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Chris Cosby
Acting Office Director
Office of Exemption Determinations
Employee Benefits Security Administration
United States Department of Labor
200 Constitution Avenue
Washington, D.C. 20210

RE: RIN 1210-ACO5 Comments on Proposed 29 CFR Part 2570 - New Rules for Prohibited Transaction Exemption Application Procedures.

Dear Acting Office Director Cosby:

This is in response to the Department's request for public comment on its proposed amendments to its regulation on exemption application procedures. We have filed this comment through the Federal eRulemaking Portal as well. The Wagner Law Group is a full-service law firm with a specialized practice in Title I of ERISA, which includes providing independent fiduciary services for clients, and submitting applications to the Department for exemptions from the ERISA prohibited transaction rules. We have had extensive experience with the Department's longstanding regulations on the procedures for applying for individual and class exemptions.

We are concerned primarily with the effect of the proposed amendments for the individual exemption applicant. While many of the proposals merely formalize Departmental policies already in practice, some greatly increase the burden on individual exemption applicants, and on the fiduciaries and other service providers whose hiring is often necessary for a successful application. We understand that the Department's experience with certain exemption seekers has led to this proposal. In our view, the changes won't just "weed out" abusers of the process but will dramatically burden the many exemption seekers who have hitherto played by the rules. The authority of the Department to impose substantive requirements on exemption seekers is broad, but not without limits. Several of the significant proposed changes for exemption applicants and their service providers appear to be beyond the Department's statutory authority, even with notice and comment, and the burdensome changes that may be within the Department's authority are largely not justified by any explanation in the preamble.

We are particularly concerned about the expansion of the types of individuals being subjected to regulation, such as under the expanded definition of "party in interest," and the

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expansion of the number and types of business relationships required to be justified, beyond the parties and relationships defined in ERISA. Courts have held that the Department in litigation cannot expand the scope of ERISA beyond what Congress intended. *Reich v. Compton*, 57 F.3rd 270(3rd Cir. 1995). Similarly, the Department should not be permitted to do so by the backdoor approach of substantially modifying the conditions for obtaining prohibited transaction exemptions. The effect of such actions would be to deny exemptive relief based upon considerations that Congress did not include when it decided to permit individual and class exemptions from the sometimes rigid and artificial prohibited transaction rules.

ERISA Section 408(a) Authority to Issue Exemptions

Titles I and II of ERISA, which are administered by the Department and the Internal Revenue Service, respectively, contain largely identical provisions regarding prohibited transactions and exemptions from the prohibited transaction rules. The provisions of Title II of ERISA are found in the Internal Revenue Code (the “Code”). In order to avoid confusion over dual jurisdiction between the two agencies, Reorganization Plan No. 4 of 1978 transferred the authority to grant exemptions from the prohibited transaction provisions under the Code to the Department.

Under Section 408(a) of ERISA, the Department is required to establish a procedure for any transaction, or any fiduciary under Title I (or disqualified persons under the Code), to apply for an exemption from the prohibited transaction rules under both Section 406 of Title I of ERISA and Section 4975(c)(2) of the Code. The Department must determine that the exemption is (1) administratively feasible, (2) in the interests of participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries. These provisions further require that the Department shall publish notice of any pending exemption and require that adequate notice be given to interested persons and shall afford interested parties opportunity to present views. The Department must also afford the opportunity for a hearing for any exemptions from the self-dealing provisions of ERISA 406(b) and must make a determination on the record for the required findings.

Department’s Existing Exemption Procedures at 29 CFR 2570 (Subpart B)

The Department’s existing regulations provide procedures for requesting an exemption from the prohibited transactions described in ERISA Section 406(b) and Code Section 4975(c)(2) and require the applicant to provide information about the transaction, the parties engaging in the transaction, and the relationships between the individuals and entities covered – plans, fiduciaries, and other parties in interest as described in ERISA Section 3(14). The exemption applicant is required to (1) submit detailed information to the DOL (and update it as required to keep it materially accurate), and (2) notify interested parties. The regulations require the applicant to obtain statements from any fiduciary or appraiser who has provided supporting statements in the application that they are independent of and unrelated to any party in interest engaging in the transaction, and to give a detailed description of any relationships the fiduciary or appraiser has had or may have with a party in interest engaging in the transaction. The regulations also provide that the administrative record of each exemption is available to the public.

