November 8th, 2023

Honorable Lisa M. Gomez
Assistant Secretary,
Employee Benefits Security Administration,
U.S. Department of Labor

Reference: Amendment of Prohibited Transaction Exemption ("PTE") 84-24

Dear Assistant Secretary Gomez,

The U.S. Department of Labor ("DOL") must reject issuing the proposed amendment to PTE 84-24 [88 FR 76004] for the following compelling reasons:

1. The Proposed Exemption Amendment Violates Federal Law

The proposed amendment to PTE 84-24 provides in relevant part that DOL seeks to govern and regulate "[t]he receipt, directly or indirectly, by an insurance agent…of…an Insurance Sales Commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract" under the view that such transaction is prohibited under the Employee Retirement Income Security Act of 1974 ("ERISA"). 88 FR 76025 (Nov. 3, 2023). DOL alleges that it has the authority to amend such PTE 84-24 provision pursuant to "…its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011))," and added by footnote that the "Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor." 88 FR 76025 (Nov. 3, 2023).

However, DOL is mistaken. DOL has no lawful authority under ERISA to govern any insurance business related transaction because Congress expressly so mandated in the McCarran-Ferguson Act, codified in 15 U.S.C. §§ 1011-1015. Specifically, Congress mandated that "**The business of insurance, and every person engaged therein, shall be subject to the laws of the several States** which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). [Emphasis supplied]. Also, Congress mandated that:

> "**No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance**, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as **the Sherman Act**, and the Act of October 15, 1914, as amended, known as **the Clayton Act**, and the Act of September 26, 1914, known as **the Federal Trade Commission Act**, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law." [Emphasis supplied]. 15 U.S.C. § 1012(b).

In analyzing 15 U.S.C. § 1012(b) and its applicability to ERISA, one must know whether the following prongs are met.

(a) First Prong: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance:"

ERISA is an act of Congress, and DOL cannot construe any statutory provisions within ERISA that would invalidate, impair, or supersede any state laws to regulate how licensed insurance sales agents conduct their business dealings. Thus, the first prong is met.

(b) Second Prong: Whether PTE 84-24 amendment "imposes a fee…upon such business."

The term fee simply means "a charge for labor or services, esp. professional services." *Fee*, BLACK'S LAW DICTIONARY (8th ed. 2005). DOL admits that the amendment to PTE 84-24 will cause licensed insurance agents, and insurance companies, to incur expenses in complying with DOL's new mandates. Thus, the second prong is met.

(c) Third Prong: Whether ERISA "specifically relates to the business of insurance."

The term "specifically" relates to specific, which means "of, relating to, or designating a particular or defined thing; explicit. Of or relating to a particular named thing…" *Specific*, BLACK'S LAW DICTIONARY (8th ed. 2005).

In determining whether ERISA "specifically relates to the business of insurance" then one needs to understand Congress' declared policy for enacting ERISA, which provisions follow below. ERISA section 2(b) provides Congress' declared policy, which provides in relevant part that the:

> "…policy of [ERISA is] to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."

Further, Congress added in ERISA section 2(c) that:

> "the policy of [ERISA is] to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance."

ERISA does not specifically relate to the business of insurance. If any doubt arises, one just needs to review ERISA section 514(b)(2)(B) in which Congress made clear that no ERISA Title I plans "…shall be deemed to be…engaged in the business of insurance…for purposes of any law of any State purporting to regulate insurance companies, insurance contracts..."

(d) Fourth Prong: Whether Congress enumerated ERISA in 15 U.S.C. § 1012(b) as one of the three enumerated Acts that "shall be applicable to the business of insurance to the extent that such business is not regulated by State Law."

The answer is no. Congress did not enumerate ERISA as being permitted to engage in the business of insurance; Congress expressly mandated that only the following three Acts would be permitted to engage in the business of insurance: (1) The Sherman Act; (2) The Clayton Act; and (3) The Federal Trade Commission Act.

(e) Congress' Policy Regarding Insurance Regulations: Congress provided its public policy in 15 U.S.C. § 1011, which provided in relevant part that:

> "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011.

(f) Further, Congress mandated that "[n]othing contained [in 15 U.S.C. § 1011-15] shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the **National Labor Relations Act** [29 U.S.C. 151 et seq.], or the Act of June 25, 1938, as amended, known as the **Fair Labor Standards Act of 1938** [29 U.S.C. 201 et seq.], or the Act of June 5, 1920, known as the **Merchant Marine Act, 1920**." [Emphasis supplied]. 15 U.S.C. § 1014.

