U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

Via Electronic Delivery

April 21, 2022

U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Ave NW
Suite N-5677
Washington, DC 20210

Re: **RIN 1210-ACO5: Notice of Proposed Rulemaking: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications**

To Whom It May Concern:

The U.S. Chamber of Commerce (Chamber) appreciates the opportunity to comment on the Department of Labor's (DOL) Notice of Proposed Rulemaking on "Procedures Governing the Filing and Processing of Prohibited Transaction Exemptions Applications" (NPRM). We appreciate the DOL's efforts on this issue, but urge that any final prohibited transaction exemption (PTE) procedure should not discourage applications, but rather encourage applications and dialogue with DOL.

Background

The list of prohibited transaction under Section 406 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) is very broad, and Congress recognized exemptions were needed for a plan to be administered and managed. That is why Congress not only provided statutory exemptions under ERISA Section 408(b), but also gave DOL the authority to establish an exemption procedure and grant exemptions if DOL finds the exemption is:

- Administratively feasible,
- In the interests of the plan and of its participants and beneficiaries, and
- Protective of the rights of participants and beneficiaries of such plan.[1]

The statute also requires that before granting the exemption, the Secretary must publish a notice of its pendency in the Federal Register, give interested persons adequate notice of the proposed exemption, and allow such persons to present their views. An exemption may not be granted unless the Secretary allows for a hearing and determines on the record that the exemption meets the above requirements.[2] There is nothing in the statutory requirements relating to what must be in the administrative record and what parts of the administrative

[1] ERISA §408(a) (29 U.S.C. § 1108(a)).
[2] Id.

record must be open to the public.

Since ERISA's enactment, DOL[3] has issued procedures, regulations and informal guidance on how to obtain a PTE under ERISA Section 408 (29 USC § 1108).[4] DOL initially proposed a regulation in 1988, which was finalized in 1990.[5] The initial regulation was amended in 2011.[6] This NPRM was published in the Federal Register on March 15, 2022, and it would supersede the existing procedures.[7]

Analysis of the NPRM

Paragraph 2570.30 (e)

In this paragraph, DOL states that although it will not propose or issue a PTE upon oral request alone, it will provide feedback from DOL employees, and this feedback will become part of the administrative record. However, DOL does not explain how this will become part of the administrative record or whether an applicant will have an opportunity to review it before it does. As currently drafted, this provision will inhibit applicants or potential applicants from contacting DOL because of the uncertainty of what from these conversions could be included in the administrative record. Any final rule should revert to the current rule that provides:

> An applicant for an administrative exemption may request and receive oral advice from Department employees in preparing an exemption application. However, such advice does not constitute part of the administrative record and is not binding on the Department in its processing of an exemption application or in its examination or audit of a plan.[8]

Paragraph 2570.30(g)

In this paragraph, DOL states that the issuance of a PTE is at DOL's sole discretion and the "existence of a previously issued administrative exemption is not determinative of whether future exemption applications with the same or similar facts will be proposed, or whether a proposed exemption will contain the same conditions as a previously issued administrative exemptions."

Proposed paragraph (g) appears at odds with PTE 96-62 which DOL issued to "reduce the regulatory burdens associated with processing individual exemptions."[9] PTE 96-62

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[3] Both the labor and tax provisions of ERISA contain prohibited transaction provisions. However, to avoid duplication, Section 102 of the Presidential Reorganization Plan No. 4 of 1978 gave DOL the authority to issue exemptions under both ERISA and the Code. However, the Reorganization Plan did not give DOL authority to add ERISA's substantive requirements to entities or transactions only governed by the Internal Revenue Code (Code).

[4] See ERISA Procedure 75-1; ERISA Technical Release 85-1; 29 C.F.R. § 2570.30 (1991, 2011); Exemption Procedures under Federal Pension Law (1995) (which included definitions of technical terms).

[5] 54 Fed. Reg. 24422 (June 28, 1988) (proposed rule); 55 Fed Reg 32836, Aug. 10, 1990 (final rule).

[6] 75 Fed. Reg. 53172 (Aug 30, 2010) (proposed rule); 76 Fed. Reg. 66637(Oct. 27, 2011) (final rule).

[7] 87 Fed. Reg. 14722 (Mar. 15, 2022).

[8] 29 C.F.R. § 2570.30(e) (2011).

[9] 61 Fed. Reg. 39988 (July 31, 1996).

