NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16TH STREET, N.W., WASHINGTON, D.C. 20006 • PHONE 202-737-5315 • FAX 202-737-1308

MICHAEL D. SCOTT
EXECUTIVE DIRECTOR
E-MAIL: MSCOTT@NCCMP.ORG

October 27, 2022

Hon. Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Submitted electronically via www.regulations.gov

Re: Notice of Proposed Rulemaking: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications (RIN 1210–AC05, Docket ID Number EBSA-2022-0003) – Supplemental Comments

Dear Assistant Secretary Gomez:

The National Coordinating Committee for Multiemployer Plans ("NCCMP") appreciates having been permitted to testify at the administrative hearing ("Hearing") before the Department of Labor's Employee Benefits Security Administration ("Department") about the Department's Notice of Proposed Rulemaking: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications, published at 87 Fed. Reg. 14722 (March 15, 2022) (the "Proposal" or "NPRM") following the submission of the NCCMP's comments on May 31, 2022, as well as this opportunity to supplement the record with these further comments in response to questions and statements made at the Hearing.

At various times throughout the Hearing, representatives from the Department appeared to demonstrate a presumption about prohibited transaction exemption ("PTE") requests that was both troubling and inaccurate. The presumption was that the proposed transactions under review are "illegal" and that they are therefore necessarily more problematic, and presumably less protective of participants' interests, than potential transactions that fall under existing statutory or administrative class exemptions.[1] There are several fallacies with this presumption. First, a transaction that has not occurred, and will not occur without the granting of a PTE, is not "illegal." It is instead a proposal to engage in a transaction in full compliance with applicable legal requirements, including any additional safeguards required as a condition of the PTE. The fact that it may require action by the Department to bring to fruition should not taint it from the start.

[1] *E.g.,* September 14, 2022 Hearing Transcript ("Transcript"), p. 52 ("Obviously, our rationale for that provision is in part because we don't view the appropriate transaction rules as mere technicalities. We do think that they're there for a purpose and typically involve significant conflicts of interest that need to be addressed. . . . And it's at least when we're assessing whether it's not, it's in the interest of participants to move forward, it's good to understand if there's a way that you can do the transaction, or you can achieve those benefits that don't involve doing something that, you know, is otherwise illegal.")

Second, this presumption fails to acknowledge the role of PTEs within the larger framework established by Congress when it enacted the fiduciary provisions of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"). Within that framework, virtually *all transactions* required for the administration of ERISA-covered plans are prohibited in the absence of either a statutory or an administrative exemption.[2] That does not make these exempt transactions "illegal" or in any way inherently adverse to the interests of a plan's participants and beneficiaries. Instead, it means that either Congress or the Department has determined that these transactions are both necessary for plan administration and sufficiently protective of the rights of participants and beneficiaries, exactly the same determinations sought in any PTE application.

Also evident at the hearing was an assumption that in most cases there are alternatives to proposed transactions for which PTEs are sought that could accomplish the same or substantially similar results and objectives.[3] This fails to acknowledge the simple truth that different transactions are different, both in terms of processes and expected results. While different transactions may accomplish some overlapping goals, that does not make them viable or otherwise equivalent alternatives.

Another assumption revealed at the hearing was that the costs of the new standards that would be imposed by the Proposal could be picked up by a deep pocketed plan sponsor.[4] While this may be true of some single employer plans, it is almost never true of multiemployer plans. Ordinarily, the sponsor of a multiemployer plan is its board of trustees.[5] The only assets a board of trustees will ordinarily have access to are the assets of the plan itself. This means that the costs imposed by the additional requirements that would be imposed by the Department will in most cases necessarily be borne by either the plan directly or indirectly through increased fees payable to the service provider fronting the costs. These increased costs will be borne by the active workforce, as the only money that a multiemployer trust has comes from the workers' contributions. These contributions represent the deferred wages of the workers that have been collectively bargained as part of their wage and benefit packages.

We also wish to respond to a question raised at the Hearing. In recognition of the utility of informal, off-the-record preliminary conversations that may precede the filing of a PTE application, the question was asked whether it would be acceptable if those preliminary conversations remained confidential unless and until an application was filed, at which time they would become part of the administrative record. [6] We want to reiterate the response given by our representative at the Hearing.[7] Ordinarily, those preliminary conversations should remain

---

[2] *See* ERISA Sections 3(14), 406(a)(1).
[3] *See* fn. 1. *See also* Transcript p. 62 ("Do you immediately jump to concluding that you need to approach the Department? Or do you actually consider the alternatives of executing the transaction in a non-prohibited way?").
[4] Transcript p. 53 ("You know, we, I don't think we have any issue with, you know, obviously, people getting insurance at sponsor expense, or what have you.").
[5] *See* ERISA Section 3(16)(B)(iii).
[6] Transcript pp. 45, 49-50.
[7] Transcript, pp. 50-51.

confidential. To do otherwise would have a chilling effect and impede the ability of the parties to those conversations to have full, open, and meaningful conversations. Of course, once an application is filed, in the event that portions of those preliminary conversations remain relevant and material to the transaction under review, the Department would always have the opportunity to request that the information revealed in those conversations be placed on the record as a condition for granting the PTE. This is a very different matter, however, from either having all conversations on the record or requiring that those preliminary conversations systematically be placed on the records once an application is filed, without regard to their relevance or materiality.