Comments on Significant New Proposed Requirements

Section 2570.31 Definitions

2570.31(a) Expanded definition of affiliate

We request that the Department reconsider its proposed expansion of the definition of “affiliate” in subsection 2570.31(a) to include all employees of an affiliate. The current definition includes only the high-ranking or influential employees. In our view, rank and file employees are not likely personally to be involved in or have any influence over the transaction involved but including them in the definition of affiliate expands the class of individuals for whom the applicant must track and report in its application. Tracking all employees of a large affiliate, in particular, may be unduly burdensome, with little actual purpose to be served. The Department appears to recognize that this expansion may not be appropriate, as it proposes to give the exemption applicant the opportunity to justify using a different definition of the term “affiliate” in proposed subsection 2570.34(a)(10). However, rather than placing this additional burden on every applicant, we recommend that the current definition of affiliate be retained.

2570.31(l) Expanded definition of parties in interest

Similarly, we recommend that the Department not finalize proposed subsection 2570.31(l) which adds a new term - *a party involved in the transaction* - as a new category of regulated entities. The proposed new term is used throughout the amendments to expand and replace the current term “party in interest” as defined in ERISA 3(14), and as used in the statute and existing regulation, to describe the universe of entities whose relationships must be examined, and if necessary, exempted. The proposal also expands these relationships beyond those “engaged” in the transaction that is the subject of the exemption application, to those “involved,” a much broader category that often has little relevance to the actual transaction.

Under proposed subsection 2570.31(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.

Throughout the proposed regulation, this proposed subsection 2570.31(l) expands the group of individuals, entities, and relationships, and related time frames, subject to tracking, reporting and financial disclosure requirements, to include non-parties in interest engaged in the transaction (and their affiliates) in addition to, as is now the case, fiduciaries, or other parties in interest engaged in the transaction. The expanded group would also include service providers to any party in the expanded group (and their affiliates), and the information proposed to be

required includes past, current, or potentially future business relationships between and among this expanded group.

The Department's stated rationale is that non-parties in interest may have potential conflicts and "interests in the transaction" that should be addressed. Reading further, it appears that the additional proposed information is not necessarily related to any actual conflicting or prohibited interests in the transaction for which an exemption is sought but is needed to supplement the information currently required to demonstrate that any fiduciary or appraiser or other service provider hired to support a specific exemption application is "independent," and to examine business interests that may never need an exemption at all.

This changed definition places a heavy, if not impossible to bear, burden on the exemption applicant to identify, for instance, service providers to the non-parties in interest engaged in the transaction, as well as the affiliates of both parties and non-parties. In effect, proposed subsection 2570.31(1), as used throughout the proposal, creates a new exemption requirement – that all parties engaged, or merely involved, in the transaction, their affiliates, and all of their service providers involved in the transaction, not have business relationships with each other, or with other parties or service providers involved in the transaction, in the past, currently, or in the future. We question whether the Department has the authority to create requirements around these new relationship interests beyond the prohibited transactions and relationships in ERISA Section 406 and Code Section 4975(c)(2).

2570.31 (i)(2) and (j) Expanded compensation test for service for fiduciary and appraiser independence

We suggest that the Department reconsider its proposed new compensation limits in subsection 2570.31(i)(2) for independent qualified appraisers and in subsection 2570.31(j) for independent qualified fiduciaries, which lower the percentage of revenue test currently in place. According to the Department, the proposed limits are designed to ensure the service provider's independence. The proposal would make the 2% of revenue limit the sole standard and expands the comparison to income received from all parties involved in the transaction, not just parties in interest engaged in the transaction, and provides a choice of comparison with the prior year's total revenue or the projected current year's total, unless the Department determines otherwise in its sole discretion. The proposal in subsection 2570.31(j) also specifically requires the independent fiduciary to include revenue from preparing fiduciary reports, and from affiliates of parties involved in the transaction, to be compared to the annual revenue from all sources.

