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Submitted Electronically

The Honorable Ali Khawar
Acting Assistant Secretary
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)

Dear Assistant Secretary Khawar:

On behalf of a client of the firm, Groom Law Group is submitting comments on the above referenced proposal (the "Proposed Rule") to amend the *Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications* (the "Exemption Procedures Regulation").

I. Introduction.

The Proposed Rule contains significant additional requirements for exemption applications which are imposed, for the first time, almost fifty years after the Employee Retirement Income Security Act of 1974 ("ERISA") was passed. The purpose of the statute's administrative exemption process, and the need for individual exemptions, remains the same today as when Congress enacted ERISA. We are genuinely concerned that the amendments proposed by Department of Labor (the "Department") could inadvertently impede Congress's intent when it enacted the administrative exemption process as part of ERISA.

We are also concerned that the Proposed Rule would further limit the availability of individual exemptions in what has been, to the benefits community, a disappointing trend of declining exemptions. To demonstrate, according to the Employee Benefit Security Administration's (EBSA's) website the following is a list of individual exemptions issued from 1996 through 2021: 1996 (92); 1997 (64); 1998 (61); 1999 (50); 2000 (65); 2001 (46); 2002 (52); 2003 (38); 2004 (19); 2005 (17); 2006 (17); 2007 (21); 2008 (16); 2009 (34); 2010 (34); 2011 (24); 2012 (20); 2013 (13); 2014 (11); 2015 (23); 2016 (14); 2017 (7); 2018 (0); 2019 (7); 2020 (1); 2021 (3).

The steady decline in individual exemptions has had a chilling effect on otherwise beneficial industry practices, particularly in an area where the Department deliberately limited

the scope of one class exemption with the intention of supplementing it with individual exemptions. For example, when the Department issued Prohibited Transaction Class Exemption 79-41, the Department declined to broaden the scope of that class exemption to cover certain reinsurance arrangements. Instead, the Department provided that "applicants for individual exemptions [for these types of reinsurance transactions] will be…considered based on the merits of each case." Preamble, PTE 79-41, 44 Fed. Reg. 46365, at 46368 (Aug. 7, 1979).

Now, the Department is proposing to make unreasonably burdensome changes to the exemption procedures. This comment explains, in detail, why the changes are contrary to the purpose of the exemption relief Congress intended. We respectfully request that the Department withdraw its proposal and issue a request for information on how to improve the administrative exemption process.

II. Statutory Provisions and Policy Considerations

In enacting Section 408 of ERISA, Congress provided that the "Secretary shall establish an exemption procedure" under which the Secretary may grant an exemption provided that that the Secretary "finds that such exemption is — (1) administratively feasible, (2) in the interests of the plan and its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan."

According to the Joint Explanatory Statement of the Committee of Conference (the "Conference Report"), in providing for individual administrative exemptions, Congress "recognized that some individual transactions between a plan and party-in-interest may provide substantial independent safeguards for the plan participants and beneficiaries and may provide substantial benefit to the community as a whole, so that the transaction should be allowed." As an example, the Conference Report cited a pension plan's investment in a building development that would be leased to the same employer that established and maintained the pension plan. The Conference Report explicitly recognized that the building development would benefit multiple parties but that "the transaction has substantial safeguards that ensure that the transaction will inure to the benefit of plan participants and beneficiaries." H.R.Conf.Rep. No. 93-1280, at 5090–91 (1974). Thus, Congress recognized that individual administrative exemptions would permit otherwise prohibited transactions that inure to the benefit of the plan as well as other parties.

Accordingly, the statute provides that an exemption must be in the interests of the plan and that it must be in the interests of, and protective of the rights of, participants and beneficiaries of the plan. The statute does not prohibit individual administrative exemptions that benefit other parties, such as, for example, the benefits a plan sponsor may experience when it implements a captive insurance arrangement. In contrast to ERISA's statutory language and as discussed in more detail below, the Proposed Rule implies the Department may be seeking to determine, as a condition to granting an individual administrative exemption, that any benefit to

other parties involved in a transaction is at best suspect, at worst, impermissible.[1] Nothing could be further from Congressional intent.