Again, while Congress expressly enumerated the National Labor Relations Act, the Fair Labor Standards Act of 1938, and the Merchant Marine Act, Congress has intentionally failed to include ERISA as one of the enumerated laws that may apply to the business of insurance.

(g) To the extent DOL believes it has unilateral authority under ERISA section 408(a) to alter, supersede, or modify another law of the United States, such view is misplaced.

For purposes of ERISA Title I. ERISA section 514(d)[1], states in relevant part that:

> "**Nothing in this title** [meaning ERISA Title I] **shall be construed** to alter, amend, modify, invalidate, impair, or supersede **any law of the United States** (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law." [Emphasis supplied]. [ERISA § 514(d)].

[1] ERISA section 514(d) is known as the federal saving clause in which DOL cannot construe anything in ERISA Title I to alter any law of the United States, including any statutory provision under ERISA Title I and the Code.

As shown above, the proposed amendment to PTE 84-24 seeks to alter, amend, modify, invalidate, impair, and supersede Congress' mandates expressed in the McCarran-Ferguson Act, codified in 15 U.S.C. §§ 1011-1015, because DOL seeks to regulate the business of insurance sales agents and insurance companies, which labor pursuant to state licensing laws and regulations. Such impairment to states' exclusive insurance law governance impairs Congressional expressed mandates, and DOL thereby violates ERISA section 514(d).

For purposes of ERISA Title II. While Congress mandated in ERISA [Title I] section 406(a) that "…**[a] fiduciary with respect to a plan shall not cause the plan to engage**…" [emphasis supplied] and in ERISA [Title I] section 406(b) that "**[a] fiduciary with respect to a plan shall not**…" [emphasis supplied], Congress did NOT include such prohibitive language in Title II of ERISA, as codified in section 4975 of the Internal Revenue Code ("IRC").

As such, IRC section 4975(c)(1) does not objectively prohibit a fiduciary's physical conduct when engaging in specific conduct with respect to a plan.[2] Clearly, IRC section 4975(c)(1) lacks prohibitive terms like shall not cause or shall not. IRC section 4975(c)(1) only defines the term "prohibited transaction" as it is used throughout other subsections within IRC section 4975, mainly as the term is used in the excise tax provisions of IRC sections 4975(a) and (b). IRC section 4975(c)(1) provides in part that: "[f]or purposes of this section, the term 'prohibited transaction' means any direct or indirect…" followed by enumerated conduct between a plan and a disqualified person that do not contain additional language that objectively prohibits conduct.[3]

Because IRC section 4975(c)(1) itself does not prohibit fiduciary conduct, DOL cannot impute such conduct on state licensed insurance sales agents and insurance companies engaging in the business of insurance.

The only provisions within IRC section 4975 that do impose liability for an IRC defined prohibited transactions are codified in IRC sections 4975(a) and (b), and neither provision holds a fiduciary liable when simply acting only as such even when participating in the defined transaction. Additionally, Section 102 of the Reorganization Plan No. 4 of 1978 provides that DOL's authority covers IRC section 4975 "**EXCEPT for (i) subsections 4975(a), (b),** (c)(3)…" [Emphasis supplied].

Further, the Reorganization Plan No. 4 of 1978, Section 102, DOL's authority is subject to Section 105 thereunder ["*Except as otherwise provided in Section 105 of this Plan*"], and Section 105 states in pertinent part that DOL's authority in Section 102 "shall not affect the ability of the Secretary of the Treasury…to enforce the excise tax provisions of subsections 4975(a) and (b) of the [IRC]…" Thus, DOL cannot define the term fiduciary under ERISA Title II that would affect the enforcement authority of the Treasure Secretary.

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[2] IRC section 4975(c)(1) refers to a disqualified person instead of just a plan fiduciary while ERISA Title I bars only "fiduciary" conduct. Further, IRC section 4975(e)(2) defines a disqualified person to include a fiduciary amongst other enumerated persons and/or entities whereas ERISA Title I, sections 406(a) and (b) bars only fiduciaries.

[3] IRC section 4975(e)(2) defines the term "disqualified person" to mean a number of individuals and/or entities, which definition is not limited only to fiduciaries.

Because Section 102 and 105 of the Reorganization Plan No. 4 of 1978 did not authorize DOL to issue exemptions or regulations regarding IRC sections 4975(a)-(b), then only the Department of Treasury has the authority to affect such IRC statutory provisions. Specifically, 26 U.S.C. section 7805(a) provides that:

> "Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, <u>the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue</u>." [Emphasis supplied].

In conclusion, for the above compelling reasons, DOL must not issue its proposed amendment for PTE 84-24 because DOL will be interfering with states' business of insurance, contrary to federal law as Congress enacted.