May 26, 2022

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Acting Assistant Secretary Ali Khawar
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 2210

Re: RIN 1210-AC05

Secretary Khawar:

SIFMA appreciates the opportunity to provide comments to the Department of Labor ("Department") regarding proposed regulations to change the procedures governing prohibited transaction exemptions. We believe the proposed changes are far more extensive than perhaps the Department understood when it proposed these changes and would have the unintended consequence of harming participants and beneficiaries preparing for retirement. There is no corresponding benefit that would warrant such extensive changes to a process that has been working for decades. In light of the significant harm we believe the proposed changes would inflict on plans and participants, the Department should withdraw these proposed changes and engage with stakeholders regarding what, if any, changes to the exemptions process would help improve the process and help ensure, as Congress intended, that plans will continue to benefit from innovative investment transactions and access to markets.

We also request the Department hold a hearing on these proposed changes, and we request the opportunity to testify.

SIFMA[1] is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. Our members often seek exemptions to allow retirement plan clients to receive the benefit of market improvements in the same way as other investors, including bank and mutual fund customers; they are also service providers to plans seeking exemptions that are in the best interest of their participants and beneficiaries. As we describe in more detail below, the Department's proposal greatly restricts plan sponsors' and other parties' ability to request appropriate

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SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

prohibited transaction exemptive relief while citing no systemic or even anecdotal harm to plans or plan sponsors to merit such changes.

I. The Proposal Undercuts Congressional Intent by Ignoring ERISA's Unique Structure and the Importance of the Prohibited Transaction Exemption Process

The Department's proposed revision of the prohibited transaction exemption ("PTE") process is at odds both with the structure of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and Congressional intent.

As the Supreme Court has noted repeatedly, "ERISA is, … a `comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system."[2] ERISA, borne out of pension scandals in the 1960s and 1970s,[3] was expressly crafted by Congress to incorporate protections for plans, their participants and beneficiaries, founded on the common law of trusts, the tax rules applicable to private foundations[4] and the investor protection safeguards established by the federal securities laws as models. Congress drafted a statute that in many respects applied far more broadly than prior statutory precedents – most notably of the statute's broad "party in interest" and "fiduciary self-dealing" classification of "prohibited transactions" under ERISA Sections 406 and 407 both of which cover and prohibit virtually all transactions with "parties in interest" involving an employee benefit plans assets or investments.[5]

Congress recognized, however, that an absolute prohibition of all of these enumerated transactions was not in the interests of plans, plan participants and beneficiaries, and would mean that plans could not effectively operate, would be denied investment opportunities, and might not receive the benefits of indemnification or guarantees, or other transactions meant to benefit plans. Accordingly, Congress included ERISA Section 408, which provides both for (a) statutory exemptions and (b) a process by which the Department of Labor and the Treasury Department could grant class or individual exemptions (a

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[2] *Mertens v. Hewitt Associates*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980)

[3] *See*, e.g., H.R. Rep. No. 93-553, as reprinted in 1974 U.S.C.C.A.N. 4639 (describing the 1963 bankruptcy of the Studebaker Automobile Company, and associated collapse of the Studebaker pension plans, due to inadequate funding requirements under then-current tax law), and "Teamsters: Trouble, Trouble, Trouble," Pensions & Investments, Oct. 19, 1998 (describing the Teamsters Union's Central States pension funds' issuance of low interest loans to Las Vegas casino developers and union officials starting in the 1950s).

[4] For example, "[t]he prohibited transactions, and exceptions therefrom, are nearly identical in the labor and tax provisions [of ERISA]. However, the labor and tax provisions differ somewhat in establishing liability for violation of prohibited transactions. Under the labor provisions, a fiduciary will only be liable if he knew or should have known that he engaged in a prohibited transaction. Such a knowledge requirement is not included in the tax provisions. This distinction conforms to the distinction in present law in the private foundation provisions [of the Code] (where a foundation's manager generally is subject to a tax on self-dealing if he acted with knowledge, but a disqualified person is subject to tax without proof of knowledge." ERISA Conference Report 93-1280 at 306-307.

[5] "A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect— (A)sale or exchange, or leasing, of any property between the plan and a party in interest; (B)lending of money or other extension of credit between the plan and a party in interest; (C)furnishing of goods, services, or facilities between the plan and a party in interest; (D)transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or (E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section [407(a)] of this title" and "[a] fiduciary with respect to a plan shall not (1)deal with the assets of the plan in his own interest or for his own account,
(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are averse to the interests of the plan or the interests of its participants or beneficiaries, or
(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." ERISA Section 406(a)(1)(A-E); ERISA Section 406(b)(1-3).

process which was later consolidated with the Secretary of Labor through Executive Order: Reorganization Plan No. 4 of 1978).[6] ERISA Section 408(a) authorizes the Secretary to grant administrative exemptions (applicable either to a class or individual plans) from the restrictions of ERISA Sections 406 and 407 in situations where a finding is made on the record that such relief is (1) administratively feasible, (2) in the interests of the plan, its participants and beneficiaries, and (3) protective of the rights of such plan's participants and beneficiaries, and, if appropriate, for the Department to initiate exemptions on its own motion.

