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Submitted Electronically

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

RE: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications (RIN 1210-ACO5)

Ullico Inc. ("Ullico") appreciates the opportunity to comment on the above-referenced proposed amendments (the "Proposed Amendments") to the Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications (the "Exemption Procedures Regulation") following the Department's hearings on the Proposed Amendments. Ullico is a privately held investments and insurance holding company serving the union workplace. The activities of the company's subsidiaries cover a broad range of financial products and services provided principally to employee benefit plans and trustees of benefit plans, labor unions and their members, and employers of union members, including investment advisory services, asset management, commercial mortgage lending and servicing activities, life and health insurance, and property and casualty insurance.

Ullico agrees that the Exemption Procedures Regulations should reflect the requirements the Department will impose on applicants for administrative prohibited transaction exemptions in a transparent manner. Due to the importance of these issues, we also appreciate the Department's decision to hold a hearing on the Proposed Amendments. However, Ullico is concerned that the Proposed Amendments would unduly restrict the ability of prospective applicants to engage with the Department and would create new unwarranted obstacles in the availability of exemptions. The imposition of unnecessary and burdensome obstructions within the exemption process runs contrary to Congress's direction to the Department to grant exemptions when doing so would be in the interest of plan participants and beneficiaries. We provide introductory thoughts on the Department's exemption-granting authority and specific comments on the Proposed Amendments below.

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I. Introduction

The Exemption Procedures Regulation represents a vital aspect of the Department's regulatory authority under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Section 406(a) of ERISA prohibits transactions between a plan and a "party in interest" to the plan. A "party in interest" is defined to include any employer, employee organization, fiduciary, service provider, as well as certain affiliates and relatives, employees, officers, and directors of these entities. ERISA § 3(14). This definition is so broad that the Department has recognized that there may be "thousands" of parties in interest with respect to any single plan. 47 Fed. Reg. 56945, 56946–47 (Dec. 21, 1982). Section 406(b) of ERISA also prohibits a fiduciary from acting in a transaction that may involve conflicts of interest or an adversity of interests, or that may result in the fiduciary's receipt of any consideration. As a result of their wide scope, the prohibited transaction rules restrict transactions that are both harmful and not harmful to a plan. *Keach v. U.S. Tr. Co.*, 419 F.3d 626, 635 (7th Cir. 2005) ("A plan need not suffer an injury in order for a court to find a transaction prohibited by section 406."). What is more, the prohibited transaction rules restrict transactions that are necessary to the ordinary operation of the plan, such as the provision of services. ERISA § 406(a)(1)(C). Congress recognized that the broad sweep of the prohibited transaction rules would disrupt "established business practices" and authorized the Department to grant administrative exemptions to temper the effect of the prohibited transaction rules. H.R.Conf.Rep. No. 1280, 93d Cong., 2nd Sess., reprinted in 1974 U.S.Code Cong. & Admin.News 4639, 5038, 5089–90. Section 408(a) of ERISA requires the Department to "establish an exemption procedure," which the Exemption Procedures Regulation reflects.

While section 408(b) of ERISA provides several statutory exemptions, the delegation of authority to the Department to grant administrative exemptions in section 408(a) demonstrates Congress's understanding that it could not anticipate every type of transaction that should be exempted from ERISA's prohibited transaction rules. As Congress foresaw, the needs of employee benefit plans have evolved over the years since the passage of ERISA, with new and innovative products and services continually being developed. Beneficial transactions that would enhance the efficient operation of employee benefit plans or improve participant and beneficiary outcomes may not fit within the confines of the prohibited transaction rules because they were not anticipated by Congress at the time of ERISA's passage. Section 408(a) of ERISA, accordingly, calls for a robust Departmental exemptions program that readily grants exemptions in connection with transactions that are administratively feasible, in the interests of the plan and its participants and beneficiaries, and protective of the rights of participants and beneficiaries. For many years, the Department maintained such a robust exemptions program, through which the Department granted many beneficial exemptions. And the Department has not identified any exemption that it believes was improvidently granted.

We are concerned, however, that the Proposed Amendments would introduce new, unwarranted obstacles to the process of applying for an exemption. The decreasing number of exemptions granted over the past two decades suggests to us that the Proposed Amendments may stem from a philosophical resistance to prohibited transaction exemptions. A. Ramsey, *Proposed Rule 'Beginning of the End' to Benefit Exemptions*, Bloomberg Law (Sept. 16, 2022), *available at* https://www.bloomberglaw.com/bloomberglawnews/employeebenefits/XF6I0R2O000000?bna_

news_filter=employee-benefits#jcite. However, as explained above, the Department should not be opposed to granting exemptions that are in the interest of plans. We provide commentary on specific aspects of the Proposed Amendments below.