The current regulations provide that a fiduciary or appraiser is deemed independent if less than 2% of its revenue is derived from parties in interest engaged in the transaction, and their affiliates, but based on the facts and circumstances, the fiduciary or appraiser may nonetheless be independent if that revenue is less than 5%. In the past, in our experience, the Department has routinely accepted use of the 5% limitation.

We suggest that the Department reconsider its proposal and maintain the current percentage tests. The new absolute 2% of revenue standard of independence will be harder for

exemption applicants to meet and could reduce competition, by eliminating smaller firms from consideration. It could impact smaller entities by limiting the amount of work they do for any one client and allow a larger entity to negotiate a higher fee by virtue of its overall revenue characteristics, quite probably affecting what may in the future be considered reasonable compensation if fees increase due to reduced competition.

2570.31 (i)(1) and (2) and 2570.31 (j) Expanded prohibited relationships among service providers to plans

We suggest that the Department not add to subsection 2570.31(i)(1) that the appraiser must be independent of and unrelated to “(1) any party involved in the transaction, and (2) any qualified independent fiduciary present.” These additions are unnecessarily expansive and expensive requirements compared to the current requirement that the appraiser be independent of and unrelated to any party in interest engaging in the exemption transaction.

We also suggest that subsection 2570.31(j) not include the proposed text that a fiduciary may not be considered independent “if it has an interest in the subject transaction or future transactions of the same nature or type.” According to the Department “. . . This language addresses the Department’s concern that a fiduciary may not be independent if it has a business interest in promoting the exemption transaction. For example, a fiduciary may be affected by a conflict of interest if it is motivated to use the exemption transaction to promote its fiduciary services to potential clients contemplating similar transactions or if its work with respect to the exemption transaction is connected to a valued relationship with a third party, such as an investment advisor or bank.” 87 Fed Reg. 14726.

Proposed requirements such as these, not related to the transaction, go well beyond the relationships, and prohibited transactions described in the statute for which an exemption may be sought. The Department appears to recognize that it is searching for “business” interests that are not currently, or may never be, conflicted under the statutory definition. We suggest that this bootstrapping creates, through the definition of “independent,” a new type of prohibited interest not within the exemption requirements contemplated by Congress.

As we suggest above, the definitions proposed in this subsection 2570.31 unnecessarily expand the individuals, entities, and business relationships for which an exemption applicant is required to track, disclose, and sometimes justify use of, and limits the hiring of fiduciaries and appraisers based on engagements not connected to the engagement in the proposed transaction. In addition, the uncertainty of the definition of “independent” inherent in proposed subsection 2570.31(j) will likely reduce the number of entities willing to serve as independent fiduciaries, thereby reducing competition and increasing cost.

Section 2570.32 Persons who may apply for exemptions and the administrative record

2570.32(d)(1) Expanded public disclosure of administrative record

We request that the Department reconsider its proposed expanded definition of when an exemption’s administrative record will be “open for inspection” in subsection 2570.32(d)(1),

which, as proposed, would begin with the Department's transcriptions of oral conversations with a current or prospective applicant. Referring to proposed subsection 2570.51(a), this proposal would establish an administrative record open to the public from the first informal communication, and that would remain open even if an exemption application is never made, or if made, is subsequently withdrawn (as proposed under proposed subsection 2570.44(f)). We suggest that the Department retain its current regulations under which interested parties are given a summary of the application materials, but not access to the administrative record, and current subsection 2570.51(a) under which an administrative record of an exemption is made public. The proposed standard would chill and reduce communications with the applicants, thereby reducing the applicants' understanding of the Department's thinking, and would undercut the applicant's efforts at compliance.