Finally, we are enclosing a written version of the testimony presented by our representative, Paul Green, at the Hearing. Once again, we appreciate the opportunity to provide these additional comments.

Regards,

Michael D. Scott
Executive Director

Attachment

Testimony of

Paul A. Green

on behalf of the

National Coordinating Committee for Multiemployer Plans

Presented September 14, 2022, before the Employee Benefits Security Administration of the United States Department of Labor

On the Notice of Proposed Rulemaking: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

RIN 1210–AC05, Docket No. EBSA-2022-003

My name is Paul Green, and I am here to present testimony on behalf of the National Coordinating Committee for Multiemployer Plans ("NCCMP") in my capacity as its General Counsel. I am an attorney in private practice at the Washington, DC law firm Mooney, Green, Saindon, Murphy & Welch, P.C. and, in addition to the NCCMP, I represent multiemployer pension and benefit plans and labor organizations.

On behalf of the NCCMP, I want to thank the Department for allowing us to testify about the Notice of Proposed Rulemaking ("NPR") modifying the procedures for applying for and obtaining prohibited transaction exemptions ("PTEs") under Section 408(a) of ERISA and 4975(c)(2) of the Internal Revenue Code ("Code") from the restrictions and prohibitions otherwise imposed under ERISA Section 406 and Code Section 4975.

The NCCMP is the only national organization devoted exclusively to protecting the interests of multiemployer plans, as well as the unions and the job-creating employers of America that jointly sponsor them, and the more than twenty million active and retired American workers and their families who rely on multiemployer retirement, health, and welfare plans. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America's working men and women.

As the Department is aware, multiemployer plans always involve two or more employers, sometimes numbering in the hundreds or even thousands, and often involve multiple unions. Furthermore, multiemployer plans are typically organized as so-called "Taft Hartley Trusts" pursuant to the requirements of Section 302(c)(5)-(8) of the Labor Management Relations Act of 1947 – the so-called Taft Hartley Act. Accordingly, these plans are administered by joint boards of trustees composed of equal numbers of employee (union) and employer representatives, and possibly one or more neutral Trustees. The number and complexity of these relationships can result in a very large number of "parties in interest."

Another distinguishing characteristic of multiemployer plans is that they are fundamentally separate entities from their stakeholders. Unlike single employer plans, which are often provided office space and personnel directly from the sponsoring employer, multiemployer plans must obtain their own office space, hire their own personnel, negotiate their own contractor agreements, and more. Often, they own the facilities out of which the plans are administered, and lease out extra space to third parties, including parties in interest.

Importantly, all of the money that a multiemployer plan has to pay benefits and the administrative costs of the plan comes from the workers themselves, as they are negotiated as part

of a total wage and benefit package between the union and the contributing employers. In other words, any increase in costs to a plan is borne by the workers, either in the form of reduced wages or reduced benefits.

Against this backdrop, we are concerned that the proposed changes to the PTE application process would, if implemented, impede the ability of multiemployer plans to engage in certain transactions that would be beneficial to the plans' participants and beneficiaries. While we applaud the Department's overall efforts to streamline, simplify, and clarify its procedures, we are concerned that the NPR imposes hurdles, restrictions, and outright prohibitions that would arbitrarily prohibit otherwise valuable and beneficial transactions, and unnecessarily delay and impede others.

For example, the Department proposes to eliminate the existing practice of permitting informal, off-the-record inquiries by plans and their interested parties prior to the filing of a PTE request. These conferences are useful, both in terms informing the potential requesters as to what they would need to do to have their exemptions granted, thereby saving them time, money, and effort, but it also does the same for the Department. In some cases, these conferences enable potential applicants to provide more robust safeguards and protections prior to filing, and in others, it may enable potential applicants to chart a different course entirely to achieve their objectives.

We understand the Department's concern that, either through misunderstandings or incomplete presentation of the facts, potential applicants may seek to rely on representations made by the Department in these informal conferences, and we agree with the Department that this type of reliance is unjustified. Our view, however, is that prohibiting these conferences altogether is an overreaction, figuratively throwing the baby out with the bathwater.

We also presume that the Department intends for the procedures themselves to provide the sort of information and forewarnings that are currently provided through the informal conferences. Our concern, however, is that the restrictions and conditions that would be imposed under the NPR are both overly categorical and themselves overreactions, which impose unnecessary and, in some cases, irrelevant, obstacles in the path of engaging in otherwise beneficial transactions.

Notably, the NPR indicates that the Department will categorically reject an application involving a party in interest who is under any sort of investigation for any reason by any governmental authority. The Department, as well as the IRS and other government agencies, frequently conduct investigations involving various issues, including plan procedures for locating missing participants, HIPAA policies and procedures, mental health parity requirements, and other, often entirely routine, matters. These audits and investigations can take years – sometimes more than five years. Nevertheless, while one of these investigations drags on, the subject plan is effectively barred from seeking a PTE on wholly unrelated matters. Even more remarkably, if a plan trustee is under police investigation following a traffic accident, the Department will reject PTE applications involving that plan. That is absurd.