Further, the Proposed Rule's requirement that applicants must demonstrate the need for exemptive relief by furnishing detailed descriptions of possible alternatives to the proposed transaction indicates the Department is reluctant to issue exemptive relief except as a last resort. 87 Fed. Reg. 14722, 14728 (Mar. 15, 2022). The preamble states that the "Department's intention…is to evaluate whether the exemption transaction could be structured in a manner that would not result in a prohibited transaction." Neither the statute nor the legislative history supports this approach. The Department should encourage stakeholders to approach the Department with proposed transactions that create positive results for participants and that contain protections. Instead, in practice, stakeholders are reluctant to approach the Department due to delays and an overly burdensome process.

The Proposed Rule follows a steady decline in administrative exemptions issued by the Office of Exemption Determinations ("OED"). The Proposed Rule would further limit and restrict access to individual administrative exemptive relief. The Proposed Rule impose boundaries more restrictive than the findings set forth in the statute which are precedent to administrative relief. In this manner, the Proposed Rule illustrates that the Department is no longer advancing the Congressional intent behind the administrative exemption process: the allowance of individual transactions that benefit the community as a whole. The Department is attempting to establish an administrative exemptions framework that is outside of Congressional intent. For this reason, we would urge the Department to withdraw the Proposed Rule and to open a request for information on how to improve the exemption process.

III. Detailed Comments

1. Proposed Changes Create an Unpredictable Working Environment for the Benefits Community Seeking Exemption Requests

Proposed Rule section 2570.30(g) would codify the Department's position that administrative exemptions are at its sole discretion. The Proposed Rule states that "The existence of previously issued administrative exemptions is not determinative of whether future exemption applications with the same or similar facts will be proposed, or whether a proposed exemption will contain the same conditions as a previously issued administrative exemption." *Id.* at 14739. This stance, in both practice and procedure, deprives the public of any precedent for predicting how the Department will grant exemptions under similar facts and circumstances. The Proposed Rule would formally declare what has already been observed in some contexts: that the Department will exercise its discretion in an ad hoc fashion, granting relief to one, and

[1] Under Proposed Rule section 2570.34(a)(4)(ii), an applicant would have to provide a description of "[a]ny material benefit that may be received by a party involved in the exemption transaction 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)."

not to the other, under the same circumstances. The Department will add conditions for one, and not the other, under exceedingly similar circumstances.

The Department's position, in effect, causes the public to be uncertain as to whether the Department will frustrate efforts in planning transactions that may be beneficial to a plan and its participants and beneficiaries and that would otherwise qualify for an exemption based on precedent. Under an ad hoc exemption practice, the Department creates no precedent upon which the benefits community may plan or rely. Instead, each applicant (or would-be applicant) is subject to the Department's arbitrary exercise of discretion that allows beneficial transactions for one party while denying the very same relief to another.

The effect of granting exemptions to some, while denying similar exemptions to others with the same or similar facts and circumstances, is to create an uneven playing field. In the case of a captive insurance exemption, one manufacturer may decrease its labor burden and provide a richer benefit for less cost, which its competitor may not. To the public, this appears to be arbitrary and capricious; there is no explanation for the differences. The Department's failure to maintain a consistent administrative exemption approach frustrates efficiencies that would be gained through market innovation. Worse, it undermines public trust in a discretionary process.

2. Pre-submission Information as Public Record

The pre-submission process is especially important for parties who are in the early stages of planning. In light of the recent years of uncertainty of whether the Department will issue an exemption or what conditions the Department would aim to impose, the pre-submission process becomes even more important. Proposed Rule section 2570.32, in conjunction with Proposed Rule section 2570.51(a), would open the administrative record to public inspection at the first time a potential applicant provides any information or documentation to OED. Even notes taken by OED at a pre-submission conference would be open to public inspection. Such a requirement effectively treats any contact between a potential applicant and OED as open to public inspection.

We agree that sound government and good public policy requires the exemption process to be transparent in the same way that sound government and good public policy should provide similar and predictable outcomes under similar facts and circumstances. The facts and circumstances upon which the Department's findings and decisions are based should be open to public inspection for this very purpose. However, discussions prior to an exemption application should not form the basis for the Department's findings and decisions. Accordingly, such pre-application exchanges are not appropriate for, and should not be, a part of the administrative record or open to public inspection.