Section 2570.33 Applications the Department will not ordinarily consider

2570.33(c) Confidential Information.

We ask that the Department reconsider its proposed changes to subsection 2570.33(c) on confidentiality and retain the current version under which an applicant may request that information required or requested by the Department be confidential. The current version of the regulation provides that the Department will consider the request and determine whether the information designated as confidential is material to the exemption determination, and therefore must be made public. Proposed subsection 2570.33(c) removes this consideration and provides that if an applicant designates any information as confidential, the Department will not process the application until the applicant withdraws its claim of confidentiality. The proposal also adds the statement that by submitting an exemption application, the applicant consents to public disclosure of the entire administrative record.

We understand the Department's need to be transparent in its exemption decisions. That transparency will not be affected by the Department permitting an admittedly small exception to allow some information to remain non-public. An applicant, for instance, may include some information it believes is requested or required by the Department, perhaps about business practices, but which the applicant believes may not be germane to the transaction for which an application is being submitted. The current regulation allows the Department to consider the question. If the Department determines that the information is material to its exemption determination, the applicant has the option of withdrawing its application before the information is made public. Under the proposed changes, the Department will not even consider a confidentiality request, and once the application is filed, the material designated confidential becomes part of the public record, even if the application is withdrawn. We submit that this inflexibility will have the effect of needlessly discouraging applicants from approaching the Department for exemptions involving a range of different business practices.

2570.33(d) Prohibition on informal non-public consultations

We request that the Department consider removing proposed subsection 2570.33(d), which states that the Department will no longer provide informal non-public access to Department personnel. Here, the Department proposes to abandon the Department's

longstanding, published policy of providing existing and prospective exemption applicants the opportunity privately to discuss informally their transactions with Department personnel both before and during the application process.

The Department retains the provision in subsection 2570.30(e) that an applicant may ask and receive oral advice from Department employees, but now proposes that no anonymous discussions will be provided, and that under proposed subsection 2570.33(d) even a pre-submission caller must fully describe the transaction, identify the applicant, the affected plans, relevant parties involved, the prohibited transactions involved. When read with proposed subsections 2570.30(d), 2570.32(d)(1) and 2570.51(a), all discussions will be recorded, and with other submissions, before and during the application process, will be made part of the administrative record open to public inspection.

This proposal runs counter to the Department's current and longstanding policy of giving informal non-public advice to all current and prospective exemption applicants, and its current public disclosure policy.¹ The rationale for provide informal and non-public access is succinctly described by the Department – when cautioning prospective applicants not to rely on exemptions in force to formulate their applications:

They [exemptions in force] may not reflect current law, policies, or procedures. The Department, for example, may require terms and conditions that were not required in prior exemptions. Persons considering filing for an exemption or EXPRO authorization may find it very helpful to discuss the facts or issues in their cases with the Department before preparing the filing. The Department welcomes all inquiries and is available to answer any questions you may have.

www.dol.gov/ebsa/exemptions.²

The only justifications offered are that non-public informality and anonymity could result in wasting the Department's time in analyzing an incomplete set of facts, or that a prospective applicant could attempt to hold the Department to an informally expressed view. These concerns seem speculative, and in any case could easily be dealt with by the DOL personnel involved in the application process, rather than denying the availability of informal non-public access to all future actual or potential applicants. The Department also offers no rationale for the expanded definition of the administrative record to include informal discussions reduced to writing by Departmental personnel, and for the expansion of public access to all informal discussions even relating to prospective or withdrawn exemption applications.

¹ The proposal also runs counter to the IRS process under EPCRS which allows an authorized representative of a plan to discuss a potential VCP submission with the IRS by making an anonymous written request for a pre-submission conference. See Section 10.10 of Revenue Procedure 2021-30.