The requirements and restrictions related to the retention of independent fiduciaries are also problematic, particularly in their effective exclusion of unaffiliated, truly independent fiduciaries. The NPR requires plans to limit their choice of independent fiduciaries to ones affiliated with large institutions because of the income, asset, and insurance requirements. Often, however, a plan is best served by independent fiduciaries with particular skill sets and characteristics, whether those are knowledge of and experience in the particular industry, academic achievement, a reputation for integrity, or some other possibly unique characteristics. Indeed, the Department itself frequently selects independent fiduciaries to take charge of troubled plans and for other purposes without any of these arbitrary restrictions and requirements. Although some circumstances may call for the participation of a large institutional independent fiduciary, that is not always the case.

The insurance requirements for independent fiduciaries are also problematic for another reason. As the Department is aware, ERISA Section 410 prohibits plans from indemnifying fiduciaries from liability for their own breaches of duty. Plans are permitted, however, to pay the cost for fiduciary insurance, provided the insurer has recourse against the fiduciary. Notably, those same fiduciaries are then permitted to buy waiver of recourse riders, typically for a nominal fee, the effect of which is to eliminate the insurer's recourse against the fiduciary. The obvious reason this practice is permitted is because, in its absence, plans would be unable to find individuals willing to serve as fiduciaries, and it is already hard enough to find people willing to take on those responsibilities. As the Department is also aware, independent fiduciaries, including independent fiduciaries selected by the Department itself, routinely engage in this same practice. For unaffiliated independent fiduciaries, this is necessary since the cost of fiduciary insurance would otherwise be prohibitive. Because the NPR explicitly goes beyond the prohibitions of ERISA Section 410, it is not clear whether plans and independent fiduciaries would be prohibited from taking advantage of these cost-saving measures in matters involving administrative PTEs.

It is also hard to understand the principled distinction between the duties and responsibilities of an independent fiduciary with respect to administrative PTEs and with respect to other circumstances for which independent fiduciaries are typically required and we question whether the NPR presages a new and dramatic restriction on the ability of plans to obtain the services of truly independent fiduciaries. This would be incredibly problematic for all plans.

The NPR is also unclear how far the new restrictions and requirements are intended to go. Because the procedures established under the NPR apply to both individual and class exemptions, we do not know if they will also be applied to all future class exemptions and potentially to all existing exemptions, including both individual and class exemptions. Furthermore, although we fully support the NPR's separate proposal to make the effect of exemption revocations prospective-only, we hope that this laudable provision is not designed to blunt the blow of a mass-revocation of existing exemptions that do not meet the NPR's newly proposed standards. Such an *en masse* revocation would be both expensive and disruptive to the plans that rely on those existing exemptions.

The NCCMP is also concerned that the proposal to automatically deny PTE applications that are withdrawn may have a chilling effect, and, particularly when combined with the proposed elimination of the process for informal, off-the-record conversations, deter plans and their stakeholders, not only from seeking PTEs, but even from consulting with the Department in deciding whether to submit an application in the first place. This is not good for plans, their participants, and beneficiaries, nor for the Department itself. The NCCMP believes that it is in the interest of all stakeholders to encourage open communication.

We also note that there are many reasons for withdrawing a PTE application. Sometimes the conditions of the transaction change or the transaction is otherwise restructured so that the PTE is no longer necessary. Other times, external factors may result in the transaction being abandoned for reasons having nothing to do with any potential prohibited transaction. In all cases, however, issuing a denial of the requested exemption may impose an imprimatur of wrongdoing or culpability that may taint a perfectly lawful, beneficial, and appropriate transaction.

Additionally, we agree that Congress granted the Department broad discretionary authority to administer ERISA's statutory process to consider and determine whether to grant administrative PTEs. When Congress enacted ERISA, however, it understood that Section 406, standing on its own, would make nearly all transactions by covered plans unlawful and thereby destroy the very plans ERISA was designed to safeguard. This is why it established, not only the statutory exemptions, but also the administrative exemption process, which it mandated that the Department carry out. By granting this broad authority, Congress clearly intended that the Department exercise it in a manner that would permit beneficial transactions to occur so that plans could function and best serve their participants and beneficiaries, albeit with appropriate safeguards.

Finally, although the NCCMP acknowledges that the number and scope of existing class exemptions are much greater than they were when the PTE procedures were first designed, the world is complicated and fluid, and new and unexpected circumstances continue to arise. The very fact that Congress specifically authorized individual exemptions in addition to class exemptions demonstrates Congress' clear intent that the PTE process remain open and available to address new and unusual circumstances as they arise. That hasn't changed. For these reasons, we ask that the Department retain a robust PTE process rather than imposing arbitrary and unnecessary hurdles.

Thank you for the opportunity to appear in this proceeding. In addition to the comments the NCCMP filed in May of this year, we will be filing a written version of this testimony. I look forward to addressing your questions.