Pre-submission discussions are necessary for potential applicants to understand whether the Department would have concerns about a proposed transaction, including in some cases whether the Department would view the contemplated transaction as prohibited. Before incurring significant expenses associated with an exemption application, a potential applicant

needs information to make a business decision to go forward with the application. Information relevant to a potential applicant's decision includes an understanding of what information the Department will require from the applicant as part of the administrative record (including whether such information may include the public disclosure of confidential trade information), the likelihood of a successful application, and the types of conditions the Department might consider. The Department should understand the practicality, from the business standpoint of a potential applicant, of such an approach.

It is in the public interest for pre-application discussions (including the identity of the applicant) to remain confidential. No public interest is advanced by making pre-application discussions and the identity of a potential applicant public. Such a requirement would discourage the exchange of information between the Department and a potential applicant's counsel or representatives. Further, opening a public record during informal pre-submission discussions could impair a potential applicant's ability to obtain compliance assistance or keep proprietary information confidential. Instead of the Proposed Rule's approach, the Department should work with members of the benefits community to encourage communication, compliance assistance, and a mutual approach to solving problems and facilitating beneficial transactions. The Department's current pre-conference process encourages communication that is ultimately to the benefit of plan participants by providing stakeholders access to discussions about beneficial transactions that may be the subject of exemption.

We request that this part of the Proposed Rule be removed. The better approach is for the Department to require all information needed for its statutory findings to be included as part of the formal exemption application. That way the Department preserves the public's interest in a transparent process. At the same time, the Department will not inadvertently discourage potential applicants from seeking compliance assistance or from seeking understanding of how the exemption process would apply to its own facts and circumstances before incurring significant expense.

3. Information Burden

The Proposed Rule imposes significant burden by requiring, under section 2570.34, significantly more information as part of an exemption application. In this manner, the Proposed Rule would significantly raise the cost to file an exemption application and, in turn, discourage applications. Rather than supplying the relief that Congress intended through the individual administrative exemption process, the additional information burdens under the Proposed Rule create barriers to relief.

Proposed Rule section 2570.34(a)(4)(ii), would require an applicant to describe "[a]ny material benefit that may be received by a party involved in the exemption transaction 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)." Requiring the disclosure of any material financial benefit to a fiduciary involved in the transaction is necessary and appropriate in order to

identify conflicts of interest under section 406(b) of ERISA. Further, the disclosure of material benefits to participants is appropriate to explain the benefits of the proposed transaction. For instance, in the case of a captive insurance exemption application, participants may stand to benefit from guarantee issue life insurance.

To this point, the Department should clarify that "material benefit" speaks to financial benefit. Any other approach creates uncertainty and speculation as to what the Department would view as a benefit. Such a requirement would impose an obligation to describe even non-monetary benefits and invites speculation. In the event the Department retains this disclosure, the proposed language should be revised to include only those benefits which are direct result of the transaction and which are reasonably foreseeable and financially quantifiable. Further, the parenthetical speaking to the avoidance of any materially adverse outcome as a result of engaging in the exemption transaction should be clarified or struck entirely. On its face, the phrase is circular because the intended result of any exemption is to avoid engaging in an otherwise prohibited transaction. Engaging in any prohibited transaction would risk a materially adverse outcome to any fiduciary causing the transaction.

However, we do not agree that monetary and non-monetary benefits flowing from the transaction are appropriate for quantification and/or description, even if material, for other parties "involved" in the transaction. To solicit such information, knowing that it will open to public inspection, is an abuse of discretion. It appears to have no rational goal other than penalizing parties to the transaction by publicly displaying private information that does not affect the merits of the transaction in any way. Such information is unnecessary and has no proximate connection to the Department's findings that a transaction is in the interests of the plan and is in the interests of, and protective of the rights of, participant and beneficiaries of the plan. This is particularly true for costs not borne by the plan. This requirement should be dropped altogether to the extent it applies to parties other than the fiduciary to the transaction.

