

GROOM LAW GROUP

March 21, 2022

Submitted Electronically

Mr. Ali Khawar
Acting Assistant Secretary
Employee Benefits Security Administration
U.S 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 a group of professional independent fiduciaries with respect to the Department of Labor's proposed rulemaking related to the "Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications" (the "Proposed Rule"). 87 Fed. Reg. 14722 (March 15, 2022). We appreciate the opportunity to comment on the Proposed Rule, but it is clear that additional time will be needed to formulate informed and meaningful comments. Therefore, we request that the Department extend the comment period for *at least* an additional 30 days and reconsider its conclusion that the rulemaking is not subject to review by the Officer of Management and Budget ("OMB").

As the Department is aware, the class and individual exemptions granted by the Department are critical to the efficient operation of the private health and retirement systems. The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the Internal Revenue Code of 1986, as amended, prohibit a wide array of transactions involving employee benefit plans and IRAs, including transactions that are necessary or advantageous for the ordinary operation of benefit plans and IRAs. Congress understood this and, in addition to creating certain statutory exemptions, provided the Department with authority to grant exemptions on either an individual or class basis, subject to certain conditions.

The Proposed Rule would fundamentally alter the process for applying for prohibited transaction exemptions. It would also impose significant new compliance burdens on exemption applicants and other entities who may be involved with exemptions, including independent fiduciaries. These changes will have material direct and indirect costs, and they implicate novel issues of administrative law. Ultimately, 30 days is simply not enough time for the regulated community to conduct an evaluation of the direct and indirect effects of the Proposed Rule and to provide considered comments.

March 21, 2022

Page 2

There is no statutory or other deadline that necessitates such a short comment period. Additionally, when the Department last proposed changes to the exemption application process in 2010, the Department provided a 45 day comment period. The changes proposed in 2010 were considerably narrower and more limited than the Proposed Rule, so a longer comment period is justified.

We also urge the Department to reconsider its conclusion that the Proposed Rule is not subject to review by OMB under Executive Order 12866. There is no question the Proposed Rule raises novel legal and policy issues, including, but not limited to, issues related to the Department's authority to impose the fiduciary standard under ERISA Section 404(a) and the Impartial Conduct standards under Prohibited Transaction Exemption 2020-02 on IRAs.

Additionally, we believe the Department's estimate of the number of transactions affected by the Proposed Rule is significantly lower than as stated in the Proposed Rule. Historically, the Department granted dozens of exemptions per year and, in some years, upwards of 90. In our experience, there is as much demand for exemptions today as there was in the past, and it is only the *number* of exemptions issued that has declined. For example, in 2020 and 2021, the Department granted a *total* of five exemptions. This dramatic decrease in exemptions, and presumably applications, is due to the effect the Department's informal rules have had on the industry. The Department now seeks to codify those policies in the Proposed Rule but has not conducted an analysis of the impacts those policies have already had on the regulated community, further necessitating more time for comment.¹

We appreciate your attention to this issue and urge you to announce an extended comment period as soon as possible.

Sincerely,



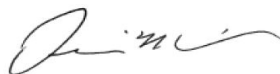
Jennifer E. Eller



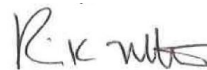
Allison A. Itami



Michael P. Kreps



David N. Levine



Richard K. Matta

cc: Shalanda Young, Director, Office of Management and Budget

¹ Plan sponsors and financial institutions often view exemptions as effectively unavailable because of the Department's policies, and as a result, they either forgo transactions that would be beneficial or restructure those transactions in much less efficient ways.