May 31, 2022

Submitted Electronically

Mr. Ali Khawar
Acting Assistant Secretary
Employee Benefits Security Administration
U.S Department of Labor
200 Constitution Ave NW
Washington, DC 20210

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

Dear Acting Assistant Secretary Khawar:

We appreciate the opportunity to comment on the above-referenced proposed regulation to amend the *Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications* (the "Proposed Rule"). Groom Law Group, Chartered ("Groom") has submitted comments on the Proposed Rule for other clients and groups of clients. However, after careful consideration, we feel compelled to take the unusual step of writing on our own behalf to express our serious concerns with the Proposed Rule and changes to the prohibited transaction exemption ("PTE") application process under section 408(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

For 47 years, Groom has worked constructively with the Department to solve problems in a way that promotes the interests of employee benefit plans and their participants and beneficiaries. Our attorneys have advised hundreds of applicants on individual and class PTE applications, and we have seen firsthand the value of the process. Although we appreciate the Department's decision to seek public comment on some of its informal policies, we are dismayed by the Department's efforts to make the PTE application process more difficult, costly, and time consuming.

The structure of ERISA and its legislative history reflect an intent to empower the Department to grant PTEs whenever doing so would be in the interest of plans and their participants and beneficiaries. As the Department is aware, section 406 of ERISA prohibits a wide array of direct and indirect transactions, based on the possibility that the transactions might involve conflicts of interest. The courts have recognized that Congress intentionally drafted section 406 to be over-inclusive in that it prohibits transactions that are not harmful but rather are in the interest of plans. *See, e.g., Etter v. J. Pease Constr. Co.*, 963 F.2d 1005, 1010 (7th Cir. 1992); *Cutaiar v. Marshall*, 590 F.2d 523, 529, 530 (3d Cir. 1979); *Chao v. USA Mining, Inc.*, 2007 WL 208530, at *10 (E.D. Tenn. Jan. 24, 2007). For example, when read in isolation,

section 406 would prohibit any service provider from providing services to a plan. Additionally, in 1975, the Department recognized that "immediate and full application of all of the prohibited transactions provisions" without administrative exemptions would result in "serious harm to the plans, their participants and beneficiaries." Preamble to Interim Exemption from Prohibitions on Securities Transactions With Certain Broker-Dealers, Reporting Dealers and Banks, 40 Fed. Reg. 5201, 5201–02 (Feb. 4, 1975).

Section 406 of ERISA must be read in tandem with section 408. By authorizing the Department to grant administrative exemptions under section 408(a) of ERISA, Congress envisioned that the Department would grant PTEs that avoid the disruption of established business practices. H.R.Conf.Rep. No. 93-1280, at 5089 (1974). Congress also expected that the Department would grant PTEs that benefit both plans and other parties, including "the community as a whole." *Id*. at 5090–91. Although the legislative history states that PTEs should be subject to adequate safeguards, it does not state that PTEs are presumptively harmful or that they should only be granted under rare circumstances.

Since the passage of ERISA, the administrative PTEs the Department has granted have overwhelmingly worked for the benefit of plans and their participants and beneficiaries. One example of a common-sense type of exemption the Department has granted are PTEs that allow investment vehicles holding ERISA plan assets to invest in all of the securities listed on an index, such as the S&P 500 index. *See, e.g.*, PTE 2019-04, 84 Fed. Reg. 36591 (July 30, 2019); PTE 2008-13, 73 Fed. Reg. 70378 (Nov. 11, 2008). Where a financial institution whose stock is listed on the index manages the index fund, the investment may be considered a prohibited transaction, but given increased diversification and reduced tracking error that will result, it is clearly in the interests of plans and their participants and beneficiaries for this prohibited transaction to occur. In addition to exemptions that reflect common sense, the Department has granted PTEs that embrace innovative solutions to employee benefit policy problems, including the problem of leakage of retirement savings resulting from employees who change jobs but do not consolidate their retirement accounts. *See* PTE 2019-02, 84 Fed. Reg. 37337 (July 31, 2019).

Despite the intent of Congress and the long history of the PTE program, the Department appears to have adopted the view that PTEs are presumptively harmful or problematic. The preamble to the Proposed Rule states that "[s]tructuring a transaction in a manner that is prohibited by ERISA and requires an exemption should not be the applicant's default approach." 87 Fed. Reg. at 14728. The Proposed Rule also would require applicants to provide a "detailed description of the alternatives to the exemption transaction that did not involve a prohibited transaction and why those alternatives were not pursued." 87 Fed. Reg. at 14741. Additionally, the Proposed Rule would add circumstances where the Department will not discuss a potential PTE application with prospective applicants and would streamline the Department's ability to deny an exemption application. 87 Fed. Reg. at 14721, 14728.

This shift in the Department's view of PTEs did not begin with the Proposed Rule but, rather, is a change that has been happening over the past decade. It has resulted in a precipitous decline in the number of PTEs granted. According to a recent article, "The number of [PTEs] the [Department] issues each year has declined by more than 97% since 2002. *A. Ramsey, Benefits Industry Balks at Exemption Changes Sought by DOL, Bloomberg Law (April 21, 2022).*

We have seen no evidence that stakeholders have less of a need for exemptive relief today than in the past. In fact, we see a tremendous demand from employers, unions, benefit plans, and service providers to work with the Department to improve benefit plan design and address very real challenges. As the Department has issued fewer and fewer PTEs, plans have been forced to forego transactions that would have benefitted participants and beneficiaries, to change transactions to fit within the framework of existing PTEs, and to utilize independent fiduciaries outside of the PTE process. The decline in the number of PTE applications and PTEs granted is due to the Department's increasing resistance to seriously considering exemptive relief and the Department's formal and informal efforts to make the application process slower, more challenging, and more costly. The cost of applying for exemptive relief has grown substantially over the years, even as the chance of the Department granting a PTE has fallen drastically. The Proposed Rule would exacerbate this trend.

Congress granted the Department authority to exercise its judgment to issue PTEs, and it is generally the Department's prerogative when deciding how to use its authority. For the first thirty years after ERISA was enacted, the Department worked with plans to find exemptive approaches that met the statutory standard. We do not agree with the Department's apparent conclusion that by refusing to grant PTEs, it is advancing the interests of participants and beneficiaries. As with any other regulatory authority, the PTE process must be carefully calibrated, including through coordination with regulated entities and other stakeholders. But PTEs cannot help anyone if they are not granted. The suggestion that PTEs should only be granted as a last resort is not, in our view, a careful calibration. It is more akin to a decision by the Department not to play all the cards it has at its disposal.

By choosing to *de facto* end the PTE program for most purposes, the Department will further limit its opportunities to engage constructively with plans and to influence important plan transactions. Consequently, we urge the Department to withdraw the Proposed Rule.

Thank you for the opportunity to comment on the Proposed Rule. 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.

Sincerely,

Jennifer E. Eller
Co-Chair
Retirement Services &
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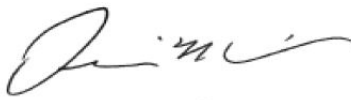

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