Proposed Rule section 2570.35(a)(5) would require every exemption application to state "[w]hether the applicant or any of the parties involved in the exemption transaction are currently, or have been within the last five years, defendants in any lawsuits or criminal actions concerning their conduct as a fiduciary or party in interest with respect to any plan (other than lawsuits with respect to a routine claim for benefits), and a description of the circumstances of the lawsuits or criminal actions." Restricting the scope of this disclosure to "conduct as a fiduciary or a party in interest with respect to any plan" is appropriate in that any disclosure should be strictly limited to information relevant to the Department's findings. However, the Proposed Rule goes too far in requesting information concerning actions which consist of unproven allegations that did not result in a conviction or judgement. Any such requirement is an inappropriate presumption of guilt and should have no connection to the Department's determination of whether an exemption is protective of the rights of participants and beneficiaries of a plan. Neither should a party be required to provide descriptions of lawsuits or criminal actions against it -- no matter how unsuccessful and unproven -- that will be published in a public record as reminders even after

such allegations are cleared or dropped. This requirement operates as an inappropriate penalty for filing an exemption request and should be removed.

Proposed Rule section 2570.35(a)(20) would require the application to disclose any prior transaction between the plan sponsor and any "party involved in the exemption transaction," which includes any party in interest as defined in section 3(14) of ERISA. 87 Fed. Reg. at 14740, 14745. This requirement is overbroad and is not needed for the findings necessary for an exemption. For example, a consulting firm providing actuarial services may provide an array of services to a plan sponsor, including assistance with captive insurance consulting with respect to risks that are unrelated to the plan. Such services have would have no bearing or direct relation to a captive insurance exemption transaction. For example, applicants would be required, under a straightforward reading of the provision, to report any transaction between a plan sponsor and such actuarial firm that has occurred since the formation of the plan sponsor. Likewise, other professionals such as accounting and investment banking firms may provide an array of services to a plan sponsor. Reporting all of these transactions is not workable; further, to the extent that reporting such transaction triggers the obligation under Proposed Rule section 2570.35(a) to provide copies of all documents bearing on the exemption, such obligation is overly burdensome and seeks the disclosure of irrelevant confidential and proprietary information with the result that such information would become available for public inspection. The Department should clarify that this is not the intent of the Proposed Rule and that in the event of ongoing and pre-existing relationships between plan sponsors and service providers, a description of the relationship is all that is needed for this disclosure.

4. Information Collection Subsequent to an Exemption Grant

Proposed Rule section 2570.37(a) would require an applicant to continually update an exemption request for changes in any material fact or representation (or if anything occurs that may affect the accuracy of any material fact or representation) following the grant of an exemption request. Further, following an individual exemption grant, if an applicant discovers that any material fact or representation provided in support of the application was inaccurate, the applicant must promptly notify the Department. This requirement creates a burden to continually, in effect, re-apply for an exemption without certainty as to what the Department would view as material. This requirement was not contemplated by Congress and creates additional burdens. The requirement should be deleted and any exemption grant should, instead, be conditioned upon the accuracy of material facts and representations that were the basis of the exemption, and the exemption should be valid as long as those material facts and representations are materially accurate. We understand that this is consistent with the Department's practice that has been in effect for over forty years.

In the event of a material change in facts, an applicant who is concerned about losing the exemption may, under the present practice, reapply. Here the Proposed Rule section 2570.50 requires that the Department be notified about a change in who is the independent fiduciary. However, a change in the independent fiduciary is not necessary or appropriate for notice to the

Department. Neither is it appropriate to obligate an applicant to report insignificant and ongoing business operations out of a concern that the Department might view such a development as a change in a material fact. Because the Proposed Rule would leave the determination of whether a change in facts is "material" to the Department's sole discretion, the Proposed Rule creates more uncertainty and additional unjustified barriers to exemptive relief. Such a result is impractical and overreaching. For example, many ongoing exemptions are subject to minor changes in facts and circumstances that would create questions as to whether the Department would view such changes as material.

Further, the Proposal Rule's requirement is inconsistent with the Department's previous positions that certain exemptions are administratively feasible specifically because they do not require continued monitoring by the Department.[2] The Proposed Rule takes the position that the Department will continually monitor every new exemption. This unexplained inconsistency is arbitrary and capricious. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (citing *F.C.C. v. Fox TV Stations, Inc.*, 556 U.S. 502, 515–16 (2009)).