II. Specific Comments

A. Making Pre-Submission Conferences Part of the Public Record

The Proposed Amendments would provide that the publicly-available administrative record of an exemption would include documents, correspondence, and information submitted to the Department, as well as notes taken, in connection with pre-submission conferences prospective applicants hold with the Department prior to the filing of a formal application. 87 Fed. Reg. 14722, 14741 (Mar. 15, 2022). During the September 15 hearing on the Proposed Amendments, Department staff suggested that final amendments to the Exemption Procedures Regulation may clarify that such documents and information would only become part of the public record to the extent the party holding the pre-submission conference with the Department actually files a formal application. While Ullico agrees that clarifying that a public record will not be created when no formal application is filed would be an improvement, we believe that the filing of a formal application should continue to act as the bright line to determine when the public record would begin to be compiled.

The pre-submission process has historically been useful to both applicants and the Department by encouraging full and frank communication between the Department and potential applicants regarding whether and on what basis the Department may favorably consider an exemption application. It is helpful to applicants by providing data informing the decision as to whether to expend the time and resources to fully develop an exemption application. It is also helpful to the Department because it increases the quality of exemption applications filed by parties that have conducted a pre-submission conference and decreases the likelihood the Department will have to expend time and resources processing exemptions it does not view as having merit.

Making pre-submission conferences public would have a chilling effect—potential applicants would provide less rather than more information. Moreover, applicants would be motivated to make any details they do provide to the Department more generic rather than specific. This chilling effect would decrease the utility of the pre-submission process and negatively affect the quality of exemption applications.

Moreover, we do not believe that making pre-submission conferences public would substantively affect the total information available to the public. While a prospective applicant may provide a limited amount of factual information to the Department in connection with a pre-submission application, the formal application itself (which is available to the public) will generally provide information that overlaps with and goes beyond what was provided to the Department at the pre-submission stage. If there are circumstances where applicants provide relevant information at the pre-submission stage and then omit the same information in the formal application, the Department could always ask for such information following the submission of the formal application. Such information would then become part of the public record after it is

provided to the Department. Finally, the Department could clarify that it will only consider information submitted in connection with or after a formal application is filed in deciding whether to grant or deny an exemption. For these reasons, we believe that the chilling effect of making pre-submission conferences public outweighs any value that practice may produce.

B. 2% Revenue Standard of Independence

The Proposed Amendments would provide that a fiduciary or appraiser will not be treated as independent if the revenues it receives or is projected to receive from parties involved in the exemption transaction exceeds 2%, unless the Department decides in its sole discretion otherwise. 87 Fed. Reg. at 14740. By contrast, under the Exemption Procedures Regulation in its current form, a fiduciary or appraiser is presumed independent if less than 2% of its revenue is derived from parties in interest engaging in the exemption transaction, but the fiduciary or appraiser may nonetheless be independent if the revenue is less than 5%. 29 C.F.R. § 2570.31(i); (j).

Dropping the percentage of revenue to 2% will reduce the universe of potential firms available to a plan because only those firms with larger books of business would meet the more restrictive test. Qualified candidates may become unavailable. This change would especially affect the ability of plans to retain smaller firms. However, Ullico does not believe (and the Department has not identified any instance where) a fiduciary or appraiser would fail to act independently because it receives between 2–5% of its revenue from parties involved in an exemption transaction. Establishing a quantitative measure of independence requires drawing a line, and for at least twenty years the line has been drawn at 5%. *See* DOL Adv. Op. 2001-09A (Dec. 14, 2001). The regulated community has come to understand and is comfortable with the 5% of revenue standard. Therefore, the Department should not tighten the percentage of revenue standard for independence.

We are also concerned with the inclusion of language suggesting that a fiduciary or appraiser could fail to be independent if its "projected" revenue from parties involved in the exemption transaction is more than 2%. Requiring that parties look forward to the future to project revenue is not workable for purposes of this calculation and raises new risks that may arise if the projection is not correct. Using an objective number—based on past year's revenues—is more appropriate.

C. New Fiduciary Liability Insurance Requirements

The Proposed Amendments would require an independent fiduciary to maintain fiduciary liability insurance in an amount sufficient to indemnify the plan for damages resulting from a breach by the independent fiduciary of either (i) ERISA, the Internal Revenue Code ("Code"), or any other Federal or state law; or (ii) its agreement with the plan. 87 Fed. Reg. at 14743. Combined with tightening the revenue standard for independence, as described above, this change would further limit the universe of potential firms from which a plan could select because only large firms would be able to afford the expense of securing such insurance.

As the Department is aware, ERISA permits but does not require fiduciaries to obtain fiduciary liability insurance. ERISA § 410. By adding insurance requirements for exemption

transactions, the Department appears to suggest that exemption transactions should be subject to standards that are higher than other ERISA-governed transactions. We do not believe this position is warranted by section 408(a) of ERISA. Although section 408(a) requires that the transaction be protective of the rights of participants and beneficiaries, the retention of an independent fiduciary is itself the protection to assure the transaction will be conducted in accordance with ERISA's duties of prudence and loyalty and without conflicts of interest. ERISA provides a cause of action against breaching fiduciaries but does not require that plans be insured against all possible losses. ERISA §§ 409–410.