Congressional intent (as well as subsequent Executive guidance) clearly indicates the critical need for an efficient, well-functioning prohibited transaction exemption process. While we doubt this could have been the Department's intent, the proposal reads like a roadmap to limit or eliminate altogether further exemption requests. Contrary to Congressional intent, this proposal creates unnecessary and unreasonably high hurdles, and potentially will serve as an absolute bar to some parties even seeking an exemption that by definition will be granted only if it benefits plans and participants. Congress did not intend that parties essentially would be precluded from seeking exemptions by an overly burdensome application procedure. Indeed, Congress recognized the need for a robust exemption process which would make workable ERISA's challenging prohibited transaction regime.

In 1974, as part of the initial enactment of ERISA, Congress included nearly two dozen statutory exemptions in the statute. In 2006, Congress established nearly half a dozen additional exemptions when it revisited ERISA Section 408. Through these actions, Congress was clear about the importance of the agencies issuing prohibited transaction exemptions that would address the changing needs of plan participants and beneficiaries. As the ERISA Conference Report noted: "[T]he conferees recognize that some transactions which are prohibited (and for which there are no statutory exemptions) nevertheless should be allowed in order 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 plans."[7] The Conference Report specifically mentions pending securities legislation regarding broker dealers which became the Securities Acts Amendments of 1975, and notes that they "expect that any action taken by the Secretaries on requests for variances under this Act will be consistent with the outcome of such legislation".[8] Thus, Congress did not believe exemptions should be kept to a minimum but instead, assumed that the exemptions under ERISA would "keep up" with changes in the securities laws that would modernize the regulatory structure applicable to investors generally, increase market efficiency, and offer a broader array of investments to the public.[9]

Unfortunately, statistics from the Department's website suggest the Department has adopted a much more restrictive view of the exemption process. In 2001, the Department issued 46 individual prohibited exemptions covering a wide range of transactions. In 2021, the Department issued just two. The last eight

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[6] See Executive Order: Reorganization Plan No. 4 of 1978 signed August 10, 1978 [https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/executive-orders/4]. In particular, then-President Jimmy Carter indicated that a critical reason for this reorganization was to "make an immediate improvement in ERISA's administration. It will eliminate almost all of the dual and overlapping authority in the two departments and dramatically cut the time required to process applications for exemptions from prohibited transactions."
[7] ERISA Conference Report 93-1280 at 309
[8] ERISA Conference Report 93-1280 at 310
[9] Public Law 94-29, 88 Stat. 97:
"To amend the Securities Exchange Act of 1934 to remove barriers to competition, to foster the development of a national securities market system and a national clearance and settlement system, to make uniform the Securities and Exchange Commission's authority over self-regulatory organizations, to provide for the regulation of brokers, dealers and banks trading in municipal securities, to facilitate the collection and public dissemination of information concerning the holdings of and transactions in securities by institutional Investment managers, and for other purposes."

years in particular have seen a marked decrease in grants of exemptions, with an average time of review lasting more than two years under the current process. If the Department were to adopt its proposed changes, we fear it may not grant *any* exemptions, and we believe this result will benefit no one.

Over the years, exemptions have benefitted plans by allowing: investment managers to restructure portfolios for investors;[10] foreign exchange transactions between broker dealers and plans;[11] parties in interest to make unsecured interest-free loans to plans for plan operating expenses;[12] and multiemployer plans to transact with parties in interest with regard to construction loans and leasing of office space, among other activities.[13] All of these transactions are prohibited under ERISA, but were permitted by exemptions under conditions that benefitted plans. These are just a handful of the examples where the current process allowed for exemptions that in turn allowed for efficient markets that benefit plans and participants.

The proposal seemingly equates ERISA's "prohibited transactions" with illegal acts, rather than recognizing that the manner in which Congress crafted the prohibited transaction provisions required that virtually every plan transaction engaged in would need a statutory, class or individual exemption. Congress not only anticipated the issuance of statutory, class and individual exemptions, but it created ERISA's prohibited transaction regime specifically based on the assumption that there would be a rationally administered exemption process to make it workable so that plans would not be disadvantaged in the investment world.

The Department's proposal, if adopted, would require complicated and disadvantageous workarounds for plan stakeholders, leading few to apply, even if the transaction were in the best interest of the plan, which is a finding the Department makes before granting any exemption. The index of individual exemptions is replete with other exemptions granted to permit plan sponsors to purchase other non-performing or illiquid assets from plans, including Executive Life insurance contracts, other nonperforming insurance contracts, mortgage securities, real estate, private equity interests, *etc.* During the 2008 economic downturn, many financial institutions filed individual exemption requests allowing them to buy auction rate securities from their clients at par when the trading market for these securities froze.[14] Indeed, every downturn has seen plan sponsors, financial institutions and other service providers agreeing to provide this kind of emergency support to plans. Exemptions that benefit plans and participants in these critical times would become so difficult that plan stakeholders no longer will consider the exemption process as a reasonable path to assist plans weather challenging times. Instead, plans and participants inevitably will incur losses that could have been avoided had the Department retained a workable exemptions process, as Congress intended.