We would respectfully appeal to the Department to reconsider this and other changes to the exemption that draw upon the resources of OED by adding oversight to OED's function of granting administrative exemptions. Oversight and enforcement activities add burden to OED, an office with an effectively shrinking budget and staff. As a result, we are concerned that these enforcement type activities will further absorb resources that should be dedicated to OED's administrative exemption process.

5. Denial of Exemption without a Tentative Denial Letter and a Conference with to Respond

Proposed Rule section 2570.41 would modify the exemption process to provide, under specified conditions, for final denial letters in the absence of a prior tentative denial letter or a hearing on the exemption. The Proposed Rule would provide for the issuance of a final denial letter following any conference "during which the Department and the applicant addressed the reasons for the denial that otherwise would have been set forth in a tentative denial letter." This provision should not remain in the final rule. A reason addressed in a meeting or conference does not supply an applicant advance opportunity to supplement the record with a well-reasoned response demonstrating evidence that would refute the reason for denial. A pre-denial conference does not provide the applicant with a full and fair opportunity to understand the basis for a denial and to provide its best response or to withdraw the request.

6. The Proposed Rule's Independence Requirements Are Overly Restrictive and Therefore Could Lead to the Disqualification of Qualified Firms

[2] *See, e.g.*, Proposed PTE 2016-06, 81 Fed. Reg. 29709 (May 12, 2016); Proposed PTE 2013-06, 77 Fed. Reg. 76783 (Dec. 28, 2012); Proposed PTE 2004-05, 68 Fed. Reg. 64648 (Nov. 11, 2003); Proposed PTE 2001-33, 66 Fed. Reg. 30014 (June 4, 2001); Proposed PTE 81-52, 46 Fed. Reg. 18409 (Mar. 24, 1981).

We agree with the Department that independent fiduciaries play an important role in protecting plans, and their participants and beneficiaries, in connection with many exemptions. Requiring that the plan be represented by a fiduciary who is independent of the applicant and other parties engaging in the exemption transaction can provide assurance that the plan's decision to enter into the transaction is not motivated by conflicts of interest. However, we believe the Exemption Procedures Regulation, in its current form, is sufficient to establish the fiduciary's independence. For the following reasons, we disagree with the Department's proposed changes to the definition of a "qualified independent fiduciary." Proposed Rule § 2570.31(j).

a. Percentage of Revenue

The Proposed Rule would provide that a fiduciary or appraiser will not be treated as independent if the revenue it receives or is projected to receive from parties involved in the exemption exceeds 2%, unless the Department decides in its sole discretion otherwise. This change would narrow the definition of a "qualified independent fiduciary," in the Exemption Procedures Regulation, which currently states that a fiduciary is presumed independent if less than 2% of its revenue is derived from parties in interest engaging in the exemption transaction, but the fiduciary may nonetheless be independent if the revenue is less than 5%.

The Department did not explain why it proposes to lower the revenue threshold to 2%, but we believe that this change would unnecessarily exclude otherwise qualified firms from acting as an independent fiduciary. We simply do not agree that a fiduciary should be presumed to be subject to improper influence unless it receives at least 98% of its revenue from sources other than the parties involved in the exemption transaction. Fiduciaries can and do act in the sole interests of the plans they serve where they receive more than 2% of their annual revenue in connection with providing services to the plan.[3] This is especially the case in connection with many independent fiduciary engagements, in which a firm is engaged to represent a plan in connection with a discrete transaction or set of transactions. In these cases, the independent fiduciary has no other relationship with the relevant parties, and no expectation that the parties will retain the independent fiduciary after the engagement has been concluded.

Decreasing the percentage of total revenue a firm may receive in connection with an independent fiduciary engagement will inevitably disqualify many firms, especially small firms that build a particular expertise, such as actuarial services for captive insurance companies.