> permits a plan to engage in a transaction following a demonstration to the Department that the transaction: (1) Is substantially similar to those described in two prior individual exemptions granted by the Department; and (2) presents little, if any, opportunity for abuse or risk of loss to a plan's participants and beneficiaries. [10]

If an applicant cannot rely on past exemptions under the proposed paragraph (g), it does not seem possible that it could utilize PTE-96-62. Furthermore, as a matter of procedural fairness, applicants with similar facts and circumstances should not be treated differently. "A fundamental norm of administrative procedures requires an agency to treat like cases alike."[11]

Paragraph 2570.31(a)

The NPRM proposes a new definition of affiliate to include any "officer, director, partner, employee or relative" of any person directly or indirectly controlling another person. With respect to employees, the current definition of affiliate only includes:

- Any employee or officer of the person who:
    - Is highly compensated (as defined in section 4975(e)(2)(H) of the Code), or
    - Has direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets involved in the subject exemption transaction.

The proposed definition of including any employee is overly expansive because very few employees, if any, other than those listed in the current definition have any authority over a prohibited transaction. As such, we recommend that the final regulation reflect the current regulation in this regard.

Paragraphs 2570.31(i) and (j)

In the proposed regulation, an appraiser or fiduciary will be considered "independent" if the revenue the appraiser or fiduciary receives from the parties involved is less than two percent of either the revenue for the previous tax year or the projections for the current tax year. Although this is a carry-over from the current regulation which deems an appraiser or fiduciary as independent at the two percent threshold, the proposed regulation deletes the current provision that a fiduciary or appraiser may nonetheless be independent if the revenue is less than five percent.

The five percent threshold was added to the final 2011 regulation in response to concern in the proposed regulation that would have set the presumption at 1 percent. For many of the reasons expressed in those comments, such as limiting competition, increasing costs, limiting new entrants, and impacting small firms, we suggest that DOL reinstate the five percent test in

[10] Id.

[11] Westar Energy, Inc. v. Federal Energy Regulatory Com'n, 473 F.3d 1239, 1241 (D.C. Cir. 2007).

the final regulation.[12]

Paragraph 2570.31(l)

The NPRM contains a new definition of a "party involved in the exemption transaction", a term that does not exist under ERISA. In the preamble to the NPRM, DOL explained that this

> term replaces the more limited term 'party in interest' in multiple places throughout the Exemption Procedure Regulation to more accurately describe parties that have interests in the exemption transaction. The Department believes that parties engaged in the transaction (and their affiliates) that are not ''parties in interest'' could have interests and potential conflicts that should be addressed by the Exemption Procedure Regulation. Similarly, the Department proposes to include service providers in the definition to ensure that all parties with interests in the transaction are included.[13]

ERISA prohibits certain transactions between a plan and a party in interest and between a fiduciary and a party in interest,[14] and ERISA defines a party in interest.[15] As noted above, as part of its prohibited transaction procedures, DOL also must provide notice to "interested persons" on the proposed exemption. However, ERISA does not authorize DOL to create an entire new group that is subject to the prohibited transaction exemptions and procedures. As such, the final regulation should not include a definition or use of the term "party involved" or place any additional requirements with respect to "parties involved"

Paragraph 2570.32(d)

Paragraph (d) creates a new definition of the administrative record, which also will include any notes taken by DOL during a pre-submission conference and any oral information provided by a pre-submission applicant. Although it is understandable that DOL wishes to have a "complete" administrative record, inclusion of staff notes or other documentation that was submitted before the actual application will have a chilling effect on entities who may wish to contact DOL with questions that may arise regarding a possible PTE for fear that if an exemption is needed, any conversations will be included. Finally, if any staff notes from conference calls are included in the administrative record, the applicant should have a chance to review and comment on such notes before they are included in the administrative record.

Subparagraph 2570.33(a)(2)

This section provides that DOL will not consider an applicant involving a party interest "who is a defendant in an action by the Department, the Internal Revenue Service, or any other regulatory entity to enforce ERISA, the Code, FERSA or any other federal or state law." DOL should clarify that this does not include routine audits or investigations or other federal or state

[12] 76 Fed. Reg. 66639-40 (Oct. 27, 2011).
[13] 87 Fed. Reg. 14726 (Mar. 15, 2022).
[14] ERISA § 406(a), (b); 29 U.S.C. § 1106(a), (b)).
[15] ERISA § 3(14); 29 U.S.C. § 1002(3).

laws unrelated to the proposed prohibited transaction exemption.