II. The Proposal is Significant under Executive Order 12866

Before delving into the problematic details of the Department's proposal, we emphasize that these changes are "significant changes" that will negatively impact a large number of retirement plans and their participants, while raising novel legal and policy matters. We fully expect that the appropriate economic

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[10] PTE 2002-12
[11] PTE 1994-20
[12] PTE 1980-26
[13] PTE 1976-01
[14] See PTE 2009-06, 2009-07, 2009-08, 2009-09, 2009-18, 2009-20, 2009-21, 2010-05, 2010-10, 2010-14, 2010-20. 2010-24, 2011-02, 2011-05, 2011-06, 2011-07, 2011-18, 2012-14, 2013-10, 2014-04.

analysis required by law will be undertaken by the Department and circulated for public comment if the rule is re-proposed. The preamble of the proposal states, without explanation, that the rule is not significant. SIFMA strongly disagrees and can only conclude that the Department does not fully appreciate the impact of its proposed changes. A regulation is significant if it raises novel legal or policy issues arising out of legal mandates.[15] This proposed regulation raises both novel legal and policy issues and will have long term economic effects on plans, participants, and retirement security.

The legal and policy issues are serious. First, notwithstanding that the Fifth Circuit Court of Appeals found that the Department had exceeded its authority by imposing, through conditions in exemptions, impartial conduct standards on individual retirement accounts ("IRAs"),[16] the proposal from the Department now would require those same impartial conduct standards in *every* future exemption. The Department refers to this as an administrative change; however, we believe this is a substantial addition to the Prohibited Transaction Exemption process and is contrary to a Fifth Circuit Court of Appeals decision handed down in 2018.

In 2018, the Fifth Circuit correctly recognized that Congress chose to impose some, but not all of the requirements imposed on employer sponsored plans to IRAs. ERISA's legislative history is replete with references to the differences between the approaches in Title I and Title II of ERISA. Congress specifically chose not apply ERISA's prudence requirement to IRA fiduciaries. Similarly, Congress chose not to penalize a lack of prudence as a "prohibited transaction" when it adopted ERISA, and it has not wavered from that choice in any instance when it revisited the statute. Yet by requiring parties to meet the impartial conduct standard in *every* exemption, the Department essentially amends the prohibited transaction provisions to include a failure to act prudently. The Department should not bootstrap what is couched as an insignificant amendment to its long-standing prohibited transaction exemption application regulation into a hugely significant change to the prohibited transaction rules, so that a failure to act prudently is transformed into a prohibited transaction. Doing so would materially alter the duties and penalties Congress carefully crafted in ERISA and the Internal Revenue Code.[17] In granting exemptions that are "(1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries," the Department cannot find the authority to expand the prohibited transaction rules to cover a fiduciary's failure to act prudently.

Second, Congress carefully defined the term "party in interest" when ERISA was enacted and has seen no reason to change it since, including in 2006 when these statutory rules were revisited. The proposal ignores that definition and coins the term "party involved in the exemption transaction," which sweepingly covers uninvolved affiliates, employees, and those indirectly involved in related business interests who are not "parties in interest." Indeed, the new definition includes service providers to parties in interest and all of their affiliates, not just those that are included in ERISA's definition of "party in interest" service providers to plans.[18] The sweep of the definition, and the problems it causes, is difficult to quantify. The

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[15] See Executive Order 12866, 87 FR 14735

[16] Chamber of Congress, et. al. v. Secretary of Labor, 885 F. 3d 360 (5th Cir. 2018)

[17] See Conference Report on ERISA, which states: "A variance from the prohibited transaction rules is to have no effect with respect to the basic fiduciary responsibility rules requiring prudent action, diversification of investments, actions exclusively for the benefit of participants and beneficiaries, etc. (This is the case with respect to all statutory exemptions from the prohibited transaction rules as well.)" Conf. Rept. Pp-310-311.

[18] (l) A party involved in the exemption transaction includes:

(1) A party in interest (as defined in paragraph (f) of this section);

(2) Any party that is engaged in the exemption transaction or an affiliate of the party that is engaged in the exemption transaction; and

(3) Any party providing services to either the plan or a party described in paragraph (1)(1) or (2) of this section
with respect to the exemption transaction or its affiliates.

preamble ignores the limits imposed by Congress, intended to ensure that while being protective, did not discourage the establishment of plans or disadvantage them in the markets. The Department provides no justification for its broad expansion. Nor does it reference any authority to expand the "carefully reticulated" statutory definition. It identifies no problem under current law or prior exemptions that this change is intended to address.[19] The preamble notes:

> "The Department believes that parties engaged in the transaction (and their affiliates) that are not "parties in interest" could have interests and potential conflicts that should be addressed by the Exemption Procedure Regulation. Similarly, the Department proposes to include service providers in the definition to ensure that all parties with interests in the transaction are included."[20]