[3] For example, a QPAM's annual revenue is usually directly tied to its assets under management. PTE 84-14, a widely-relied upon exemption, permits a QPAM to engage in transactions with parties in interest with respect to a plan, so long the plan (combined with plans maintained by affiliates of the employer with respect to the plan) represents no more than 20% of the QPAM's assets under management. PTE 84-14 § I(e). Where the QPAM manages a commingled investment fund, PTE 84-14 explicitly allows the QPAM to enter into transactions with a party in interest responsible for appointing the QPAM where no plan and related plans invested in the fund represents 10% or more of the assets invested in the fund. PTE 84-14 § I(a).

Expertise may be concentrated in small firms, and expertise is to the benefit of all parties to a transaction. The Proposed Rule would effectively require that the firm receive annual revenues equal to 50x the fee it will receive in connection with an engagement, when under the Exemption Procedures Regulation, in its current form, the firm would need to receive annual revenues equal to at least 25x the fee. This would be difficult for small firms to satisfy because independent fiduciary engagements in connection with exemptions can be more complicated than other professional engagements, necessitating a higher fee. Moreover, the requirements the Proposed Rule would impose, such as maintaining fiduciary liability insurance with coverage equal to the size of the exemption transaction, would add more costs that the firm would need to reflect in its independent fiduciary fee, making it even more difficult for small firms to satisfy the 2% threshold. Further, such insurance may be unobtainable. Finally, the regulatory impact analysis accompanying the Proposed Rule fails to account for the costs the Proposed Rule would impose on independent fiduciary firms that are small businesses in terms of loss of potential future engagements.

b. Future Transactions of the Same Nature or Type

The Proposed Rule's definition of a "qualified independent fiduciary" would provide that the Department will consider whether the independent fiduciary will have an interest in "future transactions of the same nature or type" when determining whether the fiduciary is independent. The preamble to the Proposed Rule states that a "fiduciary may not be independent if it has a business interest in promoting the exemption transaction." 87 Fed. Reg. at 14726. This restriction could be read to disqualify any firm from acting as an independent fiduciary if it intends to take on more than one engagement as an independent fiduciary.

The Department has interpreted the conflict of interest rules of section 406(b) of ERISA from prohibiting fiduciaries from acting in transactions where they have interests that could affect their judgment as fiduciaries that are more than incidental as a result of the transaction, such as a tangible financial interest. For example, the Department's regulations state that a fiduciary may not engage itself, an affiliate, or a related entity to provide services for an additional fee. 29 C.F.R. § 2550.408b-2(e)(1). Conversely, a fiduciary may retain itself or an affiliate where no additional fees would be paid by the plan. 29 C.F.R. § 2550.408b-2(e)(2); DOL Adv. Op. 91-44 (Nov. 14, 1991). The Department has also opined that a fiduciary may not cause a plan to invest in a fund the fiduciary or an affiliate manages to the extent doing so would generate revenue for the fiduciary or an affiliate. DOL Adv. Op. 97-15 (May 22, 1997). On the other hand, an incidental interest is not been sufficient to give rise to a violation of section 406(b) of ERISA. *Reich v. Compton*, 57 F.3d 270, 279 (3d Cir. 1995); DOL Adv. Op. 2000-10A (July 27, 2000). Additionally, the fiduciary would not violate section 406(b) of ERISA if it receives a benefit from a transaction that is separate from a transaction conducted on behalf of the plan. *Friend v. Sanwa Bank California*, 35 F.3d 466, 469–70 (9th Cir. 1994); DOL Adv. Op. 87-04A (June 2, 1987); DOL Adv. Op. 85-33A (Oct. 1, 1985).

The Proposed Rule would upset decades of precedent by prohibiting firms from benefiting from the experience or expertise they gain by acting as an independent fiduciary. This benefit is clearly incidental to an exemption transaction, and the fact that a firm may promote its experience or expertise as an independent fiduciary does not transform the ability to gain experience or expertise into a material conflict of interest. In this respect, the Department has identified a service provider's experience as an important factor for plan fiduciaries to weigh in deciding whether to retain the service provider. Department of Labor, Meeting Your Fiduciary Responsibilities, 5, *available at* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf. It is incongruous for the Department to take the position that an independent fiduciary cannot promote its experience while at the same time stating that the duty of prudence requires the independent fiduciary's experience to be taken into account in deciding whether the independent fiduciary should be engaged. However, if the Proposed Rule is finalized, it appears that any independent fiduciary that intends to use its experience or expertise to gain more engagements would be disqualified. Finally, if the Department imputes an interest in future exemption transactions based on an independent fiduciary's (or another service provider's) experience or on a pattern of serving in similar exemption transactions, and then disqualifies that party from service, the result would have the perverse effect of disqualifying parties with the most expertise.

