NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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The Honorable Lisa M. Gomez
Assistant Secretary, Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor

Submitted electronically at www.regulatons.gov

Re: Proposed Amendment to Prohibited Transaction Exemption 2020-02
Application No. D–12057
ZRIN No. 1210-ZA32

Dear Assistant Secretary Gomez:

The National Coordinating Committee for Multiemployer Plans ("NCCMP") appreciates this opportunity to comment on the Employee Benefits Security Administration ("EBSA"), U.S. Department of Labor's ("the Department" or "DOL") Proposed Amendment to Prohibited Transaction Class Exemption 2020-02 (the "Investment Advice Exemption") ("Proposal"), published at 88 Fed. Reg. 75979 – 76003 (November 3, 2023). For the reasons outlined below, we encourage the Department to modify the Proposal to reduce the scope of its ineligibility provisions in order to prevent unanticipated harm to the affected plans and their participants and beneficiaries.

The NCCMP is the only national organization devoted exclusively to protecting the interests of multiemployer plans, as well as the unions and the job-creating employers of America that jointly sponsor them, and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America's working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code Section 501(c)(4), with members, plans and contributing employers in every major segment of the multiemployer universe. These industries include airline, agriculture, building and construction, bakery and confectionary, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking/transportation. Multiemployer plans are jointly trusteed by labor and management trustees.

Section III(a) of the Proposal would dramatically expand the list of events that trigger ineligibility for reliance upon the PTE for a period of ten years. Even more notably, the Proposal dramatically

expands the reach of the disqualification well beyond any reasonable nexus to the actual business that is providing the fiduciary services to the affected plan. At the same time, the Proposal would significantly narrow the grounds upon which entities and individuals subject to potential disqualification under the Proposal could seek to avoid its effects. In combination, these changes will place the plans the exemption rules are intended to protect in significant jeopardy.

Financial institutions, such as those providing fiduciary services to plans, are subject to a number of "safety and soundness" regulators both domestically and globally. Domestically, these regulators include the Federal Reserve, the Federal Deposit Insurance Corporation ("FDIC"), the Office of the Comptroller of the Currency ("OCC"), the Securities Exchange Commission ("SEC"), the Commodities Futures Trading Commission ("CFTC"), the Financial Industry Regulatory Authority ("FINRA"), state banking and insurance regulators, and many others.[1] The fitness of a financial institution to provide investment management services appropriately rests in the hands of these regulators rather than the Department.

Under the Investment Advice Exemption as originally adopted, the list of offenses that would result in disqualification was limited to the "conviction of a crime described in ERISA section 411 arising out of such person's provision of investment advice to Retirement Investors . . . ." PTE 2020-02, Section III.(a)(1). The breadth of the offenses that can trigger a disqualification have been dramatically expanded, and now encompasses a veritable laundry list of offenses. While the expansion of the list of offenses may not in itself be necessarily objectionable, the lack of any required nexus between the circumstances of the offense and the fiduciary services performed for the affected plans is deeply problematic. This is especially the case because the disqualification applies to the extent such an offence is committed by any "Affiliate" of the entity actually providing the fiduciary services. Furthermore, although "Affiliate" is not clearly defined, according to the Proposal, it extends beyond the confines of the "controlled group,"[2] which is at least a well-defined term.

At the same time the scope of both the offenses and the extent of the disqualification are being expanded, the grounds for avoiding disqualification are being dramatically narrowed.[3] Most problematically, the opportunity to be heard and to challenge a disqualification based upon a domestic conviction has been eliminated entirely. Thus, any conviction of any affiliate, foreign or domestic, in a U.S. court, without regard to the circumstances of the offense or the relationship between that affiliate and the individual or entity providing the fiduciary services, would result in

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[1] Congressional Research Service, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework*, Updated March 10, 2020, accessed at https://sgp.fas.org/crs/misc/R44918.pdf.

[2] As stated in the Proposal:

> The Department is proposing to expand ineligibility to include Financial Institutions that are Affiliates, rather than a more limited definition of ''Controlled Group.''