Depending on the size of the transaction at issue, it may not be possible for an independent fiduciary to secure the required coverage because that amount of coverage is not available in the marketplace, as a result of either insurers' business decisions or their application of of their underwriting requirements. For example, in connection with a sale of an asset from a plan to a party in interest, an independent fiduciary may be engaged to represent the interests of the plan in connection with the transaction. The "loss" that may occur in connection with the transaction might be considered to be the fair market value of the asset. However, if the fair market value of the asset is sizable (e.g., in the tens of millions), the amount of insurance coverage the independent fiduciary has secured in the ordinary course of business may not be sufficient to cover the loss, and the independent fiduciary may not find an insurer willing to issue increased coverage, especially if the independent fiduciary is not a large firm. Since fiduciary insurers are subject to state regulatory schemes, it is not appropriate for the Department to effectively regulate the policy terms and underwriting for insurance companies.

Nonetheless, if the Department were to proceed with including an insurance requirement in a final amendment to the Exemption Procedures Regulation, the Department should clarify that the insurer may (but is not required to) add the independent fiduciary as an additional insured to another party's policy. The final amendment should also provide that if an independent fiduciary is added to an insurance policy paid for by a plan, the insurer may (but is not required to) allow the independent fiduciary to pay the additional cost incurred by the plan resulting from that coverage, including premium increases resulting from additional insured, waiver of recourse, or professional services endorsements. *See* DOL FAB 2008-04, Q.2 (Nov. 25, 2008).

D. New Restriction on Parties in Interest Under Investigation

The Exemption Procedures Regulation, in its current form, states that the Department will not normally consider an exemption involving a party in interest that is under investigation by the Department or the Internal Revenue Service. 29 C.F.R. § 2570.33(a)(2). The Proposed Amendments would broaden this restriction to state the Department will not consider an exemption involving a party in interest that is under investigation by any regulatory entity to enforce any federal or state laws. 87 Fed. Reg. at 14741.

Closing the door to an exemption solely because a party in interest is under investigation is unnecessary and overbroad. Many regulators conduct routine, periodic audits or investigations of entities basis without any indication that the entity has engaged in a violation of any applicable law. The Department's own investigations also generally include review of a wide array of issues and can last for more than five years. The likelihood that an entity will be under some kind of

audit or investigation, at any given point in time, is therefore significant. Moreover, the audit or investigation may be focused on a myriad of issues that are unrelated to the exemption transaction or even employee benefit plans in general. And many (if not most) exemption applications concern transactions that have not yet occurred, meaning it is not possible that the transaction can be the subject of the audit or investigation.

Accordingly, it is inappropriate to adopt a presumption that an exemption should not be granted simply because a party in interest is under an investigation by a regulator in the United States. If the Department believes that a different regulator's investigation is relevant, then the Proposed Amendment's other changes should provide the Department with the information it needs to make a decision as to whether to grant an exemption. In this regard, the Proposed Amendments would require applicants to state in the exemption application whether the exemption transaction is the subject of an investigation or enforcement action by any regulatory authority. 87 Fed. Reg. at 14741. The Proposed Amendments also state that the Department will not ordinarily consider such an application involving such an exemption transaction. *Id*. If the exemption transaction is the subject of an investigation or enforcement action, the Department could ask the applicant for more information or coordinate with the other regulator.

E. Formal Denial upon Withdrawals of Exemption Requests

The Proposed Amendments provide that the Department will issue a final denial letter to an applicant who requests that their exemption application be withdrawn. 87 Fed. Reg. at 14748. An applicant may withdraw an exemption application for a variety of reasons, including a change in circumstances that has occurred over the years since the original application was filed with the Department. We do not believe it is appropriate for the Department to take the position that it has issued a "denial" of the application when the applicant has requested withdrawal. A denial strongly suggests that the Department has determined that the requested exemption does not have merit, but that would not be the case in connection with a requested withdrawal. If the Department believes is it is necessary to memorialize a request to withdraw an exemption, it could instead send a notice or letter confirming that that the applicant has withdrawn its exemption application.

F. Prospective Effect of Revocations

The Exemption Procedures Regulation, in its current form, states that if the Department were to modify or revoke an exemption, then the revocation or modification will "ordinarily" be conducted on a prospective basis. 29 C.F.R. § 2570.50(c). The Proposed Amendments remove the term ordinarily, so that revocations or modifications to PTEs will always be conducted prospectively. Ullico agrees that revocations should only be conducted prospectively because the retroactive revocation of an exemption would upset settled expectations, causing past transactions conducted in reliance on an exemption to be considered non-exempt prohibited transactions without notice. *See generally General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (expressing disfavor for retroactive changes in law). However, there may be situations where a retroactive modification is necessary to effectuate the intent of the applicant and the Department. For example, a retroactive technical amendment to an exemption to correct a scrivener's error in the text of an exemption may be appropriate. Therefore, the Department should reserve the ability to conduct a retroactive modification.

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Again, we appreciate the opportunity to comment on the Proposed Amendments. If you think it helpful, we would welcome the opportunity to further discuss the foregoing issues.

Sincerely,

Patrick McGlone