The Department's proposal appears to require this newly expanded group not only to disclose investigations under ERISA and the Code by pension regulators and relating to employee benefits matters, but, in addition, to disclose *any investigation of any federal or state law by any federal or state regulator*, regardless of how far afield that investigation is from benefits matters. This requirement will be enormously burdensome for any entity of size and effectively will make it difficult, if not impossible, for many entities to apply for exemptive relief, because they may be unaware of an investigation because of the breadth of this requirement. In addition, the proposed rule requires a listing of all transactions among this expanded group and the revenue generated through these transactions, as well as other instances where any of these entities worked together. The Department offers no rationale for this new and unprecedented requirement. For example, if a broker-dealer files an exemption application to serve as underwriter of an asset backed security, it would be required to list all of its transactions with any other "party involved in the exemption transaction" as defined in the regulation, which as noted above, goes far beyond the parties actually involved in the exemption transaction. Since this provision is not time limited, the applicant might be required to list thousands of transactions across service providers, their affiliates, and any "real" party to the transaction. *See* for example, proposed 29 CFR 2570.34(c)(4), (e)(5) and 2570.35(a)(20).[21] Under the latter section, if a plan sponsor or any affiliate of the plan sponsor had ever used a financial institution to make a loan, execute a securities transaction, sell currency, enter into a swap, or any other transaction whatsoever, and that financial institution or any affiliate is involved in any transaction, regardless of size and regardless of how long ago, or how unrelated to the exemption transaction, that transaction would have to be listed. Compiling such a list would be nearly impossible and would seem unnecessary to the Department's deliberative process. In fact, in all the exemptions approved over the last 50 years, this extensive transaction disclosure has never been required.

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[19] The preamble states: Accordingly, new paragraph (a)(4) would require the applicant to include in its application a description of: (1) The reason(s) for engaging in the exemption transaction; (2) any material benefit that a party involved in the exemption transaction may receive as a result of the subject transaction (including the avoidance of any materially adverse outcome by a party as a result of engaging in the exemption transaction); and (3) the costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible. The Department is proposing this language to facilitate its understanding of the underlying rationale for the exemption transaction including the costs and benefits for both the party involved in the transaction and the plan and its participants and beneficiaries. 87 FR 14728

[20] 87 FR 14722, p. 14726

[21] 2570.34(a)(4) A detailed description of any relationship that the qualified independent appraiser, auditor, or accountant has had or may have with the plan or any party involved in the exemption transaction, or with any party or its affiliates involved in the development of the exemption request that may influence the appraiser, auditor, or accountant, including a description of any past engagements with the appraiser, auditor, or accountant.
2570.34(e)(5) A detailed description of any relationship that the qualified independent fiduciary has had or may have with a party involved in the exemption transaction
2570 .35(a)(20) Any prior transaction between:
(i) The plan or plan sponsor; and
(ii) A party involved in the exemption transaction.

For all these reasons, we believe these proposed changes are significant and the government and stakeholders should take the time to consider these novel legal and policy issues.

III. Substantive Comments on the Proposed Rule

A. Inclusion of Impartial Conduct Standards Not Appropriate

For the reasons described above, we urge the Department to eliminate the requirement that all individual exemptions contain the impartial conduct standards, or the applicant justify why they should not. The Court of Appeals for the Fifth Circuit made clear that the Department exceeded its statutory authority imposing the prohibited transaction regime where Congress had chosen not to impose it. Congress listed seven prohibited transactions, and failure to act prudently was not one of them. Because the proposed rule imposes penalties that Congress chose not to impose and shifts the burden of proof in a manner Congress chose not to shift it, we believe this change can be made only by Congress. The Department simply does not have the authority to amend ERISA through an amendment to the prohibited transaction exemption process.

B. "Party Involved in the Transaction" is Too Broadly Expanded

For all the reasons described above, SIFMA strongly believes that the Department's new definition of "party involved in the exemption transaction" is greatly overbroad. The prohibited transaction exemption application process should neither require all those parties to be identified, nor should it subject them to the information and disclosure requirements provided in the proposed rule. As noted above, the breadth and burden of that information is not reasonably related to the assessments involved in the exemption process and the Department has provided no evidence that there have been abuses that require this kind of sea change in the information provided with applications, especially when the scope and detail required by the proposed rule would be so burdensome and would have such a chilling effect on applications for exemptive relief.

ERISA Section 406 prohibits transactions between plans and parties in interest with a carefully drawn statutory definition of "party in interest." However, the Department's proposal broadens the potential reach of the prohibited transaction regime to the larger group of "parties involved in the exemption transaction," which includes a party in interest, as defined in the statute, any party that is engaged in the exemption transaction or an affiliate of the party that is engaged in the exemption transaction (changing the statute's definition of employee from a select group of very high paid employees to **all employees)** and any party providing services to the plan or to any party engaged in the exemption transaction or its affiliates and all of the service providers' affiliates. Thus, if a plan sponsor wants to buy a nonperforming asset from its plan at par (which is clearly in the plan's best interest), the proposal's disclosure requirements regarding investigations would cover the plan sponsor, all of its affiliates, the appraiser of the asset and all of its affiliates, the independent fiduciary and all of its affiliates, and all service providers (in general, and not just with respect to this transaction) to all of the above, including, for example, the parties' accountants, lawyers, consultants, cleaning services, parking lot employees, window washers, public relations companies, information technology companies, food service companies, and on and on.