88 Fed. Reg. 75989.

[3] The original exemption provided that a petition to avoid disqualification for any conviction, a financial institution need only demonstrate that "[its] continued reliance on the exemption would not be contrary to the purposes of the exemption . . . ." PTE 2020-02, Section III.(a)(1).

an automatic disqualification with no right of any kind to be heard or to otherwise contest the disqualification. PTE 2020-02 III.(c)(1) (Proposed); see 88 Fed. Reg. 75989.

Even in the case of a conviction by a non-U.S. court, one of the criteria to be used by the Department in considering whether to grant a petition of a fiduciary service provider to avoid disqualification has been removed, as follows:

> [T]he relationship between the conduct underlying the conviction and the Financial Institution's system and practices in its retirement investment business as a whole . . . .

PTE 2020-02 Section III.(c)(3); c.f. PTE 2020-2, Section III.(c)(3) (Proposed). Thus, even for non-U.S. convictions, the explicit requirement that the nexus between the offense and the fiduciary services be examined to determine the propriety of the disqualification has been eliminated.

Many of the larger financial institutions that provide fiduciary services to employee benefit plans have multiple related entities without any nexus to the relevant line of business, any of which, under the sweeping provisions of Section III.(a)(1), could trigger a disqualification. To illustrate, the Legal Entity Identifier database at LEI-Lookup.com lists more than 1,027 legal entities for JPMorgan[4] and more than 2,700 for BlackRock.[5] The same database reports that JPMorgan Chase Bank, N.A. lists over 90 subsidiaries.[6]

Section III.(a)'s expansive net covers hundreds, if not thousands, of entities within large financial institutions that have no meaningful connection or relationship to the services provided by the fiduciary service provider. Section III.(a) extends well beyond an effective connection or nexus between the convicted entity and the plan fiduciary. As a result, the disqualification provisions of current section III.(a) are based on an unsubstantiated theory and do not bear a rational relationship to a fiduciary service provider's integrity.

The proposed changes will have real consequences for plans. As the Department is aware, there are a limited number of entities that are qualified to provide investment advice on a scale needed by the nation's plans, including multiemployer plans. The sudden real or impending loss of significant numbers of these providers, or even a handful of the largest among them, as the result of their unwarranted disqualification will cause chaos among plans, which will have no more than six months to find suitable replacements. The harm that this will cause to plans is likely to be great, and will inure to the detriment of the very participants and beneficiaries the Department is seeking to protect.

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[4] LEI search results for "JPMorgan", *available at* lei-lookup.com/record/?keyword=JPMorgan, *accessed on* Dec. 30, 2022.

[5] LEI search results for "Blackrock", *available at* lei-lookup.com/record/?keyword=Blackrock, *accessed on* Jan. 2, 2023.

[6] JPMorgan Chase Bank, National Association, LEI: 7H6GLXDRUGQFU57RNE97, *available at* lei-lookup.com/record/7H6GLXDRUGQFU57RNE97/, *accessed on* Dec. 30, 2022.

We also note that the Proposal suggests that a disqualified plan fiduciary could potentially obtain a separate individual prohibited transaction exemption. PTE 2020-02, Section III.(b)(2)(C). The Department, however, recently proposed to dramatically reduce the ability of plans and service providers to obtain such exemptions,[7] which makes the Proposal's suggestion deeply problematic. Furthermore, even under the existing PTE procedures, obtaining an individual exemption, no matter how meritorious, is a lengthy and expensive process, and certainly could not be completed in time to avoid harm to the affected plans.

We therefore request that the Department both narrow the breadth of the potential disqualifications in terms of the scope of the disqualifying offenses, the identity of the parties at fault, and their nexus to the fiduciary services provided. We further request that the Department restore a full and fair opportunity to be heard in order to provide plan fiduciary service providers with the opportunity to demonstrate why their disqualification would not serve the interests of their client plans and the participants and beneficiaries who these rules are intended to protect.

Regards,

Michael D. Scott
Executive Director

[7] Notice of Proposed Rulemaking: *Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications*, 87 Fed. Reg. 14722 (March 15, 2022); *see,* NCCMP Comment, https://www.regulations.gov/comment/EBSA-2022-0003-0024, June 1, 2022; NCCMP Post-Hearing Comment, https://www.regulations.gov/comment/EBSA-2022-0003-0044, October 27, 2022.