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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:

I represent an independent fiduciary who frequently provides services to ERISA covered plans, either pursuant to exemption or where no exemption is required but the plan fiduciaries for because of or other reasons believe an independent fiduciary would be appropriate. I am pleased to submit comments on the definition of qualified independent fiduciary in 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").[1] 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. I appreciate the opportunity to comment on the proposed procedures from the point of view of an independent fiduciary.

Our comments relate mainly to the definition of qualified independent fiduciary in section 2570.31(j). That definition reads as follows:

[1] 75 Fed. Reg. 53172 (August 30, 2010).

> (j) A qualified independent fiduciary is any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA, **that is independent of and unrelated to any party in interest engaging in the exemption transaction and its affiliates**; the determination as to the independence of a fiduciary is made by the Department on the basis of all relevant facts and circumstances. As a general matter, an independent fiduciary retained in connection with an exemption transaction must receive no more than a de minimis amount of compensation (including amounts received for preparing fiduciary reports and other related duties) **from the parties in interest to the transaction or their affiliates**. For purposes of determining whether the compensation received by the fiduciary is de minimis, all compensation received by the fiduciary is taken into account. Such de minimis amount will ordinarily constitute **1% or less of the annual income of the qualified independent fiduciary**. In all events, the burden is on the applicant to demonstrate the independence of the fiduciary.
> (emphasis added)

We think the language highlighted above may be confusing, and we offer the following comments. The definition of qualified independent fiduciary uses the term "independent of and unrelated to." We are concerned that the use of this phrase term in the definition may not be as helpful as the Department may wish it to be. If the Department means that a qualified independent fiduciary may not be an affiliate of the party in interest engaging in the transaction and its affiliates, we think it would be clearer to say so. In addition, the term "unrelated" is undefined; presumably, it refers to the affiliation rules described in the definitions. Unless the regulation defines the term, we are not sure how it is meant to be interpreted. Accordingly, we suggest that the Department amend the definition as follows:

> A qualified independent fiduciary is any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA, **that is not an affiliate of any party in interest engaging in the exemption transaction**; the determination as to the independence of a fiduciary is made by the Department on the basis of all relevant facts and circumstances.

Second, the proposed regulation uses a de minimis compensation rule that is troubling. The definition would make the compensation paid to the independent fiduciary a function of the income of the independent fiduciary, without reference to a period of time. We assume the Department intends the test to be annual, either on a rolling basis from the date of engagement or on a calendar year basis. We think that clarification would be helpful. In addition, the definition uses the term income as the base comparison, and that term lends itself to substantial interpretation: gross income, taxable income, etc. In other exemptions, the Department has used revenue as the base for the comparison; we think that revenue is a clearer base.

Third, we strongly urge the Department to reconsider the 1% limit. It is significantly more limiting than the 5% guideline often used in individual exemptions in the past and will severely constrain most of the independent fiduciaries who have historically taken on these assignments from doing so in the future. The 1% limit will also make it nearly impossible for any new independent fiduciary to enter this business -- the very people who would have no conflicts under the proposed rule and no affiliations will never be able to take on a significant assignment because the 1% limit is so constraining. We note that the same would be true even if the yardstick were 5% of revenue.

While we understand why a percentage limit seems appealing, we think the Department should consider alternative methods of defining independence. Percentage limitations of the magnitude proposed have no relationship to the complexity, risk, or time commitment an engagement may entail. The de minimis test has, at best, a narrow relationship to duty and commitment to perform fiduciary responsibilities in accordance with ERISA. With artificially low compensation, independent fiduciaries are more likely to devote less time to the task at hand, and the more skillful fiduciaries are more likely to opt not to take on such assignments. As the Department may have noted, there is already a diminished pool of independent fiduciaries from which to select for challenging assignments, as financial institutions have largely withdrawn from serving in an independent fiduciary capacity.

The proposed rule may magnify this problem. Consider the following scenario: A plan needs an independent fiduciary to resolve a complex issue requiring an exemption. The plan fiduciaries seek to hire Ken Feinberg, a sole practitioner with impeccable credentials. His only other engagement that year was to determine how the BP oil spill fund was to be allocated, the TARP bonus limitations should be interpreted, etc. There can be no question of his credentials or his independence, nor can one seriously believe that Mr. Feinberg would put his entire reputation on the line for a single plan engagement. However, under the proposed rule, if the compensation paid to him exceeds 1% of his revenues that year, or 5% for that matter, he cannot take the assignment. Surely, this is not the result the Department has in mind. We believe the Department should define qualified independent fiduciary along the lines set forth in the Proposed Adequate Consideration Regulation, which does not contain a specific percentage limitation. We are not aware of any evidence, nor has the Department suggested any, to indicate that the de minimis test is a reliable measure by which to gauge independence. The Department has been flexible and reasonable on this point in the past, and we urge you to avoid any construct that makes the Department's approach to some of the more difficult and complex cases impractical and potentially self-defeating. The percentage limit should not cause an independent fiduciary to be disqualified based on the amount of its revenues, with no consideration of the particular risk or complexity of the proposed assignment for which the exemption is sought.[2]

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[2] We note that the Annual Cost Burden suggests that the cost per exemption application for outside legal counsel, the independent fiduciary and any appraiser/expert will be approximately $27,500, and that the independent fiduciary and appraiser combined will cost approximately $10,000. We think that these estimates are entirely inaccurate. Our experience is that legal fees may range from $10,000-$50,000 for an ex pro application and from $25,000 to more than $100,000 for a particularly complex

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All of the above analysis applies with equal force to the limitation on fees for independent appraisers. Without a doubt, some of the more highly respected appraisers will be effectively precluded from serving in that capacity. Again, we urge the Department to reconsider its position.

We appreciate the opportunity to comment on the proposed exemption.

Best regards,

Melanie Franco Nussdorf

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individual exemption. Independent Fiduciary fees may range from less than $25,000 for very straightforward, short assignments to several hundred thousand dollars for complex assignments.