C. Disclosure of all investigations, examinations from all legal bodies is too expansive

Similarly, the proposed requirement that applicants explain every investigation or examination or litigation, not just, as required under current law, involving the applicant and a party in interest involved in the transaction but also involving the applicant's affiliates and all of its employees. Further, they are not only about investigations by the Department of Labor, Internal Revenue Service ("IRS"), Department of Justice ("DOJ"), Pension Benefits Guarantee Corporation ("PBGC"), and the Federal Retirement Thrift Investment Board ("FRTIB"), relating to ERISA and the Code, but also any other investigation, examination or litigation by any state or federal regulatory authority under any state or federal law is unwarranted and unworkable.[22] While the current rule looks to a relatively narrow set of potentially relevant investigations involving the applicant, the proposal also covers the applicant's affiliates and all of its employees. And that breadth is even more pronounced when you add, as would be required by the Department's proposal, all of the potential service providers to the applicant and all of its affiliates. The Department says, again without support, that it needs this massive amount of information to ferret out "bad actors." It would be surprising and disappointing if the Department's decision is based on the belief that the mere existence of a government investigation involving one of the numerous parties for which disclosure is required might actually lead the Department to conclude the applicant is a "bad actor" for whom an exemption would be inappropriate. We urge the Department to eliminate consideration of every Federal or State investigation of every federal or state law, without regard to its connection to employee benefit plans.

D. Expansion to convictions for violation of foreign crimes is beyond the scope of the Department's authority

We urge the Department to delete the reference to foreign convictions. The Department is proposing to require all applicants to disclose in their application whether they or any of the parties involved in the exemption transaction had been convicted by a foreign court within the last thirteen years. We do not believe the Department has the authority to consider foreign convictions when granting exemptions and we believe that the manner in which the Department may do so under the proposed rule is arbitrary and capricious. The Department states that foreign convictions were always covered by this regulation. However, there is nothing in the preamble or rule itself, going back to when it was first promulgated, that supports that the Department's assertion, and we do not believe the Department will find a single application that disclosed foreign crimes, except in connection with the qualified professional asset manager ("QPAM") individual exemptions.[23]

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[22] Assuming, as we did, that the language including investigations would include tax audits, this would effectively mean that any corporate entity under a "standing" audits from the IRS would not be allowed to submit an exemption application, regardless of whether such audit related in any manner to a plan.

[23] Prudential, in 1994, first sought a QPAM exemption for a foreign crime out of an abundance of caution. Others followed for the same reason. But there have been scores of applications aside from the QPAM exemption filed by entities which had been convicted of a foreign crime that did not reference those crimes. For reference, the language of the current rule on this point is as follows:
(6) Whether the applicant (including any person described in § 2570.34(b)(5)(ii)) or any of the parties in interest involved in the exemption transaction has, within the last 13 years, been either convicted or released from imprisonment, whichever is later, as a result of: any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime of which any of the foregoing crimes is an element; or any other crime described in section 411 of ERISA,

In fact, we requested an Advisory Opinion of the Department of Labor to make that clear. In response, the Solicitor of Labor issued a letter agreeing.[24] Despite the Department's current position that the former Solicitor's views were wrong, we strongly believe that the Department is not free to use foreign crimes as a basis for granting or denying exemptions. This is discussed in more detail below.

The Supreme Court has held that unless Congress manifestly indicates its intention to give extraterritorial effect to a domestic statute, its scope does not extend beyond the United States.[25] The issue in *Small* was whether the federal felon-in-possession statute, which prohibits possession of a firearm by any person "convicted in any court" of a crime punishable by at least one year of imprisonment, 18 U.S.C. § 922(g)(1) (emphasis added), applies to "conviction[s] entered in a foreign court."[26] After concluding that "the word 'any' considered alone [could not] answer this question," the Court detailed the "significant differences" between foreign and domestic criminal law that could be implicated by applying the statute to foreign convictions. These differences included the possibility that foreign law might criminalize "conduct that domestic laws would permit," or that convictions could arise "from a legal system that is inconsistent with an American understanding of fairness" or denies "due process."[27]

The reasoning in *Small* controls here. The Department's proposed rule forces an applicant to guess what foreign laws are "substantially similar" to domestic crimes. Further, no reference to other laws in ERISA ever mentions foreign crimes. Indeed, section 411, which explicitly deals with crimes, makes clear that the provision may require disqualification of a person from holding certain positions with respect to a plan only if the person is convicted of violating certain domestic federal, state or local crimes. The proposed rule does not contemplate how the Department would "weed out" inappropriate foreign convictions from its deliberations under the proposed rule, leaving it complete discretion to consider some crimes but not others, to place particular importance on those that might not even have a counterpart under U.S. law. The preamble suggests that foreign crimes have always been covered. We note, as the Supreme Court did in *Small*, that there is no indication whatsoever, let alone a convincing indication, of an intent to cover foreign crimes.[28] Indeed, section 411 makes clear that Congress did not think foreign crimes were disqualifying under ERISA, and there is no indication Congress intended to delegate to the Department to override this determination through the exemption process.