Paragraph 2570.33(d)

This new paragraph provides that DOL will not engage a pre-submission applicant or its representative unless the pre-applicant, among other things, identifies the applicant, the applicable plan, and the relevant parties to the exemption. Requiring the identification of such entities will discourage entities from contacting DOL to see if a PTE is needed. Therefore, we request that this requirement be deleted.

Section 2570.34

This section lists the information required to be in every application. The NPRM adds many new requirements that should be removed from the final regulation.

Subparagraph (a)(4) would require each 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……" We do not believe DOL has authority to require additional information from entities that are not either a plan, fiduciary, or party interest.

Subparagraph (a)(5) requires the applicant to provide a detailed description of the alternatives to the exemption transition that did not involve a prohibited transaction and why those alternatives were not pursued. As noted above, ERISA Section 408 provides that the Secretary may not grant an exemption unless the Secretary finds that the exemption is:

- Administratively feasible,
- In the interests of the plan and of its participants and beneficiaries, and
- Protective of the rights of participants and beneficiaries of such plan.

Nothing in the statute requires that for an exemption to be granted it must have been impossible for the transaction to occur without having a prohibited transaction. As such, the final regulation should delete this requirement.

Subparagraph (b)(2) requires that the application include a statement that the proposed exemption is "in the best interest of the plan and its participants and beneficiaries" or why this standard should not apply. The NPRM defines "best interest"[16] as

> an exemption transaction is in the best interest of a plan if the plan fiduciary causing the plan to enter into the transaction determines, with the care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would, in the conduct of an enterprise of a like character and with like aims, enter into the exemption transaction based on the

[16] DOL initially created the "best interest" standard of care in the Best Interest Contract Exemption in 2016 (which was subsequently invalidated by the Fifth Circuit). The concept of "best interest" does not exist in ERISA and is distinguishable from the statutory standard that fiduciaries act "solely" in the interest of participants and beneficiaries set forth in ERISA-- a standard that is not intended to apply to every person who may seek exemptive relief. ERISA §404(a)(1); 29 U.S.C. § 1104(a)(1).

circumstances and needs of the plan.[17]

This is the fiduciary standards under ERISA Section 404(a)(1)(B). In addition, "best interest" would require that the fiduciary causing the plan to enter into the transaction "not place the financial or other interests of itself, a party to the exemption transaction, or any affiliate ahead of the interests of the plan, or subordinate the plans interests to any party or affiliate."[18] In the preamble, the DOL explains that this section "generally incorporates compliance with the impartial conduct standards as formalized in Prohibited Transaction Exemption 2020-02 as a baseline condition for approved exemptions."[19]

Prohibited Transaction Exemption 2020-02 (PTE 2020-02) applies to parties wishing to provide fiduciary investment advice to plan sponsors, plan participants, and IRA owners. Complying with PTE 2020-02 is voluntary and only for those entities where payment for the advice could create a conflict of interest.

The proposed provision effectively applies ERISA section 404(a) and PTE 2020-02's Impartial Conduct Standards to entities who are not fiduciaries and those not governed by ERISA, and it is inconsistent with the Fifth Circuit Court of Appeal's decision in Chamber of Commerce of the United States v. Acosta, which struck down DOL's 2016 fiduciary rulemaking. That 2016 rulemaking attempted to impose the Best Interest Contract Exemption's Impartial Conduct Standards on non-ERISA entities and transactions.[20] As such, the final regulation should not include this requirement.[21]

Conclusion

We look forward to working with DOL in finalizing these procedures to ensure that they encourage entities to work with DOL on prohibited transaction exemptions, rather than inhibit such action.

Sincerely,

Chantel Sheaks

Chantel Sheaks
Vice President, Retirement Policy
U.S. Chamber of Commerce

[17] NPRM § 2570.34(b)(2)(iii).
[18] Id.
[19] 87 Fed. Reg. 14728.
[20] Chamber of Commerce of the United States v. Acosta, 885 F.3d 360, 384 (5th Cir. 2018) ("Together, the Fiduciary Rule and the BIC Exemption circumvent Congress' withholding from DOL of regulatory authority over IRA plans. The grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transaction penalties is unreasonable and arbitrary and capricious.")
[21] Section 2570.34(f)(7) also would require the qualified independent fiduciary opinion must include whether the proposed exemption meets the best interest requirement as articulated in 2570.34(b)(2)(A). This requirement also should be deleted from the final regulation.