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Submitted Electronically

The Honorable Lisa Gomez
Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Procedures Governing the Filing and Processing of PTE Applications (RIN 1210-AC05)

Dear Assistant Secretary Gomez:

I write on behalf of a group of professional independent fiduciaries to provide additional information regarding the above-referenced rulemaking. The independent fiduciary group appreciates this opportunity to supplement our initial comment letter and the testimony provided on behalf of the group at the hearing held on September 15, 2022. The purpose of this supplemental comment letter is to address certain points raised at the hearing.

1. The Department should withdraw the proposal

The proposed changes to the exemption application procedures would harm plans and participants by making it exceedingly difficult to apply for, let alone receive, exemptive relief. Congress intended for DOL to grant exemptions. The fact that the statute requires certain findings from DOL before granting an exemption does not mean that the Department has authority from Congress to set the bar so impossibly high that few, if any, applications will clear it. We take issue with the Department's apparent view that seeking an exemption should be a last resort. The Department has granted hundreds of exemptions over the years, and in each case it has determined that the exemption is protective of the interests of plans and participants. Neither the preamble to the proposal nor the statements of Department personnel at the hearing on September 15, 2022, identified problems with the current procedures or documented specific instances where the Department granted an exemption that was not in the interest of plan participants. In the experience of group members, exemptions granted by the Department have helped thousands of plans and participants. However, if the proposal is adopted, the pace and quality of exemptions – already at an all-time low – will be further reduced.

2. The Department should retain the current test for determining when a fiduciary is independent

The group reiterates its position that the Department should retain the current test for independence when parties applying for an exemption propose using an independent fiduciary. Under the current procedures, a fiduciary's independence is measured with respect to a party in interest to a plan that is engaging in the exemption transaction and affiliates of that party. The proposal would drastically expand the parties from whom independence is measured to include any party involved in the exemption transaction and any party involved in the development of the exemption request. The proposal would capture a service provider to a party in interest to a plan and an affiliate of a service provider to a party in interest to a plan. The Department has simply not explained how it is that an independent fiduciary, bound by the obligations of ERISA section 404, cannot act with appropriate independence without the extreme expansion of parties contemplated under the proposal's standards for independence.

Moreover, the group believes that it will be nearly impossible to unravel the identities of the entities and relationships for purposes of applying DOL's new rule. For example, it is virtually impossible for most plans to track all parties in interest. Plan fiduciaries regularly rely on exemption strategies that assume every counterparty is a party in interest to the plan engaging in the transaction. This approach works where exemption strategies are available but it will not work where an independent fiduciary must provide a statement to the Department identifying the percentage of its revenues derived from numerous parties related to a plan engaging in an exemption transaction.

The group requests that the Department retain the existing presumption that a fiduciary is independent for purposes of the exemption application procedures if the fiduciary determines that it derives not more than 2 percent of its revenues from a party in interest engaging in the subject transaction, or, if greater than 2 percent and not more than 5 percent, based on other facts and circumstances as determined by the Department.¹

3. DOL should reconsider the proposal's insurance requirements for independent fiduciaries

Professional independent fiduciaries typically maintain professional liability insurance intended to address losses caused by the fiduciary's failure to live up to its professional standards of care. The proposal requires independent fiduciaries to maintain a different type of insurance – fiduciary liability insurance – in an amount sufficient to indemnify a plan involved in an exempted transaction for certain acts of the independent fiduciary. The Department has asked for data regarding the costs of this part of the proposal. The group believes that the costs, limits, retention levels and the terms and conditions of such coverage are likely to be such that independent fiduciaries will not be able to cost-effectively meet the proposal's requirements. For

¹ While the group believes that the current basis for determining independence is both valid and appropriate, we would be happy to discuss with the Department, as part of more constructive conversations going forward, whether a different "safe harbor" percentage might be appropriate for newly-established independent fiduciary organizations (operating for less than 1-2 years) who are otherwise qualified by virtue of ERISA knowledge and experience with the subject matter of the exemption.

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example, the cost of such insurance could range from \$2,500-\$3,000 per million of coverage for plans with assets below \$100 million and is likely to be upwards of \$10,000 per million of coverage for larger plans (*i.e.*, those with assets above \$1 billion). Retentions for some transactions would likely be a minimum of \$5 million. The group believes that the Department has not established that the value of this type of insurance coverage would outweigh the costs, and therefore asks the Department not to include these requirements.

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We appreciate the opportunity to provide additional comments on the proposal and would be happy to discuss them in more detail.

Sincerely,



Jennifer Eller