

October 7, 2022

Via Electronic Filing

Assistant Secretary Lisa Gomez
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW Room N-5655
Washington, DC 20210

Re: Proposed Amendment to Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications (RIN 1210-AC05)

Dear Assistant Secretary Gomez:

The Investment Adviser Association (**IAA**)¹ appreciates the opportunity to comment on the Department of Labor’s proposed procedures for the filing and processing of individual and class prohibited transaction exemption (**PTE**) applications.² The IAA’s comments are limited to the issue of “pre-submission” communications with the Department.

ERISA’s prohibited transaction rules generally prevent the parties responsible for creating and operating Plans from engaging in almost any transaction with “parties in interest,” which include just about any person or entity that has any connection to the Plan.³ Because this regime prevents Plans from accessing many beneficial services, investments, and transactions that are necessary for, or beneficial to, the creation and operation of Plans, Congress included a series of statutory administrative exemptions.

Congress also wanted to allow certain other transactions so as “not to disrupt the established business practices of financial institutions which often perform [] fiduciary functions in connection with these plans consistent with adequate safeguards to protect employee benefit

¹ The IAA is the leading organization dedicated to advancing the interests of investment advisers. For more than 85 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA’s member firms manage more than \$35 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

² On March 15, 2022, the Department published proposed amendments to its regulations specifying the procedures for applying for class and individual exemptions and the processing of such applications. 87 Fed. Reg. 14722 (Mar. 15, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-03-15/pdf/2022-04963.pdf> (**Proposal**).

³ ERISA § 3(14) (29 U.S.C. § 1002(14) and 26 U.S.C. § 4975(e)(2)). The definition includes, but is not limited to, any fiduciary of the Plan, any Plan service provider, and an employer or employees who are covered by the Plan.

plans,”⁴ so it gave the Department the authority to grant administrative exemptions when the Department determines that such relief is: (i) administratively feasible; (ii) in the interests of the Plan and its participants and beneficiaries; and (iii) protective of the rights of participants and beneficiaries of such Plans.⁵

The IAA’s concerns relate to proposed changes that would: (i) require that all communications with the Department regarding a requested exemption be part of the administrative record that the public can obtain on request; (ii) bar the Department from communicating with pre-submission applicants on an anonymous basis; and (iii) broadly define the term “pre-submission applicant” to mean a “party that contacts the Department, either orally or in writing, to inquire whether a party with a particular fact pattern would need to submit an exemption application and, if so, what conditions and relief would be applicable.”⁶

In our view, the Department should encourage rather than discourage informal non-public preliminary discussions. Due to the complexity of the prohibited transaction rules, interested parties engage in informal discussions with the Department regarding whether a prohibited transaction exists based on certain facts, and if so, whether the Department would consider an individual PTE to address the issue. These informal discussions are typically not public, permitting the Department and the potential applicant to have a fulsome discussion of the basic issues before the applicant commits to the significant time and expense of applying, and before the Department must commit its time and resources to formally opening a file and reviewing an application.⁷

We strongly believe that eliminating the possibility of non-public discussions will significantly limit valuable informal discussions that serve Plans, Plan fiduciaries, Plan participants and beneficiaries, and the Department well and we urge the Department to remove these provisions in any final regulation.

⁴ H.R. Conf. Rep. No. 1280, 93d Cong., 2nd Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 5038, 5089–90.

⁵ ERISA § 408(a) (29 U.S.C. § 1108(a)).

⁶ 87 Fed. Reg. at 14727.

⁷ The IAA has voiced similar concerns with publication of informal communications to the Securities and Exchange Commission (SEC). See Letter from IAA General Counsel Gail C. Bernstein, Amendments to Procedures With Respect to Applications Under the Investment Company Act of 1940, SEC Rel. No. IC-33658 (Oct. 18, 2019), available at https://investmentadviser.org/wp-content/uploads/2021/10/IAA_Comment_Letter_-_Exemptive_Application_Proposal.pdf (“Particularly with novel applications, SEC staff and applicants benefit from fulsome, unrestricted communication, and publication could have a very negative impact on these communications. We agree ... that releasing communications could impede industry innovation and unnecessarily increase burdens on SEC staff and applicants.”).

Assistant Secretary Lisa Gomez
U.S. Department of Labor
October 7, 2022
Page 3 of 3

* * *

We appreciate the Department's consideration of our comments on this important Proposal. Please do not hesitate to contact the undersigned at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

/s/ Gail C. Bernstein

Gail C. Bernstein
General Counsel

/s/ William A. Nelson

William A. Nelson
Associate General Counsel