² This statement from the Department refers to class exemption PTE 96-62, informally known as EXPRO, by which certain prospective exemption applicants may rely upon existing exemptions for a shortened approval process. If the current proposed exemption procedures are finalized as proposed, class exemption PTE 96-62 will have to be substantially revised as well.

The current informal pre-submission process has on the one hand led to the development and issuance of valuable individual and class exemptions, and on the other saved prospective applicants and the Department time and expense in preparing or reviewing a formal application that is not meritorious or that is unnecessary. Informal advice from the Department could well indicate that the Department believes it is unlikely that an exemption would be issued, or alternately, that the prospective applicant need not request an exemption because under the facts no prohibited transaction would occur, or because another exemption is available.

If the Department cannot provide justification, based on its experience, for requiring public disclosure of informal and incomplete oral submissions from a prospective or current applicant, it should not depart from its prior approach. The recording and publication of informal discussions will undoubtedly deter any applicant from having full and frank discussions with the Department, and the creation and disclosure of the incomplete applications will create needless administrative burden for the Department.

We therefore request that the Department reconsider the advisability for the proposed new preapplication submission and informal discussion disclosure rules, and expanded public access rules.

Section 2570.34 Information to be included in every exemption application

Several of the proposed changes to this section merely list the items that routinely are included in an exemption application – the reasons for proposing the transaction, the benefits to the participants and beneficiaries, other alternatives explored, and the prohibited transactions that might be seen to occur. Other proposals for more information on additional parties and relationships possibly go further, and are explained in the preamble only as reducing “. . .the need for future back and forth between the applicant and the Department.” 87 Fed. Reg. 14727.

2570.34(a)(2) Listing parties to the transaction

We suggest that the Department retain existing subsection 2570.34(a)(2), which requires the applicant to list parties in interest involved as defined currently in subsection 2570.31(f), instead of expanding the list to include all parties described in proposed subsection 2570.31(l). As with other proposed changes based on the new group identified as “parties involved in the transaction,” this new expanded list creates an unnecessary burden on the applicant to compile information not needed to determine whether the transaction proposed requires an exemption.

2570.34(a)(4)(ii) New requirement to disclose material or adverse effects of a transaction

We suggest that the Department delete proposed subsection 2570.34(a)(4)(ii), which proposes to require the applicant to provide a description of “any 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).” This new text, apparently taken from attorney ethics rules, requires reporting of the effect of a transaction that does not itself rise to the level of a prohibited transaction under ERISA or the Code. This information

may well be unknown, or unknowable to the exemption applicant, at least without extensive canvassing of all parties involved in the transaction, at least some of whom are under no compulsion themselves to disclose such possibilities. Again, we question whether, even with the broad authority to grant exemptions, the Department has the authority to require an applicant to compile and disclose this information.

2570.34(a)(4)(iii) and (a)(5) Expanded disclosures on costs and benefits and alternatives to the transaction

We suggest that the Department amend or delete:

- Subsection 2570.34(a)(4) (iii), which proposes to require the applicant to provide 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, and
- Subsection 2570.34(a)(5), which proposes to require the applicant 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.

These subsections describe some elements that are already included in the current regulations and are routinely provided by applicants in individual exemption applications, generally to support the requirement that the transaction be in the interest of the plan and participants. However, subsection 2570.34(a) (4)(iii) appears further to require an economically sophisticated cost/benefit analysis, which could be prohibitively expensive, and subsection 2570.34(a)(5) also appears to require an overbroad examination and justification of possible alternatives to the transaction, instead of the current exemption practice of providing a comparison of one or two of the more realistic alternatives to the transaction for which the exemption is sought. Without some explanation from the Department as to how the proposed additional expense is justified by the Department's experience with PTE applications, we suggest that the current requirements for a modest cost/benefit analysis and discussion of reasonable alternatives be retained.