E. <u>Selection of "Qualified Independent Appraisers" and "Qualified Independent Fiduciaries" is an impossible standard to meet</u>

In reviewing the Department's changes to the definitions of "qualified independent appraisers" and "qualified independent fiduciaries," SIFMA is concerned the Department's new independence standard

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and a description of the circumstances of any such conviction. For purposes of this section, a person shall be deemed to have been "convicted" from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal.

[24] *See* Letter from the Office of the Solicitor of Labor to SIFMA on November 3, 2020: DOL Letter to SIFMA on QPAM

[25] *See Small v. United States*, 544 U.S. 385, 389 (2005) (holding that a "similar assumption" to the presumption against extraterritoriality applies when interpreting the scope of specific statutory phrases); *cf. Goodman v. Shulkin*, 870 F.3d 1383, 1386 (2017) ("It is well established that the rules of statutory construction apply when interpreting an agency regulation.")

[26] Id. At 388

[27] The Court also noted that it was "difficult to read the statute as asking judges or prosecutors to refine its definitional distinctions where foreign convictions are at issue," leaving individuals "previously convicted in a foreign court"—particularly of "economic crimes"—"uncertain about their legal obligations." Id. at 390. These considerations "convince[d]" the Court that although the "presumption against extraterritoriality" did not "apply directly in this case," it was nonetheless appropriate to apply a "similar assumption"—based on the same "commonsense notion that Congress generally legislates with domestic concerns in mind"— when determining the scope of statutes that are otherwise domestically-focused. Id. at 389-90 (emphasis added).

[28] *Small*, 544 U.S. at 391.

imposes unreasonable burdens on applicants and their advisers to the detriment of the plans it aims to protect. Notably, as proposed, these requirements would (a) erect artificial barriers to the hiring of such parties that are impossible to satisfy, and (b) in an attempt to "promote a prudent and loyal selection process," both denigrate and undermine fiduciary competence and expertise, and impede the ability of new entrants to the market who can provide these important services, without providing any ascertainable benefit or additional protection to plans.

SIFMA believes the elimination of the "facts and circumstances" standard is the wrong approach. The Department proposes eliminating the current test for independence and substituting a two percent of revenues test in all cases, giving as the reason that the "two percent limitation is essential to ensuring" independence. Yet that statement is unexplained and unsupported by any data. The Department does not even try to explain why, for nearly 50 years, it was satisfied that using two percent as a safe harbor and up to five percent with appropriate facts and circumstances was protective of plans, yet now it has determined that adopting another test is "essential." The Department gives no examples or rationale as the reason for the change and has cited no instances where the current test allowed for conflicts that harmed participants, although the Administrative Procedure Act ("APA") requires such an explanation.[29]

Further, in meeting the two percent, the proposed rule requires the disclosure and testing of revenues from all sources for the qualified independent appraiser's or fiduciary's prior year and the appraiser's projected revenue for the current year as well as the appraiser's "related business interests." The Department does not explain the scope of the parties' related business interests, and in view of the proposal's expansive informational requirements, it will be nearly impossible to determine what limits, if any, would be recognized by the Department. The Department also does not explain how the use of a two percent test creates an appropriate level of independence or why some other test would not yield an appropriate level of independence.

Finally, even if it were possible to ascertain the extent of these requirements, we note that the Department, by imposing these new criteria, will discourage smaller or newer entities from performing fiduciary or appraisal services. The end result will be a reduction of the pool of independent appraisers and independent fiduciaries available to plans.

The Department then goes further by creating a new test for "Independence from Parties." Under the Department's proposal, appraisers, auditors, accountant, and fiduciaries need to be "independent" of any other party involved in the development of the exemption request, using the two percent threshold. The Department has significantly broadened the group that needs to be independent. It is unclear what benefit would be achieved by instituting a definition of "independence" that is inconsistent with those of other regulators, including those already in place for auditors and accounting firms for these purposes.[30]

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[29] The Supreme Court has explained that an agency decision must be set aside under the APA's standards if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
While the Court's job is not to substitute its judgment for the agency's judgment, APA review nonetheless encompasses a "searching and careful review by the courts." FCC v. Fox Television Stations, Inc., 556 U.S. 502, 537 (2009) (internal quotations omitted), which includes ensuring "that the agency examined the relevant data and articulated a satisfactory explanation for its action." Islander E. Pipeline Co., LLC v. McCarthy, 525 F.3d 141, 151 (2d Cir. 2008)
Agency action is commonly set aside "when the agency offered insufficient reasons for treating similar situations differently." Transactive Corp. v. United States, 91 F.3d 232, 237 (D.C. Cir. 1996). That is because "depart[ing] from a prior policy sub silentio" is by definition arbitrary. FCC, 566 U.S. 515; see also Motor Vehicle, 463 U.S. at 57 (holding that an "agency changing its course must supply a reasoned analysis" for doing so).
[30] See the AICPA Code of Conduct: https://pub.aicpa.org/codeofconduct/ethicsresources/et-cod.pdf

This could create unnecessary conflicts among regulators. Further, the proposed rule suggests that such individuals would need to be independent of the lawyers or law firms who helped file the exemption application. Again, the Department fails to articulate its concern so that the concern could be narrowly addressed.