In addition, by stating that a fiduciary could be disqualified as a result of having an interest in "future transactions," the Proposed Rule would require an independent fiduciary to take into account, when deciding whether a plan should enter into a transaction, the possibility of separate transactions not involving the plan, which may or may not occur later. This is clearly contrary to established precedent. *Friend*, 35 F.3d at 469; DOL Adv. Op. 87-04A (June 2, 1987); DOL Adv. Op. 85-33A (Oct. 1, 1985). Whether an independent fiduciary's decision for one plan could lead to an engagement for another plan is conjectural. Requiring fiduciaries to take into account attenuated circumstances like these (and the effect on parties other than the plan they are serving) would lead to decision paralysis, making it impossible to act on behalf of a plan. Further, such a rule would impair the ability of fiduciaries who gain expertise in particular types of transactions from serving as fiduciaries on similar transactions in the future. As explained above, a fiduciary's expertise in a particular type of transaction is an important factor in the prudent selection of a fiduciary or other service provider and is to the benefit of participants. For example, if an independent fiduciary who knows the most about a captive exemption is disqualified by reason of having an interest in future transactions, an applicant would be forced to employ a less experienced independent fiduciary, with the result that the project would take far longer and be more expensive. Further, when combined with the 2% independence test in the Proposed Rule, the two restrictions would create impossible hurdles for hiring independent fiduciaries with special expertise (such as in the area of captive insurance). Finally, in the event an independent fiduciary is subject to professional licensing standards such as those for actuarial licenses, securities licensing, and licenses for certified public accountants, strong bodies of oversight ensure the application of professional standards that bolster the purposes of the Department's independence standard. For example, Precepts 1 and 7 of the Code of Professional Conduct for actuaries address integrity, competence, and conflicts of interest

while the Actuarial Board for Counseling and Discipline investigates alleged violations. *See* http://www.actuarialstandardsboard.org/profcounts/conflicts-of-interest-transparency-is-key/.

c. Expansion of Entities from whom a Fiduciary Must be Independent Beyond Parties Enumerated by Congress

The Proposed Rule would require a fiduciary to be independent of "any party involved in the exemption transaction," which would include (i) any party in interest, as defined in section 3(14) of ERISA, (ii) any party engaged in the exemption transaction, or an affiliate, or (iii) a party providing services to the plan or one of the foregoing parties. Proposed Rule § 2570.31(j); (l). This change would dramatically increase the types of relationships that would disqualify an independent fiduciary by including relationships that pose no risk of harm or conflicts of interest.

We disagree with the Department that a fiduciary's relationship with any of a plan's parties in interest could give rise to a conflict of interest. As you know, the definition of a party in interest includes all of a plan's service providers. ERISA § 3(14). Plans generally have many service providers that do not have an interest in whether an exemption transaction occurs. For example, a plan's recordkeeper would typically not be involved in an exemption transaction beyond processing transactions at the direction of a fiduciary. Therefore, an independent fiduciary's affiliation or business relationship with such a service provider does not present risk of harm or conflicts of interest. Additionally, because (a) an independent fiduciary would become a party in interest when it is engaged, (b) there is no exception from the definition of a "party involved in the exemption transaction" for the independent fiduciary, and (c) the independent fiduciary cannot be independent from itself, a plain reading of the Proposed Rule would lead to the absurd result of the independent fiduciary becoming disqualified when it is engaged. Further, to the extent an independent fiduciary provides other services to the plan sponsor such as actuarial valuation, risk management consulting, investment banking, or structured finance, this requirement would unduly prohibit the plan sponsor from hiring that party as an independent fiduciary even if that party was the most qualified for the transaction.

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We appreciate the Department's consideration of the above comments. Please let us know if you have any questions related to the above or if we can be of assistance to the Department in this matter.

Very truly yours,

Allison A. Itami

Jeanne K. Wilson