2570.34(b)(2) and (f)(7) New requirements that applicant and independent fiduciary comply with PTE 2020-02

We suggest that the Department reconsider its proposed requirement that all applicants and independent fiduciaries comply with the impartial conduct standards developed under PTE 2020-02, a class exemption for conflicted fiduciary investment advice for investment advisors and investment institutions. Proposed subsection 2570.34(b)(2) requires all applicants and subsection 2570.34(f)(7) requires all independent fiduciaries to provide a statement that the transaction is in the best interest of the plan and participants, that all direct and indirect compensation received by any party involved in the transaction is reasonable, and that all statements to the Department, the plan, or an independent qualified fiduciary or appraiser are not materially misleading at the time made. The applicant and any independent fiduciary are given the opportunity to explain why these standards should not be applicable.

We recommend that the Department remove this new requirement as unnecessary and confusing. Each element of the impartial conduct standards already applies to the plan administrator and other fiduciaries involved in a transaction under consideration for an exemption. All compensation to fiduciaries and other service providers selected by a plan fiduciary must be reasonable under any circumstances, not just for purposes of an exemption application, and there is no provision in ERISA that would permit or excuse materially misleading statements being made or used in any transaction involving an ERISA-covered plan. Further, as has been extensively discussed elsewhere, PTE 2020-02 may be viewed as a compromise under the specific circumstances of possibly conflicted investment advice by financial advisors to plans and participants, and may include conditions not needed or appropriate in an exemption application.

The Department seems unsure about this addition itself, proposing that, as an alternative, an applicant may provide a statement why the PTE 2020-02 standards should not be applied to the applicant's transaction. This alternative will not alleviate the confusion caused by adding this text to the exemption application process for all applicants, and the Department does not provide any explanation of any value in adding these provisions. To the extent that the independent fiduciary is required to sign under penalty of perjury, subsection 2570.34(f)(7) would place a heavy and unwarranted burden on an independent fiduciary to independently assure itself that all compensation received, directly or indirectly, by any party involved in the transaction is receiving no more than reasonable compensation, and that its report, and any appraiser's report, contains no materially misleading statements.

We remain hopeful, as discussed above, that the Department will remove proposed subsection 2570.31(1), which expands the individuals, entities, and relationships required to be tracked and reported on by every exemption applicant. If not, adding these PTE 2020-02-based requirements will be an almost insurmountable barrier for the exemption applicant, and will make finding a willing independent fiduciary for any transaction virtually impossible.

2570.34(c) and (f) – Adding accountants and auditors to the service providers involved, and adding requirements for independent qualified appraisers and fiduciaries

Individual exemptions, in particular, often impose requirements that an independent fiduciary with no conflict of interest respecting the transaction be appointed to represent the interests of the plan and, if relevant, that an independent appraiser be hired to establish that the plan will pay no more for or receive no less than the fair market value of an asset in a transaction. These proposed subsections would impose new requirements on independent fiduciaries and appraisers involved in the transaction, and expand the type of service providers required to comply with several new reporting requirements to include accountants and auditors.³

³ The proposal does not define the terms “accountant” or “auditor,” or explain what the Department considers the difference between the two. For purposes of this comment, we will generally refer to accountants, and assume that the proposal intends to cover accountants hired by plans such as an “independent qualified public accountant”(IQPA) used for a plan's annual filing purposes.

2570.34(c) Adding new requirements and service providers - accountants and auditors

An amendment to existing subsection 2570.34(c) proposes new requirements for statements or documents submitted in support of an application made by a qualified independent appraiser, and proposes to place most of those requirements on statements of any auditor or accountant that is submitted. An auditor or accountant does not have to provide a percentage of income statement, as does an appraiser, but under proposed subsection 2570.34(c)(4), all are required to locate, compile, and disclose past engagements with the plan, or any party involved in the exemption transaction.

We suggest that, to finalize the proposed subsection 2570.34(c), the Department would need to demonstrate that it has regulatory authority over the conduct of accountants. Unlike appraisers, accountants have specific duties and positions under ERISA. In the past, the Department has not found the authority to regulate these professionals except for certain limited purposes and as described in the statute. Even though the Department has authority to set conditions for granting exemptions, this authority may not extend to placing conditions and restrictions on these service providers involved in routine plan operations, whose statements may need to be submitted by the applicant for an exemption.