It is particularly troublesome that the Department intends to consider whether a qualified independent fiduciary has an interest in future transactions, or experience with, similar transactions of the same nature or type in the past, casting doubt on independence if the fiduciary has a potential business interest in "promoting" the exemption transaction. In effect, the Department appears to be amending the definition not just of "qualified independent fiduciary" but also of the term "fiduciary," in effect stating that the Department's concern with independence outweighs the fiduciary's experience and expertise in serving in this role. Thus, if fiduciaries were routinely selected to provide oversight services, either because the field is not deep or because they are very well qualified, it appears they might not be considered independent for purposes of the application process, regardless of whether they meet a particular revenue test. If that is the case, this is a significant departure by the Department from the statutory and court-supported standard that all plan sponsors are supposed to use in prudently selecting investment managers, fiduciary advisers, or plan administrators.

Lastly, in the creation of the new standard for "Qualified Independent Appraisers" and "Qualified Independent Fiduciaries", the process now also will be subject to public disclosure. The Department proposes to add a new subsection (d) to both the qualified independent appraiser and qualified independent fiduciary definitions that would require an applicant to include in its submission a description of the process by which an appraiser or fiduciary is hired, including the diligence performed, the candidates reviewed, and the references contacted. While the Department couches this new requirement in the language of supporting a determination of prudence in hiring a vendor, the Department clearly must realize that the effect of this public disclosure will be to strongly discourage entities from participating in such request for proposal ("RFP") processes and for applicants to have a smaller pool of qualified choices. The information that would be publicly disclosed about all of the potential candidates, including details about why one was chosen over the other, potentially will subject applicants to a risk of being second-guessed by the Department, and could publicly embarrass parties who are not selected. Moreover, specific disclosure of references by name (either at an individual or corporate level) in a public document is a material departure from the typical confidential nature of such information and would not be something that our membership would typically permit its employees or executives to do (nor, do we believe, would the Department permit its personnel to do either). While the purpose of this change is not clear, the result likely will be discouraging or shrinking the applicant pool for these critical roles regardless of whether it is in the interests of the plan or its participants or beneficiaries.

Overall, the creation of a definition for independence has implications beyond the exemption process. We believe this proposal is unworkable.

F. Eliminating the Option of Withdrawing Applications is Unwise

The proposal eliminates the concept of withdrawal of an application. Under the proposed rule, the Department will issue a final denial if someone withdraws an exemption application. First, the concept of a denial suggests that the Department has considered the application in a fair and thorough manner and determined it could not make the findings necessary to grant an exemption. Where an applicant withdraws an application before the Department makes a decision or even considers all of the facts, it is misleading and harmful to describe the Department's action as a denial. Often applicants withdraw because the application has been pending for three, five or even eight years or more without action from

the Department.[31] It would be incorrect to consider such a withdrawal a “denial.” Sometimes the Department refuses to grant relief on identical terms to other exemptions issued just months before, and an applicant withdraws its application because it does not want to be treated arbitrarily, capriciously or be left at a competitive disadvantage. We urge the Department to strike this provision.

G. Request for Information Subsequent to the Granted Exemption is Burdensome

The proposal for the first time requires an applicant to advise the Department if any information subsequent to the granting of an exemption becomes outdated or materially changed, regardless of how long ago the exemption was granted and whether the transaction it covered has long ago been finalized. Over time, there could be many changes that could impact the Application, including mergers, changes in affiliation, changes to their costs structure, new investigations, different exemptions that will be applied for and granted, and different lawsuits filed, decided, or settled. It will be an enormous burden on an applicant to be required constantly to update every exemption application ever submitted. Since benefits, costs and government investigations will change over the years, this continuing obligation will tether an applicant to the process potentially forever. If there are certain facts with respect to a particular exemption that are so critical that they need to be brought to the Department’s attention, the Department should identify those facts during the exemption’s public comment period, and during the application process justify why they are so important and outside the public domain that the Department cannot administer the exemption process under ERISA section 408 without imposing the burden of an indefinite obligation to update on applicants.

