AMERICAN BENEFITS
COUNCIL

October 28, 2022

Submitted electronically via www.regulations.gov

Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Proposed Procedures for Prohibited Transaction Exemption Applications (RIN 1210-AC05)

Dear Sir or Madam:

On behalf of the American Benefits Council (the "Council"), I am writing to supplement our May 31, 2022, letter and September 15, 2022, testimony expressing significant concerns with the U.S. Department of Labor's (DOL) proposed procedures for the filing and processing of individual and class prohibited transaction exemption (PTE) applications.

In response to our testimony at the September 15 hearing, DOL officials encouraged the Council to supplement its written comments and testimony with regard to three aspects of the DOL proposal: (1) the proposed requirement for each PTE application to include a detailed description of possible alternatives that would not involve a prohibited transaction and why they were not pursued; (2) the proposed requirement for each PTE application to include, to the extent possible, a quantification of the costs and benefits of a proposed transaction; and (3) the proposed requirements that would prohibit qualified independent fiduciaries, appraisers, auditors, and accountants from limiting their liability through the use of certain contract provisions.

Our views on each of these proposed requirements are discussed in greater detail below.

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1. DESCRIPTION OF EXEMPTION ALTERNATIVES NOT PURSUED

According to the DOL proposal, all new PTE applications would be required to provide a detailed description of possible alternatives that would not involve a prohibited transaction and why the applicant did not pursue those alternatives. The Council does not believe that this information is necessary or relevant to the DOL's consideration of exemption applications and we encourage the DOL to remove this new requirement from its final procedures.

ERISA Section 408(a) authorizes DOL to grant administrative exemptions when such relief is: (1) administratively feasible; (2) in the interests of the plan and of its participants and beneficiaries; and (3) protective of the rights of participants and beneficiaries of such plan. Importantly, these statutory provisions do not require parties seeking an exemption to demonstrate that the transaction is the only possible way to achieve a plan's objectives, or that the transaction could not be structured differently to avoid a prohibited transaction. Accordingly, the Council believes that if a transaction is administratively feasible, in the interests of plans and participants, and protective of their rights, there is no need for DOL to consider whether the transaction could alternatively be structured to avoid prohibited transactions.

In responding to this proposed requirement and questions that arose during the September 15 hearing, we also wanted to share additional context on the decision-making process that typically precedes a PTE application. With regard to these decisions, it is important to recognize that plan sponsors and service providers do not approach exemptions as the first option for solving challenges facing their plans. Exemption applications are expensive, require significant resources, and can take years to obtain. Furthermore, the application process opens up potential applicants and other parties involved in exempt transactions to additional scrutiny from DOL.

Before approaching DOL with an exemption application, an applicant will review possible alternatives, including alternatives that do not involve prohibited transactions, and weigh their pros and cons. Then, following a thoughtful review of these alternatives, an applicant will determine that an exemption offers the best past forward. This conclusion may be based on a variety of reasons. In some cases, the alternatives that do not involve prohibited transactions simply may not be workable or feasible. In other cases, by comparison, those alternatives may be workable. However, the applicant may determine that they do not offer the best path forward for plans and participants. For example, an applicant may determine that, even when accounting for any additional conditions that may be required as part of an exemption, the exemption approach offers a material advantage over other approaches that do not involve prohibited transactions – e.g., greater efficiencies, cost savings, or the involvement of certain parties who bring unique expertise or possess some other beneficial characteristic.

In this regard, our concern with the proposed requirement discussed above does not reflect our belief that the parties involved in exempt transactions do not or should not be exploring exemption alternatives. Rather, our concern is that we do not believe, based on the statutory conditions for granting exemptions, that DOL procedures should incorporate an implicit requirement that the applicant must have considered and exhausted all other possible alternatives in order to receive an exemption.

2. Quantitative Cost-Benefit Analysis

During the September 15 hearing, DOL officials asked the Council to further explain its concerns regarding the condition in the proposal that would newly require all applicants to provide a description of the "costs and benefits of the exemption transaction to the affected plans(s), participants, and beneficiaries, *including quantification of those costs and benefits to the extent possible*" (emphasis added). The Council is concerned with this new provision because it would generally require a quantitative cost-benefit analysis in support of every exemption application. The Council does not believe that this requirement is necessary because, in most instances, we believe that DOL should be able to evaluate whether a transaction is in the interests of plans and participants, and protective of their rights, based on *qualitative* descriptions of the proposed transaction, along with its costs and benefits. Thus, we are concerned that the costs associated with preparing a quantitative cost-benefit analysis for every application do not justify the marginal benefits that they would provide to DOL. Furthermore, we especially believe this new requirement is unnecessary when an applicant is seeking an exemption that is based on a similar exemption recently granted by the DOL.

3. Limitations on Liability

During the September 15 hearing, DOL officials asked the Council to further explain its concerns with the proposed requirements that would prohibit qualified independent fiduciaries, appraisers, auditors, and accountants from using contract provisions that: (1) provide for their direct or indirect indemnification or reimbursement by the plan or other party for any failure to adhere to their contractual obligations or to state or federal laws applicable to their work; or (2) waive any rights, claims, or remedies against them with respect to the exempt transaction.

As we explained during the hearing, the Council believes that independent fiduciaries should be liable for any fiduciary breaches under ERISA, consistent with the requirements of ERISA Section 410. However, we also believe that the parties who participate in exempt transactions should be able to freely negotiate how any liabilities arising from an exempt transaction may be assigned. Additionally, we believe that those parties should be permitted to negotiate the remedies that may be pursued by any

parties who believe that the services provided in connection with an exempt transaction violated the terms of their agreements or applicable law.

When designing and developing transactions that require the involvement of an independent fiduciary, appraiser, auditor, or accountant, the Council's members are sophisticated enough to act in their own interests and appropriately negotiate the services that these experts will provide, the prices that will paid for these services, how the risks associated with such services will be allocated, and the remedies that will be available in the event of a dispute. This could include, for example, agreements providing certain levels of indemnification for violations of applicable law that are unrelated to the fiduciary, appraisal, audit, and accounting standards that these parties are expected to satisfy in support of an exempt transaction. This could also include agreements to arbitrate disputes that arise from exempt transactions.

Because the types of exempt transactions that rely on these experts often involve difficult and complex situations that can easily lead to litigation, and they also often involve very high dollar figures, we understand that the experts facilitating exempt transactions may, in certain circumstances, insist on these types of contractual terms as a condition for agreeing to participate in the transaction, or they may be needed to facilitate exempt transactions in a way that is economically feasible for plans. The Council believes that the plan sponsors and service providers seeking to rely on exemptions are capable of negotiating the terms of their agreements and are in the best position to determine the best possible terms for their own situation. Accordingly, in order to avoid default conditions that could unnecessarily prevent parties from participating in exempt transactions or make such participation prohibitively expensive, the Council recommends that DOL remove all of the proposal's new conditions regarding the contractual terms that independent fiduciaries, appraisers, auditors, and accountants may use in their agreements related to exempt transactions.

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Thank you for your consideration of our comments. If you have any questions or we can be of further assistance, please contact me at 202-289-6700 or at ldudley@abcstaff.org.

Sincerely,

Lynn Dudley
Senior Vice President, Global Retirement & Compensation Policy