2570.34(c)(1) Statements by appraisers and others

We suggest that the Department reconsider its proposal in subsection 2570.34(c)(1) to require that these submissions be accompanied by a signed and dated declaration, under penalty of perjury, that all representations in the submission are true and correct to the best of the appraiser's, auditor's, or accountant's knowledge and belief. We have concerns about whether the Department should by regulation impose a criminal penalty not explicitly provided for in the statute itself, and not on a party directly engaged in the transaction for which an exemption is sought. This proposal constitutes the possible imposition of a criminal penalty because including such submissions is not optional for most applicants; many types of exemption applications are virtually required to have an appraiser's report. Also, a plan's annual report under the Form 5500 Series is almost universally required to be filed with an exemption application, and many such reports are required to attach an accountant's opinion.⁴ Thus, if it is finalized as proposed, the requirement that the appraisers, accountants, and auditors sign statements under penalty of perjury may make many of the most common individual exemption requests no longer feasible.

2570.34(c)(4) Appraisers, accountants and auditors required to report past engagements

This proposal goes beyond the current requirement on appraisers to report relationships the appraiser has had or may have with parties in interest or their affiliates engaging in the transaction which might influence the appraiser. The expansion includes reporting on relationships with all "parties involved in the transaction," or "involved in

⁴ Plan administrators are required to sign the tri-agency (IRS, DOL and PBGC) forms in the Form 5500 series under penalty of perjury, perhaps based on the penalty of perjury provision in Title II of ERISA administered by the IRS. The current proposed 2570.34(c)(1) appears to have the effect of imposing the same requirement, but without explicit statutory authorization, on a plan's IQPA for the IQPA's opinion under ERISA Section 103(a)(3), in order to be submitted in an exemption application.

the development of the exemption request.” In addition to this expansion, the relationship disclosure must include past engagements. According to the Department, these additional requirements relate to the independence requirement and are included “. . . in order to address instances in which a party has potentially conflicting relationships because it is dependent on or otherwise regularly involved with parties that develop transactions that may rely on the receipt of exemptions as a part of its business.” 87 Fed Reg 14729.

As with other proposals, this proposal does not appear to be necessary for the appraiser (or an accountant or auditor if included in the final regulation) to meet the independence requirements for purposes of a transaction. Rather, it appears to be part of the new set of requirements designed to discourage exemption applicants from using an existing service provider for a new engagement, whether for an exemption, or some other plan task.

2570.34(f)(3)(i) Fiduciary liability insurance

This subsection proposes, for the first time, to require an independent fiduciary to maintain fiduciary liability insurance in an amount that is sufficient to indemnify the plan for damages resulting from a breach by the independent fiduciary of either (a) ERISA, the Code, or any other federal or state law, or (b) its agreement with the plan. The insurance may not contain an exclusion for actions brought by the DOL or any other federal or state regulator, the plan, or plan participants or beneficiaries.

We recommend that the Department consider removing this unprecedented proposal, and leave the question of insurance to be negotiated between the parties. For many transactions, this proposal may make fiduciary insurance unavailable or at least prohibitively expensive, and the cost will be passed on to the applicant. Again, this type of proposal will discourage smaller entities from applying for an exemption, and will narrow the field of persons able or willing to act as an independent fiduciary.

2570.34(c)(2)(i) and (ii) and 2570.34(f)(2)(ii) and (iii) Indemnification and reimbursement

In these subsections, the Department proposes new requirements on independent appraisers and fiduciaries, and on accountants and auditors, that prohibit any indemnification or reimbursement of expenses of the service provider by the plan or other party for any contractual failure or failure to adhere to federal or state laws applicable to the service provider’s work, and prohibit any waiver by the plan or its participants or rights, claims, or remedies under ERISA, the Code, or other federal or state law. These proposals may reflect the Department’s current informal approach, at least for independent fiduciaries engaged for an exemption application, but the proposal would extend that approach to other parties, the appraisers, accountants, and actuaries described in proposed subsection 2570.34(c).