H. Department’s Discretion Cannot Be Absolute

In many places, the Department has added “in its sole discretion,” leaving it with unfettered discretion, and leaving stakeholders with no realistic opportunity to challenge its actions as arbitrary and capricious. Indeed, the Department states that it can issue two exemptions in identical circumstances with different conditions, or refuse to give one to one applicant after having given one to a similarly situated applicant, creating competitive imbalance. It can determine that an appraiser is not independent because it is involved in a large number of employee stock ownership plan (“ESOP”) transactions. Or that an auditor is not independent because it has been recommended by a particular law firm. Allowing this kind of authority and discretion to the Department is arbitrary and capricious. It does not reference a fair, objective and reliable standard for applicants to meet, and it makes an already opaque and inconsistent process even more troublesome. Moreover, since the Department realistically understands that it likely will not be challenged in court because exemptions are granted in the Department’s discretion, there is no check on the Department’s judgment.

I. Past Engagements Should Not Be Considered Relevant

SIFMA also is concerned about the proposed new section 2570.34(c)(4), which require that appraisals provide:

> ” A detailed description of any relationship that the qualified independent appraiser, auditor, or accountant has had or may have with the plan or any party involved in the exemption transaction, or with any party or its affiliates involved in the development of the exemption request that may

[31] SIFMA believes the Department should have a more limited timeframe in which they must resolve an exemption request.

> influence the appraiser, auditor, or accountant, including a description of any past engagements with the appraiser, auditor, or accountant;"

Most appraisers, accountants and auditors will have hundreds, if not thousands of such engagements which may have included some party in interest, service provider to the plan or to a party in interest, or someone involved in the crafting of the transaction or the exemption application. The burden of compiling every such engagement and providing the required description far exceeds any usefulness that this information could provide to the Department. In this connection, we note that there is no discussion in the preamble of any instance of abuse that would justify this amount of effort. Moreover, the fact that an appraiser, auditor, accountant, lawyer or consultant had worked on similar transactions cannot reasonably justify the Department in denying or modifying an exemption.

J. Prohibition on Indemnification is Not Appropriate

Under the proposal, no appraiser, accountant, auditor or fiduciary can be indemnified. First, the specific scope of this language is not clear. For example, by "indemnification," does the Department mean to prohibit parties who may be brought into lawsuits from having their legal fees and related defense cost defrayed by corporate sponsors? Second, while all fiduciaries (including independent fiduciaries) typically have insurance, the regulation will require all qualified independent fiduciaries to carry sufficient insurance to cover all losses to the plan, which may be at best difficult to quantify. The Department, before proposing these changes has again neglected to demonstrate any particular situation involving an exemption where an independent fiduciary failed to make whole the plan for any alleged breach (or even a case where there was such a breach).

The imposition of these additional costs under the exemption process (which will presumably be reflected in the fee structure going forward for such services) will significantly increase the cost of hiring an independent fiduciary and potentially limit the pool further of qualified parties based on the Department's ad hoc assessment of risk in any transaction. None of these costs or factors appears to have been considered by the Department.

K. Additional Items

These proposed changes also include many items that seem impractical and unnecessary, including the requirement for a "detailed description of alternative to the exemption transaction" and a "description of each conflict of interest or potential instance of self-dealing." Both of these requirements can be burdensome, since they could involve identifying and disclosing numerous theoretical "conflicts" that, while technically possible, are not of any practical concern.

Finally, we believe the Department should not require that all communications with the Department become part of an exemption's administrative record. The fact that applicants will not be permitted to approach the Department on an anonymous basis will cause plans and their parties in interest additional delays, expense and burden or might lead plans or other stakeholders to decide they are not going to pursue an exemption at all (ultimately to the detriment of plans and participants). We believe this result would be directly harmful for plan participants and beneficiaries because it would discourage a provider from engaging with the Department even in a circumstance where an exemption could be of significant benefit to the plan, and to the market generally. Any innovative thoughts on the part of the benefits community about addressing potential problems no longer would be welcomed or permitted by the Department. There needs to be a way to have a meaningful opportunity to work with the Department to issue exemptions that avoids needless adversity. There are sometimes very complicated fact patterns that plans and providers face, and they may need to talk through these options with the Department without those discussions becoming part of the official record, since that will surely dissuade the public

from coming to the Department for help in addressing situations that may arise that exemptions would be needed to help plan participants. This simply is not what Congress intended when it decided to adopt a strict prohibited transaction regime that, to be workable, relied in large part on a regulator rationally granting exemptions so that plans could continue to invest without being adversely impacted by the strict conflicts regime.

IV. Conclusion

We believe the Department's proposed changes to the exemption process will unnecessarily burden parties who might otherwise seek exemptions that benefit plans. In the end, when the Department considers exemptions, ERISA says it must determine that they are: (1) administratively feasible; (2) in the interests of the plan, its participants, and beneficiaries; and (3) protective of the rights of such plan's participants and beneficiaries. It is hard to see how the Department's proposed changes support any of those findings. Rather, we believe these changes, if adopted as proposed, would undercut Congressional intent, and would result in significant harm to individual plans and their participants. Even under the current application rules, exemptions granted by the Department have slowed to a trickle; we believe that under the Department's new proposal, the process for applying for an exemption will end up being so burdensome that few, if any, parties will end up even applying for exemptive relief, which will only serve to disadvantage plans by making unavailable transaction that, by definition would have been in their interest and protective of their rights.

Sincerely,

Lisa J. Bleier

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