it puts a party in interest at his or her peril to over report any changes at all in the facts and representations to avoid the draconian result that the exemption is suddenly inapplicable. We hope the Department will limit the changes that need to be brought to the Department's attention to periods prior to the exemption being granted.

SIFMA appreciates the opportunity to comment on the proposed exemption. Please do not hesitate to contact me at (202) 962-7400 or [kbentsen@sifma.org](mailto:kbentsen@sifma.org) if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Ken Bentsen", with a long horizontal line extending to the right.

Kenneth E. Bentsen, Jr.  
Executive Vice President,  
Public Policy and Advocacy