As written, the proposals do not reflect the current norm for these types of service agreements, and, if applied, may greatly reduce the pool of available, reasonably priced, fiduciaries and other service providers for exemption application purposes. Instead, the Department should consider leaving such indemnifications and reimbursements to negotiations

between the parties or by providing a more flexible approach, such as requiring that the arrangement be commercially reasonable considering available alternatives.

2570.34 (d)(1) and (e)(1) Applicant reporting on hiring process for service providers

We suggest that the Department reconsider these proposals, under which the exemption applicant would be required to detail the selection process for either an independent appraiser or an independent fiduciary, including the due diligence performed, other candidates considered, and the references contacted. Without some evidence that exemption applicants routinely ignore the existing fiduciary requirements for hiring service providers, these proposals would impose an additional unnecessary administrative burden.

Section 2570.35 – Information required for individual exemptions

2570.35(a)(5) and (6) Reporting on criminal activities

We suggest the Department reconsider finalizing these information requirements, which are greatly expanded to cover the proposed class of “all parties involved in the transaction,” not just, as in the current regulation, to cover the applicant and parties in interest. Proposed subsections 2570.35(a)(5) and (6), for instance, require the exemption applicant to provide extensive information on whether any party in the expanded group has been involved in various criminal prosecutions in the last 5 years, or been incarcerated in the last 13 years. Acquiring this information places a heavy responsibility on an exemption applicant where many of the parties covered are not themselves engaged in the transaction for which an exemption is sought, and are not under any compulsion to compile and disclose the information to the exemption applicant.

2570.35(a)(18)-(19) Responsibility for paying exemption expenses

These subsections appear to codify the current Department practice of prohibiting a plan from paying the fees and expenses for an individual exemption, including any fee for an independent fiduciary. We request that the Department provide more guidance on which parties the Department considers the appropriate party to bear the expenses: the other party to the transaction or the plan sponsor?

2570.35(a)(20) Prior transactions

This new proposed subsection requires the exemption applicant to provide information on prior transactions between the plan or plan sponsor and any party in the proposed expanded group of “parties involved in the transaction.” This proposal, as with others, expands the exemption applicant’s responsibility to report on transactions beyond the transaction subject to the exemption application, and involving parties who are not engaged in that transaction. We suggest reconsideration. The expansion places a heavy burden on the applicant to compile information not related to the exemption request, but designed to examine unrelated business interests between service providers, including fiduciaries, with the perhaps unintended consequence of requiring plans and plan sponsors to hire new and different service providers for each of its transactions, whether subject to an exemption request or not.

Other Considerations

We have chosen to address only a few provisions in the proposed regulation. We note that there are others that raise concerns as well. We are also note that one type of proposed change may inadvertently be read to convey the view that exemption determinations are unreviewable under the Administrative Procedures Act (APA). APA section 702(a)(2) bars judicial review of an agency's action when (1) a particular statute precludes judicial review of that action or (2) the action is committed to agency discretion by law. The lack of reviewability is often evidenced by the granting of "sole" discretion to the agency. The Department has used the term "sole discretion" before, but not as here by proposing to insert "sole" before discretion in subsections 2570.30(g) and 2570.50(a) when referring to decisions to grant, modify or revoke an exemption. We understand, but would appreciate clarification, that these proposals are not intended to convey the Department's view these important exemption decisions are not reviewable under the APA.

Conclusion

We hope that these comments will assist the Department in making decisions that will retain much of the current regulation, and the current Departmental practice, for the majority of exemption seekers, those who have not abused the Department's process, but will be seriously adversely affected by the scope and attendant expense of the proposed changes.

Sincerely,



Marcia S. Wagner

Cc: Stephen P. Wilkes, Esq., The